

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2016] NZERA Auckland 17
5581247

BETWEEN Mr Y
 Applicant

AND X
 Respondent

Member of Authority: Vicki Campbell

Representatives: Tim Oldfield for Applicant
 Margaret Robins for Respondent

Investigation Meeting: 26 November 2015

Submissions Received: 3 December 2015 from Applicant
 3 and 8 December 2015 from Respondent

Determination: 15 January 2016

DETERMINATION OF THE AUTHORITY

- A. Pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) the names of the parties together with the content of a Psychologist’s report, except to the extent necessary for the resolution of this employment relationship problem, shall be prohibited from publication.**
- B. One or more conditions of Mr Y’s employment were affected to his disadvantage by an unjustifiable action of X when Mr Y was suspended on 25 June 2015.**

- C. Mr Y was unjustifiably dismissed.**
- D. X is ordered to pay to Mr Y lost wages of \$26,115.99 less any income earned during the period 10 October to 10 January 2016 within 28 days of the date of this determination.**
- E. X is ordered to pay to Mr Y compensation of \$15,000 within 28 days of the date of this determination.**
- F. X is ordered to calculate and pay to Mr Y lost benefits equal to 11% of Mr Y's gross lost wages amount once that has been calculated. Payment is to be calculated and paid within 28 days of the date of this determination.**
- G. X is ordered to pay to Mr Y interest on the awards of lost wages, and compensation for lost holiday pay and kiwisaver contributions at the rate of 5 percent per annum from 10 October 2015 until payment is made.**
- H. Costs are reserved.**

Non publication orders

[1] The applicant has applied for non-publication orders prohibiting the publication of his name or any particulars that would lead to his identification. The grounds upon which the application is made are:

- a) That highly sensitive and personal information was discussed during the disciplinary process leading to the applicant's dismissal including:
 - i. The circumstances of a protection order the applicant is subject to under the Domestic Violence Act 1995; and
 - ii. A clinical psychologist's report about the applicant dated 24 July 2015.
- b) If the information referred to is published, there is a risk of :

- i. Harm to the applicant and his children
- ii. Unnecessary distress and embarrassment to the applicant
- iii. Damage to the applicant's reputation

[2] The Authority has broad discretion to make non-publication orders pursuant to clause 10(1) of schedule 2 to the Employment Relations Act 2000 (the Act) which provides:

12 Power to prohibit publication

- (1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[3] The Authority has a wide discretion to prohibit the publication of evidence.¹ Non-publication orders depend on proof of real and substantial likelihood of undue harm.²

[4] The Employment Court in *H v A Ltd*³ stated:

We agree that non-publication of names or other identifying particulars in employment cases will be “exceptional” in the sense that such orders are and will be made in a very small minority of cases. However, we do not agree that an applicant for such an order must make out, to a high standard, that there are such exceptional circumstances that a non-publication order is warranted. That is not the standard that Parliament has prescribed for such orders in this Court or the Authority.⁴

There are, of course, other circumstances in which this Court (and the Authority and other courts) prohibit publication of information about cases. Commercially sensitive information that may be misused by a competitor, if published, is perhaps the most common example of non-publication orders in this jurisdiction.

[5] I find this case has nothing out of the ordinary which would warrant a departure from the principle of open justice. As noted by Judge Ford in *Timmins v Asurequality Ltd*⁵ persons who engage in litigation as:

¹ Employment Relations Act 2000 (the Act) Schedule 2 clause 10(1).

² *C v Air Nelson* [2010] NZEmpC 18 at [16].

³ [2014] NZEmpC 92.

⁴ *Ibid* at [78] and [80].

⁵ [2011] NZEmpC 167 at [17].

... litigants or witnesses will necessarily be publicly identified. They might well prefer that that were not so. However, that is seen as a necessary consequence of the public administration of justice.

[6] I accept that damage to reputation is a relevant factor in determining whether the orders sought ought to be made. In litigation there is an inherent risk that reputations might be damaged, even in the event that matters raised are found to have substance. In *Y v D*⁶ the Chief Judge accepted that a risk of publicity would not amount to an exceptional circumstance.

[7] However, as the parties have rights of challenge to the whole or part of this determination – including a refusal to grant non-publication orders, it is appropriate to make the orders on an interim basis. Without such an interim order a challenge could be futile because information will be published when the Authority’s determination is posted on the Employment Law Database.

[8] Pursuant to clause 10 of the Second Schedule of the Act the names of the parties together with the content of a Psychologist’s report, except to the extent necessary for the resolution of this employment relationship problem, shall be prohibited from publication for a period of 28 days from the date of this determination.

Employment Relationship Problem

[9] The applicant (referred to as “Mr Y”) claims one or more conditions of his employment were affected to his disadvantage by unjustifiable actions of the respondent (referred to as “X”) and that he was unjustifiably dismissed. X denies the claims.

[10] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from Mr Y and X but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

⁶ [2004] 1 ERNZ 1.

Background

[11] X is a charitable trust which has the aim of providing emergency medical and search and rescue services.

[12] In July 2014 Mr Y met with a Senior Manager (“Mr A”) who advised Mr Y that five complaints had been received about his behaviour including complaints that he was aggressive, shouted loudly and argued with other employees.

[13] Following this meeting Mr Y’s Manager (“Mr B”) monitored Mr Y’s behaviour and met with him on a regular basis to discuss his behaviour and the best way for Mr Y to approach others.

[14] In mid-February 2015 Mr Y commenced a period of absence due to a previous injury for which he received medical assistance and rehabilitation. Mr Y returned from this period of absence in or about mid-May or early June 2015.

[15] On 25 June 2015 the Chief Executive Officer (“Mr C”) received a written complaint dated 23 June 2015 from an employee complaining that Mr Y’s behaviour at work had deteriorated and that Mr Y was *“becoming insular, volatile, aggressive and unpredictable at times which is affecting morale and safe intra-team dynamics and practice.”*

[16] Mr C met with a senior manager (“Mr D”) and Mr Y’s Manager, Mr B, that day to discuss the complaint. As a result of those discussions Mr C determined that Mr Y should be suspended.

[17] After this meeting and while Mr Y was on rostered days off, Mr C contacted Mr Y and advised him a complaint had been received alleging aggressive behaviour and advised him that he would be *“stood down”* on pay until Mr C had had an opportunity to meet with Mr Y and the complainant.

[18] On 2 July 2015 Mr Y, through his representative, was formally invited to attend an investigation meeting on 7 July 2015 and was provided with a copy of the written complaint dated 23 June 2015.

