

attending to the secretarial needs of the Club's committees.

[3] On 30 September 2008 the Club's executive committee appointed its new financial advisor Ray O'Connor, an accountant, and Bill Garth, a previous manager of the Club, to conduct "*a full investigation into the club's operation and financial situation*". The Club's president Rod Coster described the future of the club as "*in serious jeopardy*".

[4] On 13 October Mr Munro met with Mr O'Connor and Mr Garth to discuss the Club's financial situation and business plan. Mr Coster was unable to attend but he asked Mr Munro to fully co-operate with Mr O'Connor and Mr Garth. The meeting turned out to be unsatisfactory for all three men. Mr O'Connor and Mr Garth considered that Mr Munro was not taking business issues seriously enough and Mr Munro was annoyed that they and not Mr Coster were discussing employment issues with him.

[5] On 14 October Mr Munro visited his doctor who provided him with a medical certificate excusing him from work until 17 November 2008. That certificate was later extended to 5 December 2008. He remained on sick leave throughout this period.

[6] On 6 November Mr Munro was called to a disciplinary meeting, scheduled for 17 November. The letter advising him of the meeting identified five matters described as "*of serious concern*". He was advised that if his explanations were not satisfactory his employment could be terminated.

[7] Four of the five matters were identified as "*serious misconduct*". The Club alleged that Mr Munro had:

- (i) reimbursed himself \$139.95 for a pair of shoes, using a club cheque without authority to do so; and
- (ii) purchased petrol for his car on three occasions (costing a total of \$294.78) by using the Club's account at a local petrol station without authority to do so; and
- (iii) reimbursed himself \$124.40 for his Telecom home account, using a club cheque without authority to do so; and

- (iv) falsified Club records by crediting himself an extra week's annual leave without authority do so.

[8] The fifth matter identified as of concern was that two kegs of beer in the cool room were found to be past their use-by dates.

[9] Mr Munro was also told by letter a few days later that he was "*suspended*" pending the disciplinary meeting. When challenged about the basis of the suspension, Mr Coster responded that Mr Munro was not suspended but was on full paid leave and instructed him not to enter the club until his disciplinary meeting.

[10] On 8 December Mr Munro attended the disciplinary meeting with his wife and his solicitor. He provided his explanations on each matter of concern.

[11] Four days later Mr Munro was dismissed. By letter Mr Coster said he did not accept Mr Munro's explanations about the purchases of the shoes or the petrol. Mr Coster said he was "*convinced*" that Mr Munro had no authority to reimburse himself for the cost of the shoes or to buy petrol for his car on the club account.

[12] The concern regarding out-of-date kegs had been acknowledged by Mr Munro as a mistake and requiring tighter stock control by him.

[13] Nothing was said in the letter of dismissal about the allegations regarding the payment of the Telecom account or additional annual leave. However Mr Coster accepted in his later evidence to the Authority that both payments were entitlements under the employment agreement he signed on behalf of the Club with Mr Munro and that they formed no part of the decision to dismiss.

[14] Mr Munro promptly raised a personal grievance seeking reinstatement, reimbursement of lost wages and benefits and compensation for hurt and humiliation.

[15] He also applied for interim reinstatement but this did not need to be determined by the Authority as the Club agreed to reinstate Mr Munro to its payroll on a garden leave basis until the issuing of this determination. Mr Munro had provided an undertaking as to damages in the event that his claim was not successful.

Issues and investigation

[16] Having investigating this matter, the issues for determination by the Authority are:

- (i) Whether the Club was justified in deciding that two alleged areas of unauthorised expenditure amounted to serious misconduct warranting dismissal; and
- (ii) Whether the Club went about making that decision in a fair way; and
- (iii) If the Club's actions were unjustified, (a) should Mr Munro be reinstated to his position and (b) should awards of lost wages, benefits and compensation for hurt and humiliation be made; and
- (iv) Should any remedies awarded to Mr Munro be reduced for conduct by him contributing to the situation giving rise to any grievance found; and
- (v) Costs

[17] Written witness statements were provided by Mr Munro; his wife Bonnie Munro; Club president Rod Coster; Club financial advisor Ray O'Connor; the Club's previous manager Bill Garth; and the Club's office administrator Michele Nelson. At the investigation meeting each witness, under oath or affirmation, answered questions from the Authority and the parties' representatives. The representatives provided closing oral submissions. They later provided additional written submissions on the extent of the Club president's authority to dismiss and whether Mr Coster should have decided on the dismissal based on his own evidence of conversations with Mr Munro.

