IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

AA 249/10
File Number: 5155251

	BETWEEN	David Page Applicant
	AND	New Zealand Language Centres Limited (formerly GEOS (New Zealand) Limited) Respondent

Member of Authority:	Denis Asher
Representatives:	Richard Harrison for Mr Page Emma Butcher & Shannon Kelly for the Company
Investigation Meeting	Auckland, 24 September 2009
Submissions Received	By 19 May 2010
Determination:	24 May 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Did the respondent (GEOS/the Company) unjustifiably disadvantage Mr Page by demoting and giving him a final warning, and did it then unjustifiably dismiss the him? Did it breach his employment agreement in any other respect?

[2] By way of the Company's counter-claim, did Mr Page breach his good faith obligations to the respondent? And, did he charge non-work related expenses to the

Company's credit card, and if he did should there be an off-set in respect of those monies and/or should the applicant be penalised and should that penalty be recovered by the Company?

The Investigation

[3] This employment relationship problem was directed to mediation by 30 June 2009 but did not settle.

[4] During a telephone conference call on 23 July 2009 the problem was set down for an investigation on 24 & 25 September. A timetable was agreed for filing witness statements.

[5] Despite efforts during and after the investigation, the parties were unable to settle this matter on their own terms.

[6] The two-day investigation did not hear all of the parties' evidence and arguments. The parties eventually agreed (in February 2010), and the Authority accepted, that rather than resume the investigation outstanding matters would best be dealt with by way of affidavits and submissions. Some delay then occurred and a number of timetables were attempted before all outstanding material, including final submissions, was provided to the Authority.

Background

[7] Mr Page was first employed with GEOS as the general manager/principal for GEOS Gold Coast, Australia in July 1999. That school, like the GEOS New Zealand schools, was part of the GEOS Corporation owned by Mr Tsuneo Kusunoki, who established English schools throughout Japan and a large number of other countries.

[8] On 20 March 2006 Mr Page took up the position of regional director for GEOS New Zealand. He reported to Ms Ikumi Miyamoto and was subject to a (minimalist, my term) employment agreement dated 10 April 2006 (attachment to statement of problem).

[9] I accept the respondent's submission dated 30 March 2010 where, at par 3.1, it describes Mr Page's employment as largely autonomous on a day-to-day basis and that a high degree of trust was placed in him to manage the Auckland language centre and other New Zealand schools in the best interest of the Company. Monthly reporting on the performance of the NZ region and its schools was required by his job description but little checking was done as to the accuracy of that reporting.

[10] I also accept Mr Page's claim that, until replaced by a Mr Maserow in November 2008, he largely if not entirely reported to Ms Miyamoto, and accepted her directions in respect of matters that later became highly contentious between the parties.

[11] On 17 November 2008 at a regional conference in Thailand, and without any prior notification or consultation, Mr Kusunoki announced that Mr Maserow was to be the managing director of GEOS International and the GEOS New Zealand managers (including the applicant) were to report directly to him. Mr Kusunoki also announced Mr Page's position title was now that of Auckland language centre principal. The announcements removed the regional director function of Mr Page's role.

[12] On 19 December, following his return from Thailand and because of his demotion and treatment at the conference, and in particular because of comments directed at him by Mr Kusunoki in the context of his demotion, Mr Page lodged a personal grievance with Ms Miyamoto. He also sought payment of the 2006/2007 bonus.

[13] According to Mr Maserow's statement of evidence (par 9) sometime in February 2009, and because of failures to disclose the true financial situation of the Auckland language centre, Ms Miyamoto was disciplined; she resigned her employment with the respondent soon after.

[14] On 17 February 2009, following his return from the next regional management meeting which was held on the Gold Coast, Australia, Mr Page received an email from Mr Maserow in which, amongst other things, he was warned that – if the Auckland language centre was not in a profit situation at the end of May – his

employment would be terminated (doc 4.3, attachment to original statement in reply). Mr Maserow says the warning was sent after he accepted an offer from Mr Page that he be given ‘one last chance’.

[15] In response, and because he took issue with the final warning (and does not accept he agreed to the basis of the warning) and continued to seek payment of the incentive bonus, Mr Page sought advice and, in respect of these matters, filed an application in the Employment Relations Authority (received 13 March).