[19] At the meeting on 7 July 2015 Mr Y consented to undertaking a clinical psychological assessment. Mr Y was to remain on suspension until the assessment had been completed.

[20] Between 7 and 24 July 2015 a further five written complaints about Mr Y's behaviour were received by Mr C.

[21] The report from the psychologist was received by X on 24 July 2015. The psychologist reported that Mr Y manifested no signs of any clinical syndrome.

[22] At a meeting on 5 August 2015 Mr Y provided explanations to each of the six complaints denying the accounts provided by the complainants. Mr Y asked Mr C to interview six different employees to seek their opinions of his behaviour and gave Mr C examples of allegedly aggressive conduct by other employees and requested that he investigate these behaviours.

[23] On 18 August 2015, after interviewing four of the employees named by Mr Y and two other employees who were on duty at the time, Mr Y was advised that Mr C had concluded he had sufficient information to embark on a process with potential for a disciplinary outcome.

[24] On 26 August 2015 after interviewing the owner of the Mikano Restaurant (in relation to an incident which occurred on 6 December 2014 and which I will refer to as the "Mikano incident") a further allegation that Mr Y had been untruthful in his explanations during the 5 August 2015 meeting was added to the list of allegations against Mr Y.

[25] The parties met on 28 August 2015 to provide Mr Y with the opportunity to seek further information and to comment on the information already provided. The meeting was adjourned to allow Mr C time to locate an email Mr Y had sent to him regarding the Mikano incident on 6 December 2014. The meeting reconvened on 31 August 2015 to discuss the allegation that Mr Y had been untruthful in his answers in relation to the Mikano incident.

[26] After the meeting had concluded Mr C reached a preliminary view that the issues exposed in the investigation were of such magnitude that Mr Y's behaviour posed a serious risk to safety, and that it would be irresponsible to allow Mr Y to

return to work. Mr C also concluded that Mr Y had not told the truth during the investigation and that this constituted serious misconduct and warranted summary dismissal.

[27] On 3 September 2015 Mr Y was advised in writing of the preliminary decision to dismiss him with one month's notice. This preliminary decision was confirmed on 10 September 2015 after Mr Y had had an opportunity to comment on the preliminary decision.

Issues

[28] The issues for determination are whether one or more terms and conditions of Mr Y's employment were affected to his disadvantage by unjustified actions of X, whether Mr Y was unjustifiably dismissed and what, if any, remedies should be awarded.

Unjustified disadvantage

[29] Mr Y claims he was disadvantaged in his employment when he was suspended on 25 June 2015.

[30] The test for determining whether an employer's actions were justifiable is that set out in section 103A(2) of the Act, namely whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. That issue must be determined on an objective basis⁷ and, in applying the test, the Authority must consider the factors listed in subsection (3) and any other factors it thinks appropriate.

[31] Section 103A(5) of the Act requires the Authority not to determine an action to be unjustified solely because the employer followed a defective process if the defects were minor and did not result in the employee being treated unfairly.

[32] In *Angus v Ports of Auckland Ltd (No 2)*,⁸ the full Court held that the test means that there may be more than one possible justifiable outcome and more than one possible justifiable method adopted by employers to get to that outcome.⁹ The Authority's function is to determine whether an action taken by an employer or the

⁷ Employment Relations Act 2000 section 103A(1).

⁸ [2011] NZEmpC 160; [2011] ERNZ 466.

⁹ Ibid at [22] and [23].

way it acted falls within the band of reasonable responses available and not to substitute its view for that of the employer.

[33] The employment agreement signed by the parties in September 2011 provides for suspension in the following terms:

16 Suspension

16.1 The employer reserves the right to suspend the employee;

- a While investigating serious misconduct, negligence in the performance of the Employee's duties, or any other serious misconduct or repeated breach of this Agreement; or
- b Where, because of a condition, illness, or injury, the Employer believes that the Employee constitutes an immediate hazard to himself, or to others.

[34] An employee is entitled to be provided with access to appropriate and relevant information about a proposed decision and an opportunity to comment on the information before a decision is made.¹⁰ Cases will be relatively rare where an employer is justified in deciding unilaterally to suspend without advice to, or input from the affected employee.¹¹

[35] It was common ground that the decision to suspend Mr Y was reached without any consultation or input from him.

[36] Mr C had determined that the allegations in the letter of complaint about Mr Y's behaviour might amount to serious misconduct or that he might be suffering from a condition that might constitute an immediate hazard to himself or to others.

[37] On receipt of the complaint, Mr C met with Mr D and Mr B to discuss the complaint together with Mr C's proposal that he suspend Mr Y. It was at that meeting that it was decided that Mr Y would be suspended.

[38] On 25 June 2015 Mr C contacted Mr Y while he was on his days off and advised him a complaint had been received alleging aggressive behaviour and for safety reasons he would be "*stood down*" on pay until he had had an opportunity to meet with Mr Y and the complainant. This equates to a confirmation of a decision already made and does not meet the statutory obligation to consult.

¹⁰ *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178 at [37].

¹¹ *Ibid* at [38].

[39] On 7 August 2015 Mr C wrote to Mr Y and confirmed that the reason for the suspension was as advised to him on 2 July 2015 which was:

As I have pointed out during our telephone conversations the issues raised by [the complainant] in writing and by other staff members verbally have caused me to consider that there could be a safety issue created when you are forming part of our operational [team]. You will appreciate [Mr Y] that I am compelled to take immediate action whenever the safety of our operation is, or could be compromised, and so I have taken the action of standing you down in order to look at the issues raised in a considered manner.

[40] At the investigation meeting Mr C told the Authority that the reasons Mr Y was suspended were because:

- a) The work carried out by X was inherently dangerous and it is a critical safety requirement that all employees during an active operation must be communicating and co-operating collegially and in concert.
- b) The written complaint indicated that Mr Y's psychological state was unpredictable, aggressive and potentially destructive of the necessary collegial dynamic.
- c) Mr C had to weigh up the potential danger to Mr Y, his colleagues and other third parties if it investigated the complaint first and then considered whether to suspend, against the disadvantage to Mr Y of an immediate decision to suspend.
- d) Mr Y did not say or do anything after his suspension which gave Mr C sufficient confidence in Mr Y's state of mind and demeanour towards his colleagues that could have persuaded Mr C to terminate the suspension and allow Mr Y to return to work.

[41] Mr Y did not have any opportunity to address these concerns with Mr C prior to the decision to suspend him was made. This was despite Mr C receiving specific advice from his external HR Consultant to seek feedback from Mr Y about the proposal to suspend him.