Was the expenditure on shoes and petrol serious misconduct?

[18] The Club's decision that the expenditure on shoes and petrol was unauthorised and amounted to serious misconduct would be justified if it is a decision that a fair and reasonable employer would have made in all the circumstances at the time. It is the test of justification stated under s103A of the Employment Relations Act 2000 (the Act). It is to be assessed objectively.

[19] The Club submits that Mr Munro's purchase of petrol on the Club's account was not authorised generally or specifically and that neither the purchase of the shoes

nor the reimbursement of their cost were generally or specifically authorised. On that basis it says it was entitled to find these uses of Club funds were a serious breach of trust and confidence for which Mr Munro should be dismissed.

[20] I find that this was not a conclusion that a fair and reasonable employer would have reached. I do so for the following reasons.

[21] Having heard and considered the evidence of Mr Coster, Mr Munro and Mrs Munro I consider it more likely than not that Mr Coster had, in fact and at least generally, authorised the expenditure on the shoes and the petrol.

[22] Mrs Munro was a member of the Club and present during some conversations between Mr Munro and Mr Coster about work arrangements. She had a clear recall regarding arrangements for the Club to pay for work clothes for Mr Munro. Mr Coster accepted that while he could not recall the conversation, he could not categorically say it never happened. Mrs Munro also recalled Mr Coster telling Mr Munro to reimburse himself for any expenses for which he could provide a receipt. She had also heard Mr Coster tell Mr Munro to go to the petrol station and fill his car.

[23] Mr Munro's pay slip does show a regular payment of a clothing allowance. However I accept his explanation that this was an administrative error made by a previous pay clerk who had not corrected it despite a request from him.

[24] His employment agreement provides for "*an annual non taxable payment*" and I accept his evidence that this was not a clothing allowance.

[25] I reject Mr Coster's evidence to the contrary. Despite being the Club's signatory to the written employment agreement, he had not read it before signing it and demonstrated a limited grasp of its contents during the events leading up to Mr Munro's dismissal. That limited understanding also led to unfounded accusations that Mr Munro had wrongly claimed additional annual leave and was not entitled to have his home phone account paid during a period of sick leave.

[26] I place particular emphasis on Mr Munro's conversations with Mr Coster because of the wording of the employment agreement between the Club and Mr

Munro. The Club, an incorporated society, is the legal entity that employed Mr Munro. However the employment agreement says he was “*reporting and responsible to*” the President. The agreement then says the President is “*hereinafter referred to as the Employer*”. I take that clause to refer to the practical day-to-day operation of the employment relationship with the Secretary/Manager being a matter for the President. It is for the President to give direction to the Secretary/Manager rather than all members of the Executive Committee.

[27] Some of those directions from Mr Coster included, I find, telling Mr Munro that he could fill up his car on the Club’s account after using it on Club business. In so finding I prefer Mr Munro’s evidence that he usually walked to work and only brought his car when it was needed for Club errands or tasks. On that basis he was entitled to act on Mr Coster’s direction to reimburse himself by getting petrol on the Club’s account at the local petrol station.

[28] Mr Munro’s conduct around the expenditure and reimbursement – both for the shoes and petrol – supports the likelihood that he had good reason to believe it was authorised by Mr Coster. As Mr Coster accepted in his evidence there was no subterfuge on Mr Munro’s part. The petrol was signed for by Mr Munro on the Club’s account at the petrol station. The receipt for the shoes was included with the records for the cheque that Mr Munro took to reimburse himself for that amount. In both cases Mr Coster accepted that (i) the transactions were made openly, (ii) were readily identifiable in the Club’s accounts, and (iii) Mr Munro would know such amounts could be picked up in annual auditing of the Club accounts.

[29] There is a legitimate concern – acknowledged in the evidence of Mr O’Connor and Mr Garth – that Mr Munro was able to sign a cheque reimbursing himself for an expense without then having to get the President’s counter-signature. This occurred because of what Mr Coster called his practice of leaving “*half a dozen*” pre-signed cheques in the Club cheque book for use by Mr Munro. The Club had no system or policy in place requiring any cheque reimbursing a manager or officer for a personal expense to be signed by someone other than that manager or officer. Mr O’Connor said he was “*totally against*” the practice of pre-signed cheques and “*definitely*” considered the Club should have a clear system of sign off by another person where a manager was getting a cheque for his own benefit.

