

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 174
3027732

BETWEEN XCT
Applicant
AND UHG
Respondent

Member of Authority: Andrew Dallas
Representatives: Anna Oberndorfer, advocate for Applicant
David Traylor, counsel for Respondent
Investigation Meeting: 6 and 7 June 2018 in Christchurch
Submissions and further information received: 12 June, 19 June, 22 June, 18 and 26 September 2018 for the Applicant
15 June, 20 June, 22 June, 18 and 21 September 2018 for the Respondent
Determination: 28 November 2018

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] Under cl 10(1) of the Employment Relations Act 2000 (the Act), I prohibit from publication any evidence or document lodged in these proceedings which identifies, or is likely to lead to the identification of, the parties or any of the witnesses.

Employment relationship problem

[2] XCT was employed by UHG as an investigator. UHG is an agency of the State which, among other things, contracts with third parties for the provision of services. Following an investigation, XCT was dismissed by UHG not as a result of the allegation being investigated, which was unsubstantiated, but as a result of the way XCT had conducted herself during the investigation which UHG said gave rise to a breakdown in the relationship of trust and confidence warranting dismissal.

[3] XCT's dismissal was procedurally and substantively unjustified. In settlement of her personal grievance with UHG, XCT sought reinstatement, an award of lost wages and compensation for hurt, humiliation and injury to feelings.

Issues

[4] The issues for investigation were and determination are:

- (i) Was XCT's dismissal, and how the decision was made by UHG, what a fair and reasonable employer could have done in all the circumstances at the time?
- (ii) Was XCT subject to an unjustified action to her disadvantage due to suspension by UHG during its employment investigation?
- (iii) If UHG's actions were not justified, what remedies should be awarded, considering:
 - (a) Reinstatement;
 - (b) Lost wages and other moneys under s 123(1)(b); and
 - (c) Compensation under s 123(1)(c)(i) of the Act.
- (iv) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by XCT, which contributed to the situation giving rise to the grievance?
- (v) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[5] During the Authority's investigation meeting, I heard evidence from a number of current and former employees of UHG including XCT.

[6] One witness, AMD, who played a key role into the investigation of XCT was, despite providing a witness statement, unable to give evidence on medical grounds after seemingly decompensating due to stress and anxiety. As AMD was unavailable to be cross-examined, the witness statement provided was set aside by agreement with the parties.

[7] Subsequent to the investigation meeting, I raised with the parties the possibility of anonymising the parties given the very real prospect that AMD would be subject to adverse criticism in the Authority's determination, which would not be able to be answered, and this may exacerbate AMD's medical condition.¹ UHG supported anonymisation but it was opposed by XCT. After consideration, I decided the circumstances of the case warrant anonymisation. Anonymisation is supported by the non-publication order referred to in paragraph [1] above.

[8] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of XCT's employment relationship problem. Although I have not referred to all the submissions advanced by the representatives in this determination, I have fully considered them.

What caused the employment relationship problem?

Anonymous complaint

[9] In September 2017, UHG received an anonymous complaint via the "Crimestoppers" website alleging XCT had lied about her experience as an investigator in the United Kingdom.

[10] This was not the first time an anonymous complaint about XCT's qualifications as an investigator had been made. In 2010, UHG investigated a similar complaint in the form of a typed letter. The conclusion of that investigation, which was conducted by the then manager of UHG's investigations unit, was the complaint was "malicious" and "totally unfounded". A summary of actions taken about the complaint were documented in a memorandum which was placed on UHG's personal file. The summary also outlined that the scope of the inquiry was restricted to reviewing documents provided by XCT, for that purpose, and the author of the letter had not been identified.

[11] XCT believed that was the end of the matter and continued to hold to that view. However, following receipt of the anonymous complaint, UHG decided to undertake further inquiries. This task fell to AMD, the now manager of the investigations unit. The ostensible reason given for the further investigation was the following statement which formed part of the complaint: "[s]he said they [UHG] looked into her a few years back but didn't contact her references so didn't work it out".