[42] The failure to consult prior to making the decision to suspend Mr Y was a breach of good faith and renders the suspension an unjustified action.

[43] The question then is whether the unjustified suspension affected one or more conditions of Mr Y's employment to his disadvantage.

[44] Other employees were advised about Mr Y's suspension for health and safety reasons. Further, Mr Y holds qualifications in emergency medicine which requires him to spend at least 1 x 12 hour shift each month on an operational ambulance along with undertaking education days. During his suspension Mr Y was unable to meet the requirements of his emergency medicine qualification.

[45] I am satisfied one or more conditions of Mr Y's employment was affected to his disadvantage as a direct result of the unjustified suspension because Mr Y was unable to remain current in his qualifications.

[46] I find the decision to suspend Mr Y was not a decision an employer acting fairly and reasonably could make in all the circumstances. Mr Y has established a personal grievance for unjustified disadvantage and is entitled to a consideration of remedies which is addressed later in this determination.

The dismissal

[47] Clause 15 of Mr Y's individual employment agreement provided for its termination by the giving of one month's notice in writing either way. It reserved to X the right to pay out salary in lieu of notice and to stipulate that this did not need to be worked out by Mr Y.

[48] Mr Y was dismissed on notice on 10 September 2015. In accordance with the employment agreement Mr Y was not required to work out his notice period and received a payment of one month's notice in lieu.

[49] X has not published any policies or other documents setting out what constitutes serious or less serious misconduct or its disciplinary procedures.

[50] When Mr C received the letter of complaint on 25 June 2015 he became concerned that a safety issue may be created when Mr Y was part of the operational team.

[51] On 2 July 2015 Mr Y was advised that Mr C was investigating issues that had been raised in the employee's letter of complaint dated 23 June 2015. By the time this letter was provided to Mr Y, Mr C had also received verbal feedback which also raised concerns about Mr Y's behaviour in a safety sensitive environment.

The complaints

[52] This first written complaint was dated 23 June 2015. In the 23 June 2015 complaint the writer describes Mr Y's demeanour as:

...becoming insular, volatile, aggressive and unpredictable at times which is affecting morale and safe inter-team dynamics and practice.

[53] The writer went on to describe an incident the previous morning (verbatim):

...[Mr Y] came into early ... he came storming in yelling at me while gesturing at me threateningly 'where is it?' when I asked what? he said 'you know what I mean ... stop bullshitting me ,,,, the radio of the 2nd machine' I replied on the str with the rest of the equipment....then he shouted words to the effect of 'I knew you were bullshitting when you said you were charging it...

[54] According to the complainant Mr Y left the room after a couple more exchanges still "...*ranting audibly*". The complainant states he was left shaken, humiliated and upset at Mr Y's verbal and aggressive attack.

[55] Further written complaints followed dated 8, 10, 20 and 28 July and 1 August 2015. The writer of the complaint dated 8 July 2015 indicates he was asked to provide written comment on Mr Y. This letter sets out very broad and general statements about Mr Y's behaviour which the complainant had experienced or witnessed. No specific incidents are referred to and no dates on which the behaviours said to have occurred are provided.

[56] The writer of the complaint dated 10 July 2015 refers to the original complaint letter dated 23 June 2015 and again makes very broad general statements about Mr Y's behaviour but does not provide any specific examples.

[57] The complaint dated 20 July 2015 provided an example of the behaviour the writer had personally experienced from Mr Y. The complainant refers to an incident that had occurred six or seven months earlier and had been raised with the writer's immediate manager at the time. No action was taken at that time, largely it seems,

because the report was verbal and not in writing. The writer of this complaint notes that Mr Y's moods are unpredictable and describes him as being difficult to work with often causing matters to escalate.

[58] Copies of the letters of complaint dated 8, 10 and 20 July 2015 were provided to Mr Y on 28 July 2015.

[59] In an email complaint dated 28 July 2015 Mr A added his comments to the mounting complaints. The statements by Mr A are very broad and provide no specific examples of the conduct complained of and no dates on which the behaviour is said to have occurred.

[60] The complaint dated 1 August 2015 contains further specific examples of behaviour which caused the writer concern. In particular the writer identifies three incidents. The first involving Mr Y and staff of the Mikano Restaurant (the "Mikano Incident"), the second an incident which I will refer to as the "MT incident" and the third which I will refer to as the "OT incident".

[61] The writer of this complaint describes Mr Y's behaviour as bizarre and lacking in following appropriate procedures. He describes Mr Y as becoming increasingly irrational, overbearing, insensitive, belligerent and difficult to deal with. The writer expresses his concerns that Mr Y may compromise safety and he had become uncomfortable working with him.

[62] A common thread in all the letters of complaint is the unpredictability of Mr Y's behaviour and that team members were very concerned about their safety while undertaking their roles with Mr Y.

Mikano incident

[63] This incident involved Mr Y's actions towards two employees of Mikano Restaurant on 6 December 2014. It was alleged that Mr Y was shouting loudly and using a long poled scrubbing brush in a threatening manner toward the two employees. At the time Mr Y was in his full uniform. The complainant says that Mr Y appeared to be on the verge of assaulting the two staff members and that he continued to be agitated even after two of Mr Y's colleagues, who also witnessed the incident, talked him down.

[64] On 6 December 2014, following the incident, Mr Y emailed Mr C and advised him that there had been an incident with an employee of Mikano Restaurant and one of its owners. Mr Y advised Mr C that he witnessed a Mikano employee pushing a big skip rubbish bin into X's parking space to allow a large land cruiser to park in a Mikano parking space. Mr Y says he asked the employee to move it but he refused. Eventually the owner stepped out of the vehicle and approached Mr Y. Mr Y explained that vehicles had been damaged and that the skip should not be in X's parking spaces. Mr Y explained that after some toing and froing the conversation ended with handshakes and smiles and commented that he did not expect any repercussions.

[65] During his investigation into the allegations Mr C spoke to one of Mr Y's colleagues who had witnessed the incident. Mr Y's colleague told Mr C that Mr Y did get heated and pretty loud but he calmed down after a third employee told him "...*that is enough*".

[66] During the disciplinary process Mr C contacted the owner of the Mikano Restaurant and asked for his version of events, given the clear differences between the complainant and the report furnished by Mr Y at the time.

[67] The owner described Mr Y's behaviour as very aggressive and threatening, that Mr Y had invaded his personal space and that he thought Mr Y was going to hit him. The owner reported that Mr Y was swearing continuously (using the "F" word) and that he had asked Mr Y several times to mind his language.