[30] Mr Munro accepted, in answer to a question from the Authority, that the system as operated by Mr Coster was bad practice. However Mr Munro said that Mr Coster had not wanted to follow the practice Mr Munro used at a club he previously managed whereby the President saw all invoices and receipts before authorising cheques.

[31] In this context, Mr Munro's actions might be less than the standard of performance expected of a professional manager. However a fair and reasonable employer would respond by implementing a system or policy with the proper checks rather than solely penalising the manager. The present situation occurred because of the President's practice of pre-signing cheques and the lack of a proper procedure for authorising cheques of personal benefit to a signatory. In the absence of any intentional subterfuge or dishonesty on Mr Munro's part, a fair and reasonable employer would not have found Mr Munro's actions were serious misconduct in all the circumstances at the time.

Was the Club's decision made in a fair way?

[32] The Club concedes that it suspended Mr Munro without properly consulting him but submits that he suffered no disadvantage as he was already on paid sick leave. It submits that the Club fairly carried out its disciplinary inquiry and dismissal of Mr Munro.

[33] There is no issue that Mr Munro was given adequate notice of the allegations and had the opportunity to seek representation, which he took up. What is contentious is the authority of Mr Coster to dismiss him and the role of Mr O'Connor and Mr Garth in that process.

[34] Mr Munro submits that the President did not have the authority to dismiss him under the Club's constitution and there is no evidence that the executive committee had delegated to the President that particular aspect of its general authority to govern and direct all the Club's affairs.

[35] While that position may be technically correct, the totality of the evidence

was that in practice the President did carry out key functions of the Club as an employer. In Mr Munro's case this included negotiating his employment agreement and hiring him. Mr Coster had, I find, at least the implied authority to fire Mr Munro. Whether such an action is subsequently found to be justified is another matter.

[36] Similarly, I do not place any weight on Mr Munro's submissions that Mr Garth and Mr O'Connor had no right to be involved in the disciplinary process and decision to dismiss him. It is correct that the only formal resolution of the Club's executive committee was that Mr O'Connor and Mr Garth "*look into the club's financial situation*". It had not authorised them to carry out any employment functions. However, having accepted that the President carried out those functions in practice and with at least implied authority, I also accept that Mr Coster was entitled to involve Mr O'Connor and Mr Garth as advisors in that process. That said, the responsibility – including for the justifiability of decisions made and actions taken in that process by Mr O'Connor, Mr Garth and Mr Coster – remains with Mr Coster in his role as President and acting on behalf of the Club.

[37] The real issues regarding the fairness of the actions on behalf of the Club are twofold:

- (i) was Mr Munro told about all the concerns on which Mr Coster based his decision to dismiss; and
- (ii) could Mr Coster fairly assess the evidence about conversations to which he was a party?

Not all concerns put to Mr Munro

[38] Between telling Mr Munro on 6 November that he must attend a disciplinary meeting and then meeting him on 8 December, Mr Garth learnt of three additional salary payments that Mr Munro arranged to be paid to himself and which Mr Garth considered irregular.

[39] During April and May Mr Munro has signed three cheques for his own benefit to a total value of \$1504. These cheques 'cashed up' hours of overtime that Mr Munro had accrued in a 'time bank' system used at the Club. Mr Garth believed those payments contravened a term of Mr Munro's employment agreement that overtime

could only be paid after consultation and agreement with the employer. Mr Garth understood that payment for those hours had not been approved by the President.

[40] At the investigation meeting Mr Munro's evidence was that those payments were made because of a discussion between him and Mr Coster. He says that Mr Coster was concerned that Mr Munro's accumulated lieu hours and annual leave were becoming excessive. Mr Munro asserts that Mr Coster agreed that the only solution was to reduce the level of entitlement with a cash payment. He says this discussion took place "*a couple of months*" before April but nothing was recorded in writing. Mr Coster accepts he discussed lieu hours with Mr Munro but says he did not specifically or generally authorise payment for them.