¹ See, *XYZ v ABC* [2017] NZEmpC 40 at [75] and *H v A Limited* [2014] NZEmpC 92 at [80]

UHG's investigation

[12] When asked about the 2017 complaint, XCT advised that inquiries had previously been undertaken in 2010. However when AMD contacted the then managers involved, they were unable to confirm this. XCT subsequently provided AMD with information about her experience and qualifications. AMD formed the view this information did not answer the specific deficiency identified by the complaint and, as a consequence, further inquiries should be carried out.

[13] At this point at least, AMD and UHG appeared intent on bringing the matter to finality for the good of both parties. However, the position of UHG, and that of AMD, as investigator, changed over time in response to what it regarded as the unreasonable refusal of XCT to cooperate with the inquiries.

[14] XCT initially appeared to agree to assist AMD with his inquiries. In notes XCT took during a meeting with AMD on 22 September 2017, she recorded “do what you want”.

[15] Sometime between 22 September 2017 and 27 September 2017, XCT changed her mind about cooperating with AMD's inquiries. XCT would subsequently claim AMD's conduct during the meeting gave her cause for concern. On 27 September 2017 and 9 October 2017, XCT advised AMD that she believed the matter had been fully investigated and further investigation was inappropriate.

Inquiries made in United Kingdom by AMD

[16] On 25 September 2017, AMD emailed a general email address for a government health agency in the United Kingdom requesting information about XCT who he identified by name. In the body of the email he advised he was seeking “some personal records for [XCT] (with her written consent)”. He went on to identify these records as “work history and other records”.

[17] On 5 October 2017, UHG sought XCT's formal consent to contact her former employer in the United Kingdom to verify her employment history. At this point XCT was not aware AMD had already commenced making such inquiries. Various communications then passed between the parties touching on several related matters, including that XCT was seeking legal advice about providing the consent sought. AMD also appears to have asked XCT if he could contact her university to verify her qualifications. However, for one reason or another consent was not forthcoming and this inquiry did not occur until later in the investigation.

[18] On 10 October 2017, AMD emailed XCT and advised that her consent to the inquiries was not actually necessary and he would "now continue with the preliminary inquiries into this matter". On 12 October 2017, AMD emailed AUR, a manager employed by XCT's former employer and asked if his email address was correct and if he knew XCT (by both her former and married name). Notwithstanding averting to the prospect the email may have gone to the wrong person, the body of the email also disclosed additional personal information about XCT. AMD then emailed the general inquiries email address for XCT's former employer in similar terms.

[19] Also on 12 October 2017, XCT's representative emailed a human resources advisor of UHG, who was assisting AMD to investigate the matter, and advised that UHG was not entitled to pursue matters without consent.

[20] On 13 October 2017, AMD again emailed the general inquiries email address for XCT's former employer seeking to "urgently" contact the individual he had emailed the previous day and who, presumably, had not replied. This email did not refer to XCT directly but it clearly referred to her as a "former staff member" now working for UHG in New Zealand.

[21] On 15 October 2017, AMD contacted a further person in the United Kingdom whom he believed "maybe related to ... (possibly wife?)" of AUR. Again personal details about XCT were disclosed and the previous email to AUR was also supplied. The email concluded by saying "If [AUR] is related to you I would be very grateful if you might be able to pass [on] my contact details ... in essence we are seeking to verify [XCT's] work history whilst at the [former employer] with him".

AMD involves Police liaison officer in United Kingdom

[22] On 16 October 2017, AMD emailed the New Zealand Police liaison officer in the United Kingdom and asked for assistance in contacting AUR. AMD disclosed extensive details about XCT and the nature of the complaint against her to the liaison officer.