[68] During the disciplinary process Mr Y's further explanation included that he had spoken Arabic to the owner and during a brief discussion early on in the incident the owner had advised Mr Y that he had lived in Dubai for five years.

[69] The owner was contacted again and asked about his recollection of telling Mr Y of him living in Dubai. The owner did not recall telling Mr Y that but acknowledged that it was true, he had lived in the United Arab Emirates for five years but he denied that they had conversed in Arabic.

[70] Mr Y acknowledged that he had googled the owners name following the incident in December 2014. Mr C had also googled the owner himself. Mr C noted that the owner's on-line profile states that he worked five years as an auditor in the

United Arab Emirates. Mr C accepted the owner's explanation and concluded that it was more likely Mr Y received the information about the owner's past employment history from his google search than directly from the owner.

[71] With respect to the speaking Arabic, Mr C concluded that this was not a truthful statement.

MT and OT Incidents

[72] The MT incident involves allegations that Mr Y was yelling at others in the work environment that he had "control", a phrase used inappropriately given the context of the work environment. The writer of the complaint acknowledges that this event did not lead to any safety issues, however, other employees were left on edge and Mr Y's behaviour was considered to be disruptive.

[73] With respect to the OT incident, while returning on route having completed a task, and without consulting other members of the team, Mr Y offered to pick up a new task. The complaint is that Mr Y did not follow recognised protocols.

[74] During the investigation process Mr C explained that he was satisfied with Mr Y's explanation about these two incidents and they were not taken any further.

Psychologist report

[75] At the first meeting between X and Mr Y on 7 July 2015 Mr C stated his concerns about Mr Y's behaviour and requested Mr Y to undertake a clinical psychological evaluation. Mr Y was represented at this meeting by his Union Organiser and agreed to undertake the evaluation. The evaluations were undertaken on 15 and 18 July 2015.

[76] The resulting psychologist's report cleared Mr Y and stated his hope that Mr Y would be returned to work and that support would be provided to him and his colleagues in resuming communications in a manner that was both respectful of each other and collaborative.

[77] X did not return Mr Y to work.

Investigation process

[78] Notwithstanding the conclusion that there was no evidence of a clinical issue with Mr Y, Mr C remained concerned that Mr Y's mental or psychological health was affecting or might affect his ability to perform his duties safely and effectively and that his behaviour may undermine the necessary team cohesiveness and therefore the safety of the organisation's operations.

[79] In a recent decision from the Employment Court¹², the Court has described what it considered to be a textbook example of how an investigation should be carried out:

In many ways, the process followed by Mr Firman was a textbook example of how a disciplinary investigation should be carried out. After receiving the terms of reference and finding out what was alleged, Mr Firman proceeded to work out what was required to be determined and who needed to be spoken to. He then constructed a series of open-ended investigation questions that would not bias the investigation. He used his manager to critique his questions and make sure that they were fit for the purpose. He told the Court that after crafting the questions he then made contact with Mr Goel and asked him who else he should talk to. He also ran over the process with Mr Goel and arranged to meet with him on 10 January 2013 in a neutral area, the Wellington Library Cafe. He confirmed the meeting arrangement with Mr Goel in writing, reminding him that he could bring a support person/representative with him and he recommended that Mr Goel obtain support and assistance that was available to him through the EAP service.

Mr Firman followed the same process for all interviews. He asked the open-ended questions that he had prepared and he recorded the responses "hopefully verbatim" as the interviewees answered. There was nothing said to him that was not recorded in his notes. At the end of each interview he spell checked and then sent the transcript to each person interviewed, including Mr Goel and he had each person verify that the interview was correctly recorded. He then proceeded to draft his investigation report. He attached all of the interview notes to the report and sent a copy of everything to Mr Goel for his response. He had emailed Mr Goel and spoken to him on the telephone informing him that he needed his comments on the draft report prior to it being sent to the decision-maker.

Mr Goel went through the draft report and added his comments to the document through "track changes" which were highlighted in red. Mr Firman said that he carefully considered all of Mr Goel's comments but they did not lead him to change his conclusions or recommendations. He then proceeded to finalise his Formal Investigation Report which was dated 31 January 2013 and sent it through to Mr Bolger. The document Mr Bolger received included Mr Goel's marked-up comments highlighted in red. Mr Firman had no discussion with Mr Bolger about the nature of the disciplinary action (if any) to be taken against Mr Goel.¹³

[80] From notes provided by Mr C it seems the intention was to have the 23 June 2015 complaint investigated by an independent HR person. Instead the investigation into the allegations made in the 23 June 2015 letter was undertaken by Mr C

¹² *Goel v The Director-General for Primary Industries* [2015] NZEmpC 214.

¹³ *Ibid* at [42] to [44].

personally, initially with the assistance of an external Human Resources Consultant and then with legal assistance.

[81] On Friday 26 June 2015 Mr C met with the HR Consultant and the writer of the 23 June 2015 complaint. Notes were taken from that meeting by the HR Consultant but were not provided to Mr Y.

[82] At the meeting on 5 August 2015 Mr Y provided the names of eight employees he wished Mr C to interview regarding the complaints made about him. Mr C acknowledges he spoke to some of those on the list and took the opportunity to speak to others who had not made complaints and were not on Mr Y's list.

[83] With respect to two of the people named on the list that were not interviewed, one was in New Guinea and was not contactable. Mr C checked the rosters to see when the second person would be at work but took no further steps to follow up or make contact with the person.

[84] Mr C also followed up and spoke to the one person quoted in the 23 June 2015 complaint but took no notes of that discussion and did not seek further specific information from him. No follow up was made to the writer of the 20 July 2015 complaint but Mr C did speak to the Line Manager, mentioned in the complaint. Again, no notes were taken of that discussion.

[85] The notes of the six discussions held by Mr C between 5 and 12 August 2015 indicate that two of the six employees interviewed believed Mr Y to be a serious safety concern.

[86] I am not satisfied the investigation was carried out in a fair and reasonable way. There are numerous examples of notes not being taken of important discussions held with employees. Not all those employees requested by Mr Y were spoken to. While I accept that it was difficult to contact one of those on the list, Mr C has not provided a satisfactory answer as to why others were not spoken to.

[87] Three of the six complaints about Mr Y's behaviour provided only general statements about Mr Y's conduct with no dates or other details to support the general statements. Mr C failed to seek further information or examples of the behaviour

being complained about which would have allowed Mr Y to provide fuller explanations about the complaints.