[41] To make the three payments Mr Munro used two cheques pre-signed by Mr Coster and one cheque signed by Office Administrator Michele Nelson. As with the reimbursement for the shoes, there was no suggestion of subterfuge in the payments made. The cheque butts clearly identify the payments as being for specified numbers of hours from the 'time bank' for Mr Munro.

[42] However the Club's concerns about this issue were not put to Mr Munro at any stage during the disciplinary process. Mr Coster confirmed that he, Mr Garth and Mr O'Connor did discuss this other issue after meeting with Mr Munro on 8 December and before dismissing him on 12 December. I find this unfair because Mr Munro was not given an opportunity to directly address Mr Garth's view that Mr Munro was making other unauthorised uses of Club funds and the inevitable negative inference regarding the issues of the shoes and petrol. In making that assessment I make no finding on whether Mr Munro's explanation was adequate. Rather it is a matter of the Club not having fairly sought all the information – including Mr Munro's explanation – on an issue which had a bearing on its final decision.

Mr Coster's role

[43] At the disciplinary meeting on 8 December Mr Munro, through his solicitor, challenged whether Mr Coster should be making any decision because of the President's alleged role – according to Mr Munro's explanations – in approving the contentious expenditure on work shoes and petrol. In written submissions to the

Authority it was put as a situation where Mr Coster had been “*witness and judge*” on the same matter.

[44] In the particular circumstances of this case Mr Coster was the sole officer of the Club conducting the disciplinary inquiry. Mr Garth and Mr O’Connor were his advisors but had no formal delegated role or responsibility on disciplinary matters. The evidence of both men was that they advised Mr Coster on the decision to dismiss.

[45] Neither gave any real consideration to the possibility that Mr Coster was mistaken in his recall of conversations with Mr Munro or would have any reason, given present financial difficulties of the Club, to deny earlier approvals given to Mr Munro.

[46] The opportunity to refute allegations or to offer an explanation or mitigation must be real as opposed to being nominal. An employee is entitled to an unbiased consideration which must be free from predetermination and uninfluenced by irrelevant considerations: *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35 at 46.

[47] While Mr Coster could not be independent because of his role and involvement in the disputed events, this does not automatically make his decision biased or mean Mr Munro was denied a fair hearing: see *NZ Tramways IUOW v Auckland Regional Council* [1992] 2 ERNZ 883 at 891. However, as observed by the Labour Court in *NZ Engineering Union v Fletcher Construction Co Limited* [1989] 3 NZILR 279, 282: “*A dismissal must not only be just, it must also appear to be just*”.

[48] For this reason the learned authors of *Mazengarb’s Employment Law* at paragraph ERA103.63, suggest it is “*unwise for a person directly involved in the events to be allowed to make a decision where this can be avoided*”.

[49] In its submissions the Club accepts there was a prospect of a perception of a conflict of interest for Mr Coster but asserts that there was no actual bias in the decision made. Contrary to that view I find that, as a matter of not only acting fairly but being seen to act fairly, this was a situation where Mr Coster should have arranged for the disciplinary investigation to be carried out by another member of the Club’s

executive. He – acting fairly – should have confined himself to providing information rather than deciding on the likely veracity of it.

What remedies are due to Mr Munro?

[50] Having found that the Club’s actions in deciding to dismiss Mr Munro, and how it made that decision, were not justified, I now consider remedies for Mr Munro’s personal grievance.

Reinstatement

[51] Mr Munro seeks the primary remedy of reinstatement. He accepts that returning to the position of Secretary/Manager may be difficult and realistically acknowledges that the viability of his position will depend on the attitude of the Club’s membership, staff and executive committee. However he says reinstatement remains important to “*clearing my name*”.

[52] The Authority is charged to provide for reinstatement “*wherever practicable*”: s125(2) of the Act.

[53] The Club argues against Mr Munro’s reinstatement on two broad grounds – firstly that it now lacks confidence in him and secondly that some other staff say they will resign if he returns as Secretary/Manager.

[54] The first ground is not sufficient to deny reinstatement in the light of the findings in this determination that the Club’s decision was not justified.

[55] The second ground relies on Ms Nelson’s evidence that she would leave if Mr Munro returned and a document said to be from four club staff, bearing their signatures and stating: “*Should John Munro be reinstated as manager, tender our resignations effictive (sic) immediately*”.