[23] However, the process of engaging with the liaison officer was overrun by other events because evidently AMD's email to AUR's wife was also followed up via telephone calls. On 17 October 2017, AUR emailed AMD and asked him to "refrain from making unsolicited calls to my wife's office". AMD responded to this email on 17 October 2017 and apologised "for any inconvenience in contacting [his] wife". AMD then disclosed further information to AUR, including reproducing the entire complaint received via "Crimestoppers". AMD asked AUR to disclose XCT's work history to him. AUR responded and advised that in the absence of consent from XCT, it would not be permissible for him to do so.

Consent for inquiries yet to be obtained from XCT

[24] On 19 October 2017, the human resources advisor assisting AMD responded to XCT's representative's email of 12 October 2017 and requested XCT confirm her consent to the making of inquiries about her work history by close of business that day. The advisor went on to state that if consent was not forthcoming, UHG would be seeking urgent mediation via the mediation service.

[25] XCT's representative responded to this email, also on 19 October 2017, and advised, among other things, the investigation was unjustified and should cease immediately. It was clear from the letter, and a counterpart email exchange, the consent requested would not be forthcoming from XCT.

UHG propose to suspend XCT

[26] On 25 October 2017, AMD's manager, DMC, wrote to XCT and advised that UHG proposed to suspend her and requested a meeting on 27 October 2017. However, based on a disclosed email, the decision to suspend XCT had effectively already been made on 19 October 2017. UHG separately reasserted its right to seek urgent mediation to resolve, what it clearly regarded as, an impasse. XCT's representative responded to the proposed suspension and advised it was unjustified, requested AMD's investigation cease and sought advice from UHG about what attempts had been made to uncover the anonymous complainant. UHG were advised that XCT would not be attending the meeting on 27 October 2017.

[27] XCT claimed her primary objection to AMD's inquiry was its broad scope. Notwithstanding this, in her evidence to the Authority XCT said UHG needed to "get to the right people" to clear the matter up but accepted by 25 October 2017 this had yet to occur. She would subsequently claim her objection centred on having had a stalker in the United Kingdom.

UHG propose to dismiss XCT

[28] On 27 October 2017, XCT was called into a meeting by AMD and handed a letter which advised of a preliminary decision to dismiss her due to refusal to participate in an investigation "to clear her name". DMC conceded this was, in effect, designed to encourage XCT to cooperate with UHG's investigation. However, a summary of XCT's situation was also submitted to the acting Chief Executive in the event permission for dismissal was required. In the body of the summary, DMC appears to suggest, without evidence by his own concession, that XCT's previous manager may not have investigated the 2010 complaint "because he may not have wanted to uncover what would have been exposed". Also on 27 October 2017, in response to a request from XCT's representative, UHG's human resources advisor disclosed AMD's inquiries in the United Kingdom to date. DMC would say he was not aware she had done this.

XCT's representative involves Chief Executive of UHG

[29] Seemingly in response to the proposal to dismiss XCT and the disclosure of the extent of AMD's inquiries in the United Kingdom, XCT's representative wrote to the Chief Executive of UHG on 31 October 2017 and requested the threat to dismiss XCT be withdrawn and the removal of AMD from the investigation. The letter also consented to XCT being placed on special leave. XCT would effectively remain on special leave until formally suspended by UHG on and from 30 November 2017.

AMD withdrawn from investigation

[30] The letter appeared to have the desired effect insofar as the involvement of AMD was concerned because the human resources advisor assisting AMD and DMC with the investigation advised via email on 31 October 2017, which was plainly on its face written in response to the letter, that AMD would not be involved further in this matter. During the Authority's investigation meeting it became apparent that DMC was not aware this email had been sent. However, while AMD was no longer involved, UHG would not seek to commence a new, uncontaminated, process or otherwise ameliorate the effects of AMD's actions on the existing investigation.