[88] It seems that at least two of the complainants had been requested to put information in writing and at least one of those had prior knowledge of the complaint dated 23 June 2015.

[89] One of the complaints was from Mr A and appears to be drawing on his knowledge of the complaints he discussed with Mr Y in July 2014. These complaints had been dealt with informally and steps put in place to assist Mr Y with his behavioural issues, albeit Mr Y was not aware of this at the time. Despite this, it appears Mr C has given weight to this complaint and taken it into account when making his decision to dismiss.

[90] No formal investigation report was produced and Mr Y had not received copies of any information other than the written complaints from June, July and August 2015 some of which contained unsubstantiated and broad general statements about Mr Y's behaviour.

Disciplinary process

[91] On 18 August 2015 Mr Y was advised formally that the investigation into his behaviours had been completed. Mr Y was advised that after considering all of the written statements he had received along with the verbal discussions held with additional employees Mr C remained concerned about Mr Y's suitability to carry out his role.

[92] Mr C considered safety would be severely compromised if Mr Y was returned to work and as a result the matter was now being treated as a disciplinary matter. Mr Y was advised that his employment may be terminated and he was requested to attend a meeting the following week so that he could raise any matters Mr C should consider or further investigate.

[93] On 21 August 2015 Mr Y wrote to X raising a personal grievance for unjustified disadvantage in relation to his suspension. Mr Y raised concerns about the lack of details about who Mr C had spoken to during his investigation or what they had said. Mr Y was also concerned that it was not actually clear on what basis the disciplinary action was contemplated or what the specific allegations were that he was

expected to respond to in a disciplinary setting. Mr Y maintained that he had not been made aware of the concerns with his behaviour previously and that the complaints came as a surprise to him.

[94] In response, on 25 August 2015, Mr C set out what he considered to be the relevant parts of the verbal statements provided to Mr C during his interviews from 5 – 12 August 2015. Mr Y was advised that X was considering terminating his employment on the grounds that he poses an unacceptable safety risk which was considered “...*akin to serious misconduct*”.

[95] Mr C advised Mr Y that he must consider whether he had sufficient trust and confidence in Mr Y to continue the employment relationship or whether Mr Y’s behaviour had so seriously undermined trust and confidence so as to destroy the employment relationship. Mr Y was invited to provide further information on whether Mr Y had sufficient insight into the effect his behaviour had on others.

[96] In his response Mr C referred Mr Y to the discussion held between Mr Y and Mr A in July 2014 where Mr Y was advised of five complaints that had been received about his anger, shouting at people and his inappropriate reactions to issues.

[97] Attached to Mr C’s response was a copy of notes made by Mr C which introduced a further allegation relating to an incident that occurred on 19 February 2015.

[98] Mr Y was reminded that subsequent to the July 2014 meeting with Mr A, Mr B met with him regularly and provided a mentoring process to assist Mr Y in changing his behaviours at work. Mr Y was never told either formally or informally that the reason for Mr B’s meetings with him each day was to mentor him around his behaviours. At the Authority’s investigation meeting the evidence showed that the focus of the regular meetings was on Mr Y’s reactions and how he could best react to matters arising during the day.

[99] On 26 August 2015 Mr Y was advised of a further allegation that he had not been truthful in his explanation about the Mikano incident and if that was found to be substantiated then it would be regarded as serious misconduct which would contribute to the grounds for loss of trust and confidence.

28 August 2015 meeting

[100] The first disciplinary meeting took place on 28 August 2015. The Authority has received a transcript of a recording made at the meeting. The meeting focussed on Mr Y seeking further information about the complaints. A specific request for copies of file notes taken during the investigation process was declined by Mr C.

[101] Mr Y advised Mr C that he had been told by a colleague that Mr A had been ringing other employees soliciting comments from them about whether they would be prepared to work with Mr Y. Mr Y requested that this be investigated and that it be stopped if it was happening.

[102] Mr C agreed he would contact Mr A which he subsequently did. Mr A acknowledged he had rung around but claimed it was in July 2014 and not during the current situation. Mr C did not pass this information on to Mr Y and neither did he investigate the claim any further by contacting Mr Y's colleague who had reported Mr A's soliciting comments.

[103] Mr Y raised concerns during the meeting that the extracts from Mr C's notes from his interviews did not provide any specific information to which he could respond. Mr Y was concerned the bullet points were vague and did not provide any specific information about whether the person making the comment observed anything and if so when and in what circumstances. Despite these concerns Mr C continued to refuse to provide a full copy of the file notes he had made of the discussions.

[104] Mr Y requested that the parties attend mediation in order to resolve the issues and to enable him to return to work. This request was rejected.

[105] During the meeting Mr C clarified that the issue for him was not whether Mr Y was liked by his colleagues and senior staff, but whether he was stable enough to work in the safety critical environment. Mr C was relying on comments by those he interviewed as well as the six complaints where concerns were raised that Mr Y was being erratic and was volatile.

[106] The incident from 19 February 2015 was discussed. Mr C advised Mr Y that he did not blame Mr Y for that incident. This is inconsistent with the report from Mr B that the 19 February 2015 incident led Mr B to losing trust and confidence in Mr Y.

It was agreed the 19 February 2015 incident would not be taken into account when making the final disciplinary decision.

[107] With regards to the Mikano incident, Mr Y raised concerns that the incident occurred in early December 2014, it was reported by Mr Y at the time, it was apparently witnessed by two other employees but no concerns were raised. Mr Y was concerned that variations in his explanations and the explanations provided by others was being used to support an allegation that Mr Y had lied during the investigation process.

[108] The meeting was adjourned to allow Mr C to locate the email report made by Mr Y at the time of the Mikano incident in December 2014.

Disciplinary meeting – 31 August 2015

[109] The disciplinary meeting adjourned on 28 August and reconvened on 31 August 2015.

[110] The main issue for discussion was why the version of events about the Mikano incident given by Mr Y in his email on 6 December 2014 was at variance with the version of events given by an employee witness and Mikano's owner.

[111] Mr Y maintained that during the discussion with the two Mikano employees he did not swear and their conversation was amicable. Mr Y acknowledged that one of his colleagues approached and asked whether everything was okay and shortly after that he and the owner shook hands and everyone left happy.

[112] Mr Y raised concerns that all those spoken to were being asked to recall events that occurred 9 months earlier and the difficulties the effluxion of time created in accurate recall.