[16] Proceedings in the Authority were suspended on the basis of advice from the parties that they had reached agreement to attend mediation (refer to the Authority’s correspondence dated 26 March).

[17] Subsequently, by letter dated 1 April (doc 5.2 attachment to the amended statement in reply), Mr Maserow invited Mr Page to a disciplinary meeting in respect of a range of alleged performance issues: a meeting on 8 April was requested. The applicant was warned that the conduct set out in the letter could amount to serious misconduct and result in summary dismissal.

[18] On 2 April Mr Page’s representative advised the 8 April meeting time was not suitable and, in light of the earlier commitment to mediation, asked whether the respondent was prepared to attend mediation.

[19] On 7 April the respondent, through its counsel, reiterated its agreement to mediation, said it was unavailable between 16 & 27 April, advised that the earliest available mediation date would be 28 April and, as it was not prepared to delay the disciplinary meeting until then, required Mr Page to attend a disciplinary meeting on 14 April.

[20] On 9 April Mr Page’s representative advised that the 14 April date was unsuitable and suggested alternative dates in early May.

[21] The respondent’s representative replied the same day (at 5.45 p.m.) advising the 14 April meeting would proceed: the message was not received as Mr Page’s

representative had left the office for the Easter break, not returning until after the scheduled meeting time.

[22] The meeting proceeded without the applicant or his representative. Following the meeting, and by way of a letter dated 17 April and emailed to Mr Page, Mr Maserow advised the applicant he was summarily dismissed.

[23] Shortly thereafter Mr Page returned to Australia where he currently resides: he says his efforts to find alternative employment have proved unsuccessful.

[24] An amended statement of problem was filed on 15 May. At that time Mr Page sought reinstatement, lost remuneration including any benefits and outstanding entitlements including long service leave and holiday pay not paid at the time of termination, a compliance order removing the final warning, incentive bonuses, outstanding superannuation payments, compensation for hurt of $50,000 and costs.

[25] In its amended statement in reply filed on 5 June the respondent denied the allegations and counter-claimed for, amongst other things, non-work related expenses it says Mr Page drew from the Company's credit card.

[26] During the Authority's investigation Mr Page withdrew his claim for reinstatement.

[27] In February 2010 the Australian arm of the respondent's predecessor was placed in voluntary administration. The New Zealand entity continued to operate.

[28] Earlier this year GEOS (New Zealand) Limited was sold by its former shareholder. On 26 February 2010 it changed its name to New Zealand Language Centres Limited. Its present director and owner, a former work colleague of Mr Page, was appointed on 1 March.

Discussion and Findings

[29] I do not understand there to be any issue as to the correct identity of Mr Page's employer but record here my finding that it is as set out in the intituling above.

[30] As s. 103A of the Employment Relations Act 2000 (the Act) makes clear, the relevant question of whether the disadvantage and dismissal were justifiable must be determined, on an objective basis, by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[31] In *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, the full Employment Court, at para [37], observed that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[32] Notwithstanding the voluminous, competitive evidence provided by the parties in the forms of witness statements, affidavits and extensive documentation, I am satisfied the issues between them are relatively clear and can be readily and accurately summarised. I will address them in turn, including the parties' respective positions, by order as they are listed at par 39 of the applicant's representative's closing submissions.

[33] One matter that is highly problematic is the absence of clear wage and time records. Despite repeated requests from counsel for Mr Page, and its statutory obligations to do so, the respondent has not provided the applicant with details of what it paid him. It may be that they do not exist. Where appropriate I will mention the difficulties created by the absence of these records and set out my reasoning in respect of any monies awarded the applicant.

Unjustified dismissal/disadvantage

[34] I deal with the disadvantage claims first.

[35] It is clear from the evidence that Mr Page's demotion, effected by Mr Kusunoki in Thailand on 17 November 2008, came without any prior warning and was not preceded by any performance management plan. In other words, no opportunity was afforded Mr Page to address and meet any legitimate concerns held by his employer. Those concerns clearly related to performance issues, including

record keeping. There is no evidence or claim that the respondent's concerns were urgent and of such a nature as to be incapable of attempted resolution through performance management. No argument has been advanced as to why the respondent's concerns could not be communicated to Mr Page in advance. There was therefore a complete absence of due process. The loss of duties and stature amounted to a significant, unilateral variation of his employment agreement notwithstanding the fact his levels of remuneration – with one exception – were largely unaffected. These failings were fundamental and profound. The obligations of good employers in New Zealand in this respect are well settled: *Trotter* v *Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ, 659, 660

[36] Mr Page's evidence as to the effect on him of his public demotion was strong and powerful. He felt undercut by his employer and diminished in the eyes of his peers. He felt his performance did not justify the respondent's decision.

[37] I do not accept the respondent' submission that the impact of the demotion on Mr Page must be balanced by his *"accepted understanding of the "Japanese way" of doing business* (and his) *acknowledgement that he was used to Mr Kusonki* (sic) "ranting", "berating" *and* "humiliating" *people so this was nothing new"* (par 4.2 b & c of the respondent's submissions dated 30 March 2010).

[38] Mr Maserow's final warning of 17 February (doc 4.3, attachment to original statement of problem) was similarly without prior warning and was not preceded by any performance management plan. Mr Page was told if he did not turn the Auckland college around into profit by May of that year he would be dismissed. I do not accept as credible the respondent's claim Mr Page sought and agreed to the warning, on the basis he be given 'one last chance'. Publicly stripped of his regional responsibilities, the damage was done. Mr Page was very seriously on the back foot in trying to please his employer; any offer to be given a final opportunity to restore the profitability of the Auckland language centre should be measured in the light of the disadvantage already caused him, and not as an acknowledgement by Mr Page of the legitimacy of the his employer's performance concerns: it amounted instead to a desperate effort to cling on to his job notwithstanding the arbitrary forces that opposed him.

[39] While the employer was entitled to put in place a performance plan, a fair and reasonable employer – objectively measured – would do so through consultation, with realistic and achievable targets; *Trotter* (above). If it was warranted, a final warning would be issued, notwithstanding any plea by the employee, only after a proper process had been applied. The warning therefore also was completely lacking in due process. Mr Maserow's final warning was an unscrupulous exploitation of the earlier, unlawful demotion.

Unjustified Dismissal

[40] I am similarly satisfied that Mr Page's dismissal was also unjustified, for the same reason, that it too was seriously lacking in due process. That is because, while serious allegations were put to the applicant, an entirely unfair, unilateral process was applied by the respondent in reaching its decision to dismiss Mr Page. While arguably Mr Page's representative was less than swift in making himself available in respect of serious allegations against his client, the Company has provided no evidence other than reliance on extant airline bookings to justify its insistence that the meeting of 14 April proceed. There is no other evidence of compelling business urgency. It had clear notice of the unavailability of Mr Page's representative. It had no reason to treat that non-availability as frivolous or obstructive, particularly as the Company had already agreed to undertake mediation in respect of Mr Page's live application to the Authority. With out good reason it thereby deprived itself of Mr Page's response, and any argument he and his legal representative might have put forward in respect of those serious allegations.

[41] The respondent's representatives knew the applicant was present in the workplace for at least part of the 14th but made no effort to ask him to account for his absence, and that of his counsel's, from the disciplinary meeting. That failure to communicate is particularly unacceptable as Mr Maserow had elected to address his letter of 1 April (advising him of the allegations and inviting him to a disciplinary meeting, and despite the knowledge a grievance was already a foot) directly to the applicant notwithstanding earlier clear advice Mr Page was by then legally represented: it is unacceptable for Mr Maserow to communicate direct in one instance, despite Mr Page being legally represented throughout, while declining to do so in another.

[42] Finally, a fair and reasonable approach by the respondent to its investigation was all the more important on this occasion as a number of the allegations put to Mr Page in Mr Maserow's letter of 1 April were distinct from matters previously foreshadowed or directly put by the latter to the applicant. Entirely fresh concerns were being raised, including allegations that the applicant had asked the manager of another school to put forward bleak forecasts so as to make the Auckland language centre look more favourable in comparison; that Mr Page's conduct had caused some employees to resign; and that some of Mr Page's colleagues had lost trust and confidence in him. Fair and reasonable employers typically provide employees with fair and reasonable opportunities to address allegations, especially serious allegations capable of culminating in termination and significant financial counter-claims, before coming to a decision to dismiss.

[43] In the absence of compelling reasons to press on with the 14 April meeting, the respondent's decision to dismiss Mr Page was unfair because he was given no opportunity to fairly and reasonably address his employer's serious concerns: *Trotter* (above).

[44] A conclusion that the 'Japanese way' already experienced by Mr Page was continuing to be applied is difficult to avoid. The sequence of unlawful events preceding the decision to dismiss supports a conclusion that Mr Page's dismissal was predetermined.

[45] Under these circumstances I am satisfied that, objectively measured, the respondent's decision to dismiss Mr Page is not a decision that would have been reached by a fair and reasonable employer in all the circumstances.

Compensation for lost remuneration

[46] Mr Page seeks lost remuneration as determined by the Authority. Mr Page gave limited, albeit unchallenged, oral evidence to the Authority that his efforts to find work continue to be unsuccessful. Having regard to that evidence and the relatively specialised pool within which he was employed (and the likelihood his dismissal is well known to other language school providers throughout Oceania and in a way that would act against the applicant's prospects of finding fresh employment

elsewhere) I am satisfied that, in all the circumstances, it is appropriate to exercise my discretion (per ss. 128 (3) of the Act) and award lost remuneration equivalent to 6-months, I therefore award compensation of $55,000 gross; NZ superannuation equivalent to 5% of that base rate for 6-months, or $2,750; and the NZ dollar equivalent of A$5,000 for Australian superannuation.

Compensation for hurt and humiliation

[47] While Mr Page provided little written evidence of the distress and humiliation occasioned him in respect of his demotion, final warning and unjustified dismissal, he – and his wife – did provide persuasive oral evidence during the Authority's investigation. It was clear to me that, notwithstanding the strong support from his wife, the effect on Mr Page of his unjustified treatment has been profound and is ongoing. He is deeply distressed by an inability to account to friends, family and colleagues his considerable fall from professional grace.

[48] I am satisfied from the evidence that the cumulative effect of his employer's unjustifiable conduct was significant and severe.

[49] Having regard to that evidence I am satisfied a global award of $21,000 is appropriate in all the circumstances.

[50] However, I also conclude that is not safe to assume Mr Page's regional responsibilities would have survived a proper performance management process, and I am therefore not prepared to award a portion of higher duties allowance for that period as claimed.

Higher Duties Allowance

[51] Mr Page's 10 April 2006 offer of appointment provided for *"NZ$ 20,000 p.a. for higher duty allowance as a Regional Director"*.

[52] Payment of the allowance was unilaterally stopped on 26 November 2008, following his demotion in Thailand. He seeks $8,076.92 being the amount he would have received from that time to the termination of his employment (a period of 21

weeks), as well as it being factored into any successful claim for lost remuneration arising out of an unjustified dismissal.

[53] Because of my unjustified disadvantage findings in respect of Mr Page's demotion, it follows that some award for compensation for lost higher duties allowance must follow. Speculation is required as to what might have happened had a proper process been followed and how long might that process taken? In the absence of evidence as to overwhelming urgency, I am satisfied a fair and reasonable employer, objectively measured, would have provided up to 6-months to an employee in the applicant's situation to improve their performance. I therefore find the claim is made out, up to the termination of his employment.

Non payment of superannuation payments

[54] The 10 April 2006 offer to Mr Page in respect of his New Zealand employment included, *"NZ Superannuation (as per other GEOS NZ managers)"* and *"A$10,000 per year will be contributed to Super in Australia"*. No detail was provided in respect of the term, *as per other GEOS NZ managers*.

[55] Mr Page says it was accepted in evidence that GEOS managers employer contributions in NZ amounted to 5% of base salary. He says this amount should have been paid into the Sovereign Superannuation Fund for the duration of his employment.

[56] Despite requests to do so, the Company has to date not provided details of payments made into the fund. In response to inquiries from the applicant, Sovereign has advised that his contributions into the New Zealand Superannuation Fund from the respondent amounted to $1,943.00. A contribution at 5% of his base salary should have totalled $16,500.00 (approximately 3-years service), resulting in a shortfall of $14,557.00.

[57] The Company has also not provided details of payments into the Australian Superannuation Fund. Mr Page's inquiries of that Fund indicate the Company's contributions for the period of his New Zealand employment amounted to $56,311.73. This amount is inclusive of the higher duties allowance which Mr Page elected to go

into that Fund by way of a salary sacrifice. The amount of $8,076.92 should therefore be deducted from any underpayment into that Fund.

[58] The total payments that should have been made into that Fund (by way of both the $20,000 salary sacrifice and the $10,000 contribution) should have amounted to $86,244, a difference of $29,932.27, less $8,076.92, with a resulting shortfall of $21,855.35.

[59] In its closing submission dated 30 March 2010 the respondent says its evidence was that, from the date of his commencement in the role to the end of June 2007, the applicant was paid by a then related company of the respondent incorporated in Australia, GEOS Management Services Pty Limited. This arrangement was, it says, by agreement between the parties. From July 2007 to the termination of his employment in April 2009 Mr Page was paid by the respondent. And, *"the applicant received all remuneration entitlements during his employment"* (par 7.3).

[60] Section 130 of the Act makes it clear that an employer *"**must** at all times keep a record … showing … (h) the wages paid to the employee each pay period"* (emphasis added).

[61] Sub-section 130 (2) is equally clear: *"Every employer **must**, upon request by an employee or by a …* (representative) *… provide that employee or person **immediately** with access to … the wage and time record …"* (emphasis added).

[62] Sub-section 130 (4) makes it clear that an employer who fails to comply with any requirement of s. 130 is liable to a penalty imposed by the Authority.

[63] The Company has not provided Mr Page and his representative with the applicant's wage and time records, despite his request it do so. No explanation has been provided for that failure. What has been given is a bald but unsubstantiated assertion that Mr Page received all remuneration entitlements during his employment. It can clearly be seen from my findings above and below that is not the case (see Holiday Pay, par 73 below in particular).

[64] Because of the Company breaching its clear statutory obligations and in the absence of evidence to the contrary, I prefer Mr Page's claims that he is owed the sums of $14,557.00 in respect of NZ superannuation payment shortfalls, and $21,855.35 in respect of the Australian superannuation payment shortfalls. The latter is to be paid in Australian dollars consistent with the relevant provision in the applicant's terms and conditions document of 10 April 2006.

[65] I note here that no penalty is sought by the applicant in respect of this breach.

Long service leave

[66] Mr Page's 10 April 2006 offer of employment contained the words, *"Continuation of Long Service Leave* ***in Australia****"* (emphasis added).

[67] At the time of his dismissal Mr Page was just over 2-months shy of completing 10 years continues service with GEOS Corporation. This entitlement is claimed on the basis of a continuation of a statutory entitlement set out under Queensland legislation and in particular that state's Industrial Relations Act 1999 which provides that where an employee's employment is unjustifiably terminated after the completion of 7 years service but less than 10 years continuous service then the employee is entitled to that leave calculated on a *pro rata* basis. Based on the table taken from Queensland Department of Justice and Attorney-General website (attached to his closing submission) Mr Page claims 98% of 3 months leave due after 10 years service, or $31, 849.99.

[68] Having regard to the above, and bearing in mind that – like part of his superannuation arrangements – the applicant's terms and conditions of appointment effectively imported this arrangement into his New Zealand-based employment, I accept Mr Page's claim for this sum.

Incentive bonuses for 2005/2006 and 2006/2007

[69] The 10 April 2006 document set out the respondent's *"revised offer for your new position in NZ"*. Amongst other things it expressly provided for an "*Incentive Bonus … offered under the same policy as it has been"*.

[70] Mr Page says he regularly received a bonus. The respondent argues the bonus was discretionary and did not form part of Mr Page's terms and conditions of employment. I do not accept that claim. While no copy of the original (*"same"*) policy applying to the applicant was produced, Mr Maserow's oral evidence to the Authority's investigation effectively confirmed that a 3.5% bonus was paid on profits. An email from Ms Miyamoto dated 24 September 2009 and appended to Mr Page's affidavit of 8 December essentially confirms the same.

[71] The Company's own calculation is that, for the 2005/2006 financial year, the Auckland language centre made a profit of $47,793; for 2006/2007 the profit figure was $368,085; while for 2007/2008 and 2008/2009 losses were incurred (refer par 10.2 of the respondent's finance manager, Mr David Ratnayake witness statement).

[72] For the reasons set out above, I am satisfied Mr Page should have enjoyed payment of a bonus for the profitable years. I therefore find that the Company owes Mr Page the sums of $1,673.00 and $12,883.00.

Holiday Pay

[73] By way of oral evidence to the Authority Mr Maserow accepted that Mr Page was owed holiday pay of $5,303.48: he assured me it would be paid to the applicant. The money has not been paid to Mr Page. The failure of the respondent to act on that assurance is corrosive in respect of its overall claim, that Mr Page has been paid all remuneration entitlements. That claim is simply not true.

[74] For the reasons set out above, including the absence of wage and time records and in particular Mr Maserow's acknowledgement and undertaking, I find in favour of Mr Page's claim he is owed $5,303.48 or as otherwise calculated in the event the respondent finally provides wage and time records including annual leave information.

[75] Leave is reserved for this matter to be returned to the Authority for recalculation in the event of the records being provided.

Underpayment of Salary

[76] In his closing submission dated 30 March 2010, counsel for Mr Page has annexed an IRD personal tax summary reporting the applicant's taxable income for the year to 31 March 2009 as $103,998.00. In the applicant's employment agreement dated 10 April 2006 his base salary is stated as $110,000. A shortfall of $6002 is therefore claimed.

[77] As stated above, the respondent claims, *"the applicant received all remuneration entitlements during his employment"* (par 7.3). No explanation has been provided for the shortfall evidenced by the IRD record, nor has the Company challenged that record.

[78] Mr Page has clearly not received all his remuneration entitlements. The claim for a shortfall of $6,002 is therefore successful.

Counter-Claim

[79] The respondent says that Mr Page's job description required him to, amongst other things, enhance the profitability of the Company and improve all aspects of the running of the New Zealand language centres. The applicant was also bound to act in a manner that recognised the essential relationship of trust and confidence between employer and employee.

[80] The respondent also says it is clear the respondent was under financial pressure in 2007 and 2008. Mr Page was in a position of trust and charged with, amongst other things, responsibly monitoring cost controls. Mr Page breached the express and implied terms of his employment agreement with the respondent, and his good faith obligations to it, by misuse of its credit card, by failing to provide tax invoices regarding his expenditure on the credit card, by failing to accurately report regarding the financial performance of the Auckland language centre, and by asking another manager to lie about the performance of another language centre so as to make the Auckland centre look better by comparison. Mr Page denies those allegations.

[81] While it is clear, the Company says, that most of the credit card usage put into question by the respondent was for business related expenses, that is not to say the expenditure was responsible or in accordance with Mr Page's contractual obligations to the Company. The level of expenses incurred was unlike any other principal or manager of a school in New Zealand, and expenditure was not coded accurately or consistently by the applicant. The proper documentation supporting the expenditure was never provided to the Company.

[82] The respondent says that, while it is difficult now, due to the lack of documentation to accurately quantify what was proper expenditure and what was not, it is clear the respondent has lost a significant amount due to the breaches of the applicant in his misuse of the credit card. It seeks to recover an estimate of those losses and submits that that figure should be set at a conservative 25% of the total expenditure unable to be justified on the documentation provided by Mr Page to the Company (amounting to $52,847.30 over the period in question).

[83] Additionally, a good deal of management time and legal fees have been expended by the Company on investigating the claims against Mr Page. This has not been quantified or sought by the respondent but should be recognised in any determination by the Authority.

[84] On behalf of Mr Page, his counsel describes the counter-claim as *"something of a hindsight claim"* (par 34 of the 30 March 2010 submissions). It was clearly within the power of the respondent during Mr Page's employment to take up matters such as the expenses incurred by him, either through Ms Miyamoto or by her successor, Mr Maserow.

[85] Mr Page has done the best in the circumstances to respond to the claims and provide detail where he can. At par 80 of his witness statement, the applicant makes it clear that invoices and supporting documentation were forwarded to Brisbane at the request of Mr Maserow, shortly before the applicant's dismissal: this is not disputed by the respondent. Mr Page should not now be penalised if they have been lost or misplaced by the respondent. The respondent knew at the time that Mr Page was incurring expenses as a result of hosting international dignitaries and making purchases for the Auckland language centre. Mr Page kept Ms Miyamoto advised and

complied with her directions in terms of the use of expense accounts for her visits and while attending to regional duties. There was plenty of opportunity during Mr Page's employment for the respondent to take issue with the areas of expenditure but this was never done despite its knowledge of the level of expenditure, as set out in Mr Page's earlier reports.

[86] I do not accept the respondent's counter claims for the following reasons:

a. I prefer Mr Page's evidence of relevant events;

b. No evidence has been produced challenging the applicant's claim his credit card use and the expenses he incurred were known to Ms Miyamoto and condoned by her;

c. No evidence has been produced challenging Mr Page's claim he sent relevant tax invoices to Mr Maserow in Brisbane;

d. The credibility of the Company's witnesses claims is undermined by the respondent's gross conduct toward Mr Page, in unilaterally demoting him, issuing a final warning in the absence of due process and, ultimately, unjustifiably dismissing him, also as a result of the absence of due process; and

e. The Company's failure to comply with its statutory duty and provide wage and time records in respect of Mr Page, and to fulfil its undertaking to pay him holiday pay it acknowledged was due, strips away any basis the respondent might have to rely on Mr Page's good faith obligations to it. It is a matter of clean hands and credibility: an employer who cannot produce wage and time records is inherently unlikely to fairly advance reliable claims in respect of alleged misuse of its funds.

Contributory Fault

[87] When it determines that an employee has a personal grievance, the Authority is required by s. 124 of the Act, in deciding the nature and the extent of the remedies

to be provided, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the grievance, and, if those actions require, reduce the remedies that would otherwise have been awarded.

[88] Notwithstanding the arguably less than perfect practices condoned under Ms Miyamoto's supervision, but because of the gross absence of due process afforded Mr Page at the time Mr Maserow assumed regional responsibility, and in the absence of evidence such that on a balance of probabilities finding it could be said he contributed to the overall situation giving rise to his grievances, I am satisfied there is no basis to reduce the remedies awarded.

Determination

[89] I find in favour of Mr Page's claims against the respondent and award him the following sums:

a. Compensation for lost remuneration of $55,000.00 (fifty-five thousand dollars) gross; NZ superannuation equivalent to 5% of that base rate for 6-months, or $2,750.00; and the NZ dollar equivalent of A$5,000 for Australian superannuation;

b. Compensation for hurt and humiliation of $21,000 (twenty one thousand dollars);

c. Higher Duties Allowance $8,076.92 (eight thousand and seventy six dollars and ninety two cents);

d. New Zealand Superannuation $14,557.00 (fourteen thousand, five hundred and fifty seven dollars) gross;

e. Australian Superannuation A$21,855.35 (twenty one thousand, eight hundred and fifty five dollars and thirty five cents) gross;

f. Long service leave $31,849.99 (thirty one thousand, eight hundred and forty nine dollars and ninety-nine cents) gross ;

g. Incentive bonuses for 2005/2006 and 2006/2007: $1,673.00 (one thousand, six hundred and seventy three dollars) gross and $12,883.00 (twelve thousand, eight hundred and eighty three dollars) gross;

h. Holiday pay: $5,303.48 (five thousand, three hundred and three dollars and forty-eight cents) or as otherwise calculated in the event the respondent provides wage and time records including annual leave information. Leave is reserved to the parties to resubmit this matter to the Authority if agreement cannot be reached in respect of the calculation arising out of the wage and time records); and

i. Underpayment of salary: $6,002.00 (six thousand and two dollars) gross;

[90] As requested, costs are reserved.

Denis Asher
Member of the Employment Relations Authority