XCT meets with DMC on 1 November 2017

[31] DMC met with XCT and her representative on 1 November 2017. The meeting appeared to be constructive, although DMC would say that XCT said she did not trust her immediate manager or AMD. Both parties left with an understanding about the way forward. However, it was not a common understanding. UHG believed XCT would provide consent to contact AUR. Contrastingly, XCT and her representative believed consent would only be forthcoming if the information provided by her former employer in the UK was not sufficient. XCT would provide a limited written consent to UHG consistent with her position on 2 November 2017. DMC said he formed the view the argument about the outcome of the meeting and offering a limited consent were further examples of XCT's attempts to obstruct UHG's investigation.

Disciplinary process recommences but proposed dismissal “invalid”

[32] On 9 November 2017, UHG formally recommenced the disciplinary process it purported commenced on 27 October 2017 due to her failure to cooperate with its investigation. While that process had already arrived at the preliminary decision to dismiss her, XCT was advised this proposal was no longer “valid”. On 10 November 2017, XCT contacted AUR herself, outlined her background, the complaint made against her regarding her qualifications and experience and apologised for the actions of AMD.

Further concern raised by UHG about XCT’s conduct

[33] On 20 November 2017, UHG raised a further concern with XCT about certain comments she had made about not being able to trust certain UHG employees including her immediate manager. On 29 November 2017, the parties attended mediation but this failed to resolve the matters between them. Matters escalated further where XCT when withdrew her consent to special leave. Following a disputed process, for which XCT raised a personal grievance, she was then suspended by UHG on 30 November 2017.

Further allegation made against XCT

[34] On 4 December 2017, DMC had a conversation with a further manager who claimed XCT told him she “despised” AMD and that he had made the anonymous complaint against her. The manager provided DMC with a written statement to that effect. XCT would deny the allegation but acknowledged she did not like or respect AMD and suggested the manager who provided the statement had “betrayed” her and she would let his conscience deal with his actions.

First disciplinary meeting

[35] On 6 December 2017, a disciplinary meeting was convened by UHG. In attendance were DMC, two human resources advisors, XCT and her representative. XCT said she had been reluctant to cooperate with AMD because of concerns for her safety arising out of having a stalker in the United Kingdom. AMD (through documentary evidence provided by DMC) would claim that this was never raised by XCT as a reason for her non-cooperation. XCT also identified, for the first time, two further people UHG could contact who would be able to verify her experience. DMC regarded this

“spontaneous submission” as further evidence of XCT’s unreasonable refusal to cooperate with UHG’s investigation.

[36] XCT denied aspects of these attributed statements about her managers. However, XCT would also tell DMC she could not trust him (DMC) with anything personal. During the meeting, DMC did not disclose that confirmation had been received from XCT’s university two days prior that her qualification was genuine.

[37] UHG eventually obtained some relevant documentation from XCT’s former employer on 23 January 2018. Surprisingly, and somewhat unusually, it was received by UHG via XCT’s parents and her representatives. XCT eventually consented to UHG contacting a person other than AUR in the United Kingdom.

[38] A personal grievance was raised by XCT on 22 January 2018 for multiple unjustified actions. These were rejected by UHG.

Outcome of investigation and dismissal

[39] Having considered all the relevant information, and having decided not to pursue contacting AUR, DMC concluded the complaint against XCT could not be substantiated. However, as a consequence of XCT’s conduct during the investigation and her views about managers, the relationship of trust and confidence between XCT and UHG was broken and its preliminary proposal was that dismissal was an appropriate sanction.

[40] XCT’s representative provided a detailed submission in response to the proposal on 26 February 2018. However, UHG confirmed its preliminary decision to dismiss XCT on 8 March 2018.

The Authority's view of XCT's employment relationship problem

[41] UHG said XCT's summary dismissal was fair and reasonable in the circumstances and was procedurally and substantively justified. UHG, relying on several court decisions including *Reid v New Zealand Fire Services Commission*² and *Belsham v Ports of Auckland Limited*³, said, in effect, that because trust and confidence was so irrevocably broken down between the parties, it was impossible for XCT's employment to continue. In arriving at this decision, UHG placed a great deal of weight on what was described as the "privileged position of trust" held by XCT in her capacity as an investigator. Specifically, UHG said any issues of trust and credibility relating to an investigator could result in failed fraud prosecutions, as had evidently previously occurred. Organisational and reputational risk appeared to be key drivers in the decision-making process giving rise to XCT's dismissal.