[113] Mr C advised Mr Y that in his view the matter came down to Mr Y's word against others which is why he contacted the owner to get his view on what had occurred. Mr C considered the owner to be an independent person. What Mr C was told by the owner during two separate telephone conversations was that Mr Y had been aggressive and threatening in his behaviour toward the Mikano employees and he [the owner] felt intimidated. The owner denied he shook Mr Y's hand or that he conversed with Mr Y in Arabic.

[114] Mr C acknowledged that he did not believe Mr Y was a dishonest person but he was struggling with the diverse range of recall of events.

[115] The meeting ended with an agreement that Mr C would confirm his preliminary decision in writing.

Proposal and decision to dismiss

[116] On 3 September 2015 Mr C wrote to Mr Y advising him of his preliminary decision to terminate Mr Y's employment. The preliminary decision was based on Mr C's conclusions that:

- a) He preferred the explanations of the employee witness and Mikano's owner to Mr Y's explanation;
- b) He had significant doubts about Mr Y's recall of all the events complained about where Mr Y's version was at odds with the complainants;
- c) The issues highlighted during the investigation were of such magnitude that Mr C considered Mr Y to constitute a serious risk to safety and that returning Mr Y to his work was not a responsible thing to do;
- d) Mr Y was not being truthful in his answers and explanations regarding the Mikano incident and that Mr Y's failure to tell the truth amounted to serious misconduct justifying summary dismissal.

[117] Mr Y was invited to respond to Mr C's conclusions which he did on 7 September 2015. In his response Mr Y raised concerns that:

- a) Mr C had failed to provide information relevant to the decision and an opportunity for Mr Y to respond fully and alleged that in some instances Mr C had provided misleading information;
- b) Most of the allegations were historical, lacked specificity and in some cases had been dealt with;

- c) X had failed to raise any previous concerns that Mr Y's behaviour was a serious safety issue;
- d) Mr C had chosen to ignore positive comments made about Mr Y;
- e) The matter had been pre-determined and Mr C failed to keep an open mind;
- f) Mr C had ignored the findings from the psychologist's evaluation which was initiated by the organisation.

[118] On 10 September 2015 in a letter written on behalf of X, Mr Y's dismissal was confirmed. Mr Y was dismissed on notice because Mr C did not have a sufficient degree of trust and confidence in Mr Y to justify his returning to work

Determination

[119] Section 103A of the Act sets out the test for determining whether an employer's actions were justifiable (see paragraphs [30] to [32]).

[120] I have found the investigation process undertaken by Mr C was deficient in a number of areas including the failure to provide copies of all interview notes taken during interviews with employees.

[121] Also the failure to investigate any of the concerns Mr Y raised during the investigation and disciplinary processes about conduct he had been subject to from Mr A and other employees which was similar in nature to the conduct for which he was being disciplined gives me cause for concern. Mr Y had raised concerns that the workplace culture was such that his behaviour was not out of the ordinary. Mr C had an obligation to investigate those claims before reaching any conclusions about Mr Y's behaviour.

[122] Further, Mr C was alerted to concerns about Mr Y's behaviour in July 2014 and put in place a mentoring process the reasons for which were never communicated to Mr Y. Given that those same behaviours have now given rise to serious concerns about the safety of having Mr Y working as part of an operational team, it was the

responsibility of X to put Mr Y on notice that he was being monitored daily and that his behaviours were a reason for concern.

[123] Mr Y has argued that all of the complaints were historical or were so vague he was unable to respond to them fully. I am satisfied that three of the complaints received on or after 23 June 2015 contained specific information to which Mr Y could and did respond. Those three complaints were the 23 June 2015 complaint, the complaint dated 20 July 2015 and the complaint dated 1 August 2015.

[124] The 20 July 2015 complaint contained specific information about an incident in which Mr Y was accused of responding to an enquiry from the complainant in an aggressive way and which resulted in a similar response from the complainant. The complainant later apologised to Mr Y for the way he had spoken to him. While the incident was not dated, Mr Y was able to respond to the allegation when he accepted that he had spoken to the complainant in an aggressive way but considered the complainant to be the aggressor and not himself.

[125] In relation to the claim that the Mikano incident was too historical to be relied upon, I find that, until the complaint dated 1 August 2015 was provided to him, Mr C had reasonably relied on the email sent to him by Mr Y on 6 December 2014. That email did not raise any cause for concern as it appears on the face of it that the incident was minor and Mr Y had handled matters amicably. Mr C's impression of that incident changed when he received the letter dated 1 August 2015 which set out a completely different picture of the events.

[126] Mr C investigated the Mikano incident by speaking to the owner who provided him with a version of events that was similar to the version of events set out in the 1 August 2015 complaint. Both versions of events contradicted Mr Y's version set out in his email dated 6 December 2014 and his explanations during the disciplinary meetings. All responses from Mikano's owner were put to Mr Y and he had the opportunity to respond to them.

[127] Mr Y was absent from work continuously from late February 2015 until late May or mid-June 2015. The 23 June 2015 complaint arose not long after Mr Y's return to work which then resulted in the information about the Mikano incident coming to the attention of Mr C. Given the seriousness of the allegations Mr C was bound to investigate it.

[128] I am satisfied Mr C's conclusion to accept the explanations provided by Mikano's owner and the employee who witnessed the incident was a conclusion an employer acting fairly and reasonably could reach. However, the same cannot be said for the conclusion that Mr Y had lied in giving his explanations. There was no evidence that Mr Y deliberately set out to deceive Mr C. The Court of Appeal in *George v Auckland Council*¹⁴ held:

We emphasise that mere differences in recollection are likely to be commonplace during the course of the disciplinary process including any earlier investigation stage. Differences of recollection or inconsistencies are not in themselves sufficient to support a finding that the employee has lied. An employee may honestly, but mistakenly, have a different recollection of events. In order to establish that the employee has lied, there must be proof of a deliberate untruth on the employee's part.¹⁵

[129] Mr C's conclusion that Mr Y had lied is inconsistent with his own acknowledgement at the 31 August 2015 meeting that he did not believe Mr Y was a dishonest man.

[130] I find the conclusion that Mr Y had lied in his explanations about the Mikano incident was not a conclusion an employer acting fairly and reasonably could reach.

[131] Mr Y claims the decision to dismiss was predetermined. When Mr C met with Mr B and Mr D on 25 June 2015 the discussion centred on the allegations set out in the 23 June 2015 complaint. Other discussions took place during that meeting however no notes of that discussion were recorded. I find that the discussions played an important part in the decision both to suspend Mr Y and the decision to dismiss him.