[56] Assuming that statement to be genuine there is no reason given for that view or evidence to assess its likelihood and possible practical effect on the club. Mere animosity by other staff is not sufficient reason to deny the primary statutory remedy.

[57] Ms Nelson did give direct evidence that she would now find it difficult to work with Mr Munro and intended leaving if he returned to work. However she also accepted that she had been contemplating leaving in any event.

[58] On that basis I am satisfied that the Club has not discharged the onus on it to prove that reinstatement of Mr Munro would not be practicable.

[59] Mr Munro is to be reinstated to his former position or one no less advantageous. Reinstatement is effective immediately from the date of this determination; however his actual return to work should be a carefully managed exercise.

[60] He is presently under a direction from the Club not to go onto its premises. He should await advice from the Club as to arrangements for his return to work. If the Club wishes to continue his present paid garden leave until 14 April 2009, it may do so. A Department of Labour mediator may be able to assist the parties and their representatives with any difficulties making those arrangements in that period.

Lost wages and benefits

[61] Because Mr Munro was reinstated on an interim basis and placed on paid garden leave pending this determination, he has not lost any wages.

[62] For the period from his dismissal on 12 December 2008 he is entitled to be paid his usual benefits of a non-taxable allowance and having his home telephone account paid by the Club. If that has not been done already, it is to be done now.

Compensation for hurt and humiliation

[63] Mr Munro has suffered the humiliation, loss of dignity and injury to feelings of being dismissed on serious grounds from a job in the relatively tight-knit community of a social club in a small town. He was also, initially, suspended unjustifiably. Accepting the Club's submission that he suffered no financial loss from the suspension, I consider that action and how it was carried out, increased the distress

caused to him.

[64] I consider \$8000 under s123(1)(c)(i) of the Act as the appropriate amount to compensate Mr Munro for the distress and deep embarrassment caused to him by these events. I award that amount, subject to any deduction for contribution.

Contribution

[65] Under s124 of the Act I have considered whether any remedies awarded to Mr Munro should be reduced for any actions by him contributing towards the situation giving rise to his personal grievance.

[66] I do not accept that his actions in arranging for cashing up of some of his lieu time amounts to such actions. Ms Nelson's evidence what that this practice was allowed for other staff although it appeared that Mr Coster was not aware of it.

[67] Neither do I accept that Mr Munro has engaged in any blameworthy conduct in relation to use of a personal Fly Buys card on Club business. It was established that he had arranged for points to be credited to his card when conducting some transactions on behalf of the Club. However I accept the evidence of Mr and Mrs Munro that they had not done this for personal gain, those points have been separately accounted for on their Fly Buys statement, and points so accumulated have been used to buy equipment for the Club or remain available for its use.

[68] However I do accept that a reduction of remedies is required because Mr Munro's contributed to the situation by using pre-signed cheques to reimburse personal expenses. On his own evidence, this was less than a good standard of business practice. It was contrary to his experience and procedure in a previous club management position. As a professional manager he could have done more to ensure a proper procedure was in place and followed with Mr Coster so that both men could ensure the Club's executive committee of high standards of accountability.

[69] I reduce the compensation awarded under s123(1)(c)(i) of the Act by one quarter because that failure contributed materially to the problems which later arose. The reduction is not applied to the remedy of reinstatement or the allowances due to

Mr Munro under his employment agreement.

Summary of determination

[70] Mr Munro was unjustifiably dismissed.

[71] Mr Munro is to be reinstated, effectively immediately, but not return to his place of work until arrangements for that are made with the Club. Those arrangements are to be made by no later than 14 April 2009, with the assistance of a mediator if necessary.

[72] The Club is to pay to Mr Munro the following by way of remedies:

- a. Payment of his non-taxable allowance and phone account for the period since his dismissal, if not already paid.
- b. \$6000 as compensation for humiliation and loss of dignity, that amount having being reduced for his contribution to the situation giving rise to his grievance.

Costs

[73] Mr Munro is entitled to a reasonable contribution from the Club towards his costs. The parties are encouraged to resolve the matter of costs between themselves. If they are not able to do so, Mr Munro may lodge and serve a memorandum as to costs by no later than 28 days after the date of this determination. The Club will then have 14 days to lodge and serve a reply memorandum. The Authority will then determine costs on the usual principles and practices: see *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808. No application will be considered outside this time frame without prior leave.

Robin Arthur
Member of the Employment Relations Authority