[42] However, to the extent UHG had a substantive and valid reason for dismissing XCT, it was completely undermined by the employment investigation it carried out. In my view the investigation was flawed for several reasons.

[43] First, the investigation conducted by AMD was completely mishandled. While he did not give direct evidence, it was clear from the evidence that was available to the Authority that AMD engaged in extreme and inappropriate methods of inquiry to garner the information which, it is reasonable to infer, was directed at the substantiation of the complaint, rather than a fair and an objective inquiry into its bone fides. A fair and reasonable employer does not empower, encourage or acquiesce to a senior staff member conducting an investigation in this manner.

[44] Second, AMD breached XCT's privacy and the integrity of UHG's investigation by disclosing details about the complaint and also personal details about XCT, including her former name, to third parties in the United Kingdom. AMD only formally sought to obtain XCT's consent to conduct his inquiries, which by then were reasonably well advanced, when questioned about the same by AUR. These are not the actions of a fair and reasonable employer.

² [1999] 1 ERNZ 104 (CA)

³ [2013] NZEmpC 190

[45] Third, it was unresolved on the evidence how AMD came to concentrate on AUR, why he saw fit to contact AUR's wife or why he provided personal details about XCT, including the complaint itself, to AUR, his wife and, at least, one United Kingdom government agency. Consent was never ultimately obtained from XCT to contact AUR. Indeed, UHG did not pursue AMD's line of inquiry with AUR, and ultimately appeared to be satisfied with the information it received from other persons and entities to verify XCT's qualifications.

[46] Fourth, the fact the complaint was linked to the earlier 2010 investigation does suggest some prior, or insider, knowledge. To the extent XCT argued that the complaint itself should have been investigated was the correct, initial, focus. However, over time, this, regrettably, became a justification, in and of itself, for XCT's general lack of cooperation with the investigation. XCT's lack of cooperation seemed to fuel AMD's suspicions about her qualifications and experience evincing increasing haphazard investigation techniques, including somewhat extraordinary involvement of the police liaison officer to the United Kingdom, and resulting in a self-fulfilling, downward spiral for the employment relationship.

[47] Fifth, while on one approach to the evidence UHG may have had grounds to suspend XCT on 25 October 2017, which was ultimately resolved between the parties by a period of special leave, it certainly did not have grounds to propose her dismissal on 27 October 2017. Proposing to dismiss XCT with an ulterior purpose, as DMC conceded, of having her cooperate with AMD's investigation is reckless, destructive of the employment relationship, inconsistent with UHG's good faith obligations and clearly not the actions of a fair and reasonable employer.

[48] Sixth, sense appeared to prevail for a short-time on 31 October 2017 after XCT's representative wrote the Chief Executive of UHG. AMD was removed from the investigation and XCT's proposed dismissal was declared "invalid". DMC, however, over whose hand the proposal to dismiss was made, remained involved in the investigation. The détente was short-lived and the dispute between the parties flared again after the meeting on 1 November 2017 when it became clear there was a lack of mutual understanding about its outcome and what DMC regarded as XCT's ongoing reluctance – now supported by reference to having a stalker in the United Kingdom – to cooperate.

[49] The decision to recommence the disciplinary process on 7 November 2017 was fundamentally flawed. The foundations of the investigation were completely contaminated by the actions of AMD and the preliminary decision made by DMC to dismiss XCT and undermined by the presenting facts that XCT's qualifications and experience were genuine. Within this context, the further allegations about XCT's views of her managers appears increasingly to be a "bolt-on" designed to bolster the decision to ultimately dismiss XCT on 8 March 2018, although the die was cast much earlier. There is no doubt some of the observations made by XCT about her managers were unedifying and, indeed, significantly undermined her case for reinstatement (as will be seen below). However, they must be viewed to some degree within the context of a very poorly run and managed investigation.