[132] During the disciplinary meeting on 28 August 2015 in response to issues being raised on behalf of Mr Y, Mr C advised that he had had serious concerns raised by both Mr B and Mr D. Neither of these managers had provided statements to Mr C during his investigation and neither had they provided written complaints about Mr Y's behaviour. I have taken this reference to be to the discussion Mr C held on 25 June 2015 when the decision to suspend was made.

¹⁴ [2014] ERNZ 72.

¹⁵ Ibid at [36].

[133] Mr C considered Mr A, Mr B, and Mr D to have significant credibility as a result of the roles they filled in the organisation and in his words “...*were not just everyday people*”. In the absence of any evidence of what was discussed in the 25 June 2015 meeting, which has been described as “...*lengthy*...” it is not difficult to see why Mr Y is concerned Mr C predetermined his decision to dismiss Mr Y.

[134] Mr C concluded that Mr Y was not stable enough to have in the work environment. I acknowledge the importance safety has in the environment in which X operates. Mr C’s conclusion however, was based on an unfair investigation into the allegations against Mr Y, the unfair finding that Mr Y had lied, and failed to take into account the culture of the team in which Mr Y worked and whether Mr Y’s conduct was out of the ordinary. This arose due to Mr C’s failure to investigate the allegations Mr Y had made in respect of similar behaviours he had experienced from other employees including Mr A.

[135] Overall I find the decision to dismiss Mr Y was not a decision an employer acting fairly and reasonably could make in all the circumstances at the time. Mr Y has established a personal grievance for unjustified dismissal and is entitled to a consideration of remedies.

Remedies

[136] Mr Y claims remedies of reinstatement, lost wages, compensation for hurt and humiliation, compensation for lost benefits being holiday pay and kiwisaver, interest and costs.

Reinstatement

[137] The Authority may award reinstatement where it is practicable and reasonable to do so.¹⁶ The Employment Court has provided the following guidance about the exercise of discretion to award reinstatement:

The important criterion is that employees are entitled not to be deprived of their employment unjustifiably and when they have been they ought ordinarily to be put back, if that is their wish. That would be a proper exercise of a discretion conferred on the Tribunal for the benefit of employees unless there are features in the case or indications pointing in a contrary direction that outweigh the employee's right to have his or her job back. Factors that produce that result ought to be substantial reasons and not mere assertions by an employer that it does not want to be forced to employ the employee whom, it will be recalled, it should never have dismissed in the first place. Such an assertion, if anything, aggravates the injury and renders

¹⁶ Employment Relations Act 2000 section 125(2).

reinstatement an even more compelling imperative. That is so notwithstanding the alteration in emphasis on reinstatement in the current statute. While each case must be determined on its own facts, the statistics given above indicate that the Tribunal is not mindful to an adequate degree that it is called upon to be the impartial referee in a playing field dominated by the goal of job protection. That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.¹⁷

[138] While reinstatement has no more or less prominence than any other statutory remedy, as observed by the Court in *Angus v Ports of Auckland (No 2)*,¹⁸ it may still be “...*the most significant remedy claimed because of its particular importance to the grievant...*” in a particular case and whether an order for reinstatement should be made needs to be examined on a case by case basis.¹⁹

[139] Practicability concerns the prospects for successfully re-establishing the employment relationship. It involves the question of whether Mr Y could be a sufficiently harmonious and effective member of X’s staff.²⁰ Practicability has been described in the following way:

[P]racticability is not the same as possibility. ... Whether the [employer] has established on the balance of probabilities that it would not be practicable to reinstate [the dismissed employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.²¹

[140] Assessing the reasonableness of reinstatement requires “...*a broad inquiry into the equities of the parties’ cases...*” and into the prospective effects of an order for reinstatement not only on Mr Y but also on X and any relevant third parties.²²

[141] Mr Y’s reinstatement application has been vigorously opposed by X. This includes statements by Mr C at the Authority’s investigation meeting that Mr Y would not be put back into an operational role even if the Authority ordered his reinstatement.

¹⁷ *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at 436.

¹⁸ [\[2011\] NZEmpC 160](#) (2011) 9 NZELC 94,015, [\[2011\] ERNZ 466](#) (2011) 9 NZELR 40.

¹⁹ *Ibid* at [61].

²⁰ *Northern Hotel IUOW v Rotorua RSA Inc* (1989) ERNZ Sel Cas 535, 540 (LC).

²¹ *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243 at 286 (confirmed by the Court of Appeal in [1994] 2 ERNZ 414 at 416).

²² *Ibid* at [65] and [68].

[142] X operates in an extremely safety sensitive environment which is dangerous and challenging. It is responsible for not only the safety of its employees but also of third parties who have no control over the environment. When working on operations the team is required to work in concert and must be able to trust each other to carry out their tasks without fear or favour.

[143] During the Authority's investigation meeting Mr Y demonstrated a lack of foresight into his behaviours and the impact those behaviours may have on those around him. While I have accepted X has failed to establish Mr Y lied during the investigation and disciplinary process, Mr Y's explanations are considerably different to those set out in the complaints.

[144] Immediately following both the Mikano incident and the incident leading to the 23 June 2015 complaint Mr Y had notified senior Managers with details of each incident setting out his view of events. In his 6 December 2014 email about the Mikano incident Mr Y commented that he did not expect repercussions but was simply keeping Mr C in the loop.

[145] Mr D gave evidence that he was not surprised to receive the 23 June 2015 complaint as Mr Y had approached him that day and advised him he had just had a go at the complainant and that he [Mr D] may receive something.

[146] Mr Y's actions are not consistent with his assertions that he believed either or both incidents were other than amicable or not of the type that would cause a complaint.

[147] Mr Y's view of events is considerably at odds with the views of others directly involved. I find on balance that Mr Y has downplayed both his role in the incidents and the impact his behaviour has had on others.

[148] Trust and confidence in employment is a two way street. During the Authority's investigation meeting Mr Y accused Mr A and Mr D of lying and refused to endorse Mr B (his direct Manager) as a person of integrity. All of these men are senior managers in the organisation and Mr Y needs to have confidence in them. He clearly does not.

[149] I have considered whether the re-imposition of the employment relationship between X and Mr Y is feasible and could be undertaken successfully. I am not satisfied that it is and neither am I satisfied Mr Y would be a harmonious member of the team. I find it is impracticable and unreasonable for Mr Y to be reinstated to his former position and his application for reinstatement is declined.

Lost wages

[150] Mr Y seeks lost wages from the date of his dismissal for a minimum period of three months and asks the Authority to consider exercising its discretion to award up to nine months.

