

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 242
5333232

BETWEEN MIRIAMA MOKOMOKO and
TOM HARPUR
Applicants

A N D LA FAMILIA FOUNDATION NZ
First Respondent

LA FAMILIA NUMBER 2 LIMITED
Second Respondent

Member of Authority: Helen Doyle

Representatives: Karina Coulston, Counsel for Applicants
Paul Brown, Counsel for First and Second Respondents

Investigation meetings: 14, 15 March, 30 April and 1 May 2012 at Christchurch

Submissions Received: 5 June and 11 July 2012 from Applicants
9 July 2012 from First and Second Respondents

Date of Determination: 6 November 2012

DETERMINATION OF THE AUTHORITY

- A The applicants were not unjustifiably constructively dismissed.**
- B The applicants were unjustifiably dismissed.**
- C Each applicant is entitled to payment of one week's wages but the after discovered misconduct is of such a nature that no further remedies are awarded for the unjustified dismissal including reinstatement.**

D Orders for payment of holiday pay have been made:

Ms Mokokoko is to be paid the sum of \$9615.00 gross with interest at 5% on that sum from 31 January 2011 until the date of payment.

Mr Harpur is to be paid the sum of \$3487.77 gross with interest at 5% on that sum from 31 January 2011 until the date of payment.

E There is no award of a penalty for failing to make this payment in the circumstances of this case.

F Counterclaims have been made out in the combined sum of \$2200 for the television against both applicants.

G Costs have been reserved.

Employment relationship problem

[1] Miriama Mokokoko was employed by La Famia Foundation NZ (LFF) from 17 March 2008, until her dismissal on 31 January 2011. She was initially employed by LFF as a family manager and entered into a written employment agreement with LFF dated 17 March 2008. Ms Mokokoko's role with LFF changed in July 2009 when she accepted a new role to manage Wigram Manor Function Centre (Wigram Manor) on behalf of the charitable trust. No new employment agreement was entered into at that time however Ms Mokokoko was provided with a job description that referred to her position as house manager - document 8 applicants' bundle. LFF is a charitable trust. The managing trustee of LFF is Harmon Wilfred.

[2] Tom Harpur is Ms Mokokoko's partner. He was employed by La Famia Number 2 Limited (La Famia) to work at Wigram Manor. He entered into a written employment agreement with La Famia recording his employment commencing on 7 July 2009 and his position as bar manager. The Managing Director of La Famia is Mr Wilfred.

[3] Ms Mokokoko and Mr Harpur resigned on 18 January 2011 from their respective positions with LFF and La Famia in circumstances they say amount to an

unjustified constructive dismissal. They gave 30 days notice as at 18 January 2011 in accordance with their employment agreements.

[4] Ms Mokokoko and Mr Harpur say that they were then actually unjustifiably dismissed from their employment during their notice period in a letter dated 31 January 2011. They say that despite requests they have not been paid holiday pay owing to them or payment for lieu days. Ms Mokokoko and Mr Harpur seek the following remedies:

- compensation for