Could a fair and reasonable employer have reached in all the circumstances at the time the decision to dismiss XCT?

[50] Objectively assessed, I am not satisfied UHG's actions in dismissing XCT in the circumstances that it did were what a fair and reasonable employer could have done in all the circumstances at the time. I find the investigation carried out by UHG was not what a fair and reasonable employer would have conducted and, as a consequence, the decision to dismiss her could not have been properly reached. A fair and reasonable employer, given the uncertainty as to how the complaint against XCT arose, would have conducted a careful, sensitive and discreet investigation. It would have maintained both XCT's privacy and the integrity of the employment relationship. It is no less ironic as it is hypocritical for UHG to say that XCT's credibility was key to her work as an investigator when one of her own managers engaged in conduct which clearly damaged it. The fact UHG continued to rely and build on AMD's investigation after being so clearly put on notice about its shortcomings is not to its credit as an agency of the State. The net result is, XCT has a personal grievance for unjustified dismissal and she is entitled to an assessment of remedies as a result.

[51] While XCT separately claimed her proposed suspension was unjustified, I find this was, in effect and in reality, part of the continuum of a very poor process adopted by UHG which resulted in her dismissal. However, it is worth noting that even where an employer has carried out an unjustified suspension, the Court has suggested this does not

prevent it from justifying a subsequent dismissal.⁴ Although that has not been the case here.

Remedies for the employment relationship problem

Reinstatement

[52] XCT sought reinstatement effectively as a primary remedy. Section 125(2) of the Act provides the Authority may reinstate an employee who is found to have a personal grievance if it is practicable and reasonable to do so. UHG strongly resisted reinstatement. Significant effort was directed in UHG's evidence to the "unreasonableness" of reinstatement in the circumstances of the case.

[53] In *Angus v Ports of Auckland Limited (No 2)*⁵, the Court suggested where reinstatement was resisted through evidence the correct approach to assessing the, in particular, reasonableness of the remedy is to conduct a broad inquiry into the equities of the parties' representative cases insofar as they relate to it.

[54] Having undertaken such an inquiry, and in all the circumstances including its practicality, reinstatement of XCT to UHG is not an appropriate remedy. I specifically decline reinstatement for the following reasons:

- (i) There has been an irreparable breakdown in trust and confidence between the parties, specifically evidenced by:
 - (a) XCT's lack of trust in four managers of UHG including those who would directly and/or indirectly manage her work and performance;
 - (b) XCT's lack of trust in AMD, who would be her direct manager in the absence of her line-manager and who would also allocate her work, including that she "despises" or, at very least, "dislikes" him; and
 - (c) XCT's unsubstantiated - but subsequently denied - assertion AMD was responsible for an anonymous complaint made against her.
- (ii) If reinstated XCT would be required to work in a small team co-located with managers in an open workspace. In addition, the evidence was the

⁴ *Kereopa v Go Bus Transport Limited* [2009] NZEmpC 74 at [29]

⁵ [2011] NZEmpC 160

allocation of work by managers within the team meant all members were required to regularly engage and work with each other.

- (iii) There is no real prospect of UHG physically separating XCT from managers for whom she expressed a lack of trust or XCT being provided with discrete parcels of work which did not require her to interact with managers.
- (iv) While some of XCT's immediate colleagues gave evidence supportive of her reinstatement, I accept the evidence of UHG that their understanding of the matter is based on what they have been told by XCT and furthermore, none of these colleagues would have responsibility for managing her.
- (v) UHG raised performance concerns about XCT and said if reinstated XCT would require significant direction, mentoring and performance management. In this regard, I accept UHG's evidence that these concerns largely pre-date the disciplinary process. I also accept they were not overblown or otherwise exaggerated.
- (vi) While XCT expressed an interest in being reinstated into the audit team as an alternative, I accept the evidence of UHG that there are no vacancies in that team – and, if there were, the State Sector Act 1988 recruitment provisions would apply – XCT would still remain subject to managerial oversight from a manager she did not trust and would still be required to work closely with her old team including its managers.