[151] The evidence shows that Mr Y took some steps to mitigate his loss and was able to secure a little bit of work since his dismissal albeit not on a permanent basis. Mr Y was paid one month's pay in lieu of working out his notice period meaning his employment ended on 10 October 2015.

[152] Mr Y says he will find it difficult, if not impossible to find the same job in New Zealand. Mr Y had been employed by X for four years and two months. He says his dismissal means his career is now ended. I accept that there is little work available which would see Mr Y recruited into the exact role he was undertaking for X. However, he is qualified in emergency medicine and has worked previously in emergency and security roles. There is no evidence to show that Mr Y would not be able to obtain work in the area of emergency medicine or security.

[153] I am not satisfied the evidence establishes the claim for more than three months lost wages. I have determined that lost wages should be limited to three months totalling \$26,115.99 gross. This amount is to be reduced by all earnings received by Mr Y for the period 10 October 2015 to 10 January 2016. The Authority has been advised of earnings of \$2,643.85 but it is not clear whether this is a gross or nett amount. It may also be that Mr Y has earned additional income since the date of the Authority's investigation meeting.

[154] X is ordered to pay to Mr Y lost wages of \$26,115.99 gross less any income earned within 28 days of the date of this determination.

Compensation

[155] Mr Y seeks compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act. The amount of compensation must be referable to the harm done by the employers breach²³ and should not contain any element of punishment.²⁴

[156] As set out at paragraph 46 of this determination I have taken a global approach to the award of remedies under this heading for both the unjustified disadvantage and the unjustified dismissal grievances.

[157] Mr Y seeks payment of \$7,500 for his claim of unjustified disadvantage plus \$25,000 for his unjustified dismissal.

[158] With regards to the suspension Mr Y gave evidence that he understood that if he attended the psychologist appointment and was cleared of any clinical diagnosis he would be returned to work. Despite being cleared by the psychologist, Mr C remained concerned that Mr Y was a risk to the health and safety of other employees working in his team. On 28 July 2015 Mr C advised Mr Y that his investigation would continue and provided Mr Y with copies of the written statements received on 8, 10 and 20 July 2015.

[159] Mr Y says he cried when he received the letter of 28 July 2015. He says it was upsetting to see the statements about him showing him what other people were saying about him.

[160] With regards to the dismissal Mr Y says that, when he was told he would be dismissed, he felt sick. He began to question his integrity and his reputation and had difficulty sleeping.

[161] Mr Y also gave evidence that there was gossip about him in the workplace which give rise to him receiving an abusive phone call resulting in him calling the police.

[162] Mr Y has established he suffered injury to his feelings and loss of dignity warranting compensation under s 123(1)(c)(i) of the Act. I am mindful of the need

²³ [New Zealand Institute of Fashion Technology v Aitken \[2004\] 2 ERNZ 340](#) (EmpC).

²⁴ [STAMS v Denhards Bakeries Co \(No 2\) \[1991\] 3 ERNZ 941](#) (EmpC).

not to keep compensatory payments artificially low but need to balance that with a need for moderation in payments. That is the formulation for exercising discretion in awarding compensation expressed by the Employment Court in *Hall v Dionex Pty Ltd*.²⁵

[163] I consider that \$15,000 is an appropriate award for Mr Y's particular circumstances which includes that X is a charitable organisation. The compensation is to be paid within 28 days of the date of this determination.

Lost benefits

Holiday pay

[164] In addition to the reimbursement of lost wages, Mr Y also seeks holiday pay in respect of those wages under section 123(1)(c)(ii) of the Act which allows an award of compensation for the "*loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen*".

[165] In *Nathan Gunning v Bankrupt Vehicle Sales and Finance Limited*²⁶ the Court held that the statutory benefits under the Holidays Act 2003 may be the subject of compensation if it is established that they were lost as the result of the personal grievance.²⁷

[166] I have no evidence about whether Mr Y would have taken any holidays between 10 October 2015 and January 2016 and so have worked on the presumption that he would not have been given the type of work undertaken by X. Accordingly, Mr Y's entitlement to holiday pay would have been 8 percent of his gross earnings.

[167] X is ordered to calculate and pay to Mr Y lost benefits equal to 8% of Mr Y's gross lost wages amount once that has been calculated. Calculation and payment is to be made within 28 days of the date of this determination.

²⁵ [2015] NZEmpC 39 at [90].

²⁶ [2013] NZEmpC 212.

²⁷ *Ibid* at [52].

Kiwisaver

[168] Mr Y claims the employer's contribution to kiwisaver of 3% in respect of his lost wages. The payslip provided to the Authority is evidence that X was contributing to Mr Y's kiwisaver account.

[169] X is ordered to calculate and pay to Mr Y lost benefits equal to 3% of his gross lost wages amount once that has been calculated. Calculation and payment is to be made within 28 days of the date of this determination.

Interest

[170] It is appropriate to award interest on the sums ordered for lost wages, and compensation for lost holiday pay and kiwisaver contributions. X is ordered to pay Mr Y interest at the rate of 5 percent per annum on those sums from 10 October 2015 until payment is made.

Contribution

[171] Section 124 of the Act obliges me to consider the extent to which Mr Y's actions contributed towards the situation that gave rise to his personal grievances. If I consider his actions so require I must reduce his remedies accordingly.

[172] X submits that Mr Y contributed significantly to the actions giving rise to his personal grievances. This includes his failure to change his behaviour after the discussion with Mr A in July 2014, his failure to acknowledge during the disciplinary process that there was a problem with his behaviour and that he did not give a truthful account of the Mikano incident.

[173] It is correct that Mr Y's behaviour continued to be a cause of concern for his colleagues and managers, however the discussion in July 2014 was an informal discussion. Mr Y was never advised that the regular sessions with his Manager, Mr B, following Mr A's meeting with him in July 2014, was for the purpose of assisting him in correcting his behaviour.

[174] Mr Y did not acknowledge during the disciplinary process that his behaviour may be problematic, however at least half of the written complaints contained general statements about Mr Y's behaviour, were in some cases historical and were largely unsubstantiated. The lack of specificity made it difficult for Mr Y to respond fully.

[175] Throughout the process Mr Y made it clear he was willing to work with X to work through and resolve issues. Mr Y's offers of mediation were rejected by X until after the decision to dismiss was made.

[176] Viewed objectively I do not consider Mr Y contributed to the situation giving rise to his personal grievances in a blameworthy way and no reduction will be made to the remedies awarded.

Costs

[177] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Y shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. X shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[178] 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.

Vicki Campbell

Member of the Employment Relations Authority