Reimbursement for lost wages

[55] Having found XCT was subject to an unjustifiable dismissal by UHG, the Authority must, even if it awards no other remedies, order payment of the lesser of a sum equal to lost wages or three months ordinary time wages if it finds she has lost wages as a result.

[56] I am satisfied XCT made a reasonable attempt to mitigate the loss of her employment within the context of her recent and preferred area of work. I accept XCT's evidence as to being employed by UHG with particular skills in a specialist area and there being a limited number of similar jobs available in the Canterbury region.

[57] So then, subject to contribution, I award XCT three months' pay as reimbursement for lost wages under s 123(1)(b) of the Act. I am also satisfied that XCT should receive holiday pay and KiwiSaver entitlements under s 123(1)(c)(ii) of the Act. The amounts of which should be calculated with reference to the award of lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[58] As a remedy for her personal grievances, XCT sought compensation for humiliation, loss of dignity and injury to feelings. She sought a global sum of \$35,000 arising from her suspension and subsequent dismissal. Having found UHG was unjustified in respect of both, I accept XCT's evidence about the impact of these actions upon her. I do not doubt she was upset and distressed by her suspension and felt alienated from work colleagues and work place for an extended period, which ultimately only ended with her dismissal.

[59] I do not doubt the evidence that XCT's dismissal caused her humiliation in the face of work colleagues, family and friends, significant worry and loss of sleep. There is little doubt, the loss of employment strikes at the heart of the economic and social realities of modern existence.

[60] Subject to any consideration of contribution under s 124 of the Act, I award XCT \$20,000 as compensation for that humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

Contributory behaviour by XCT?

[61] Having found that XCT is entitled to remedies for her personal grievances, I am required by s 124 of the Act to consider whether XCT's actions were causative and blameworthy of the situation she found herself in.

[62] XCT said there should be no deduction for contribution. UHG said XCT's remedies should be reduced and principally because her conduct during the employment investigation, including what was described as "the obstructive approach she took" was a significant causative factor in her dismissal. I accept this submission but only to the extent that XCT's conduct during the employment investigation on several occasions crossed a line between robust defence of her position and obstruction.

[63] So then, while having found XCT has a valid person grievance for unjustified dismissal against UHG in the circumstances that she does, I further find, on the balance of probabilities, her actions did contribute to the situation that led, in particular, to her dismissal and I reduce her remedies by 15% as a consequence.

Recommendations?

[64] In her final submissions, XCT sought recommendations from the Authority under s 123(1)(ca) of the Act. The request for recommendations included an order of the Authority for an independent inquiry to be conducted into what was termed as a “blatant and deliberate abuse of inter-organisational powers and a severe disregard for legislated processes in relation to the employment relationship and privacy of personal information”.

[65] UHG opposed the making of any recommendations. It observed these were not sought in XCT’s statement of problem, the primary recommendation sought probably fell outside the ambit of s 123(1)(ca) and UHG said, in any event, steps were being taken to address the concerns raised by XCT.

[66] I am satisfied that as a result of this determination, UHG will be aware of its failings in process and as an employer. Consequently, I decline to make the recommendations sought.

Summary

[67] The remedial orders made are for UHG to settle XCT’s personal grievance by paying her the following amounts, less 15% contribution:

- (i) Three months’ pay as reimbursement for lost wages;
- (ii) Contributions to KiwiSaver and payment of holiday pay for the same period; and
- (iii) \$20,000 as compensation for humiliation, loss of dignity and injury to feelings.

Costs

[68] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, XCT has 28 days from the date of this determination in which to file and serve a memorandum on costs. UHG has a further 14 days in which to file and serve a memorandum in reply.

[69] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.⁶

Andrew Dallas
Member of the Employment Relations Authority

⁶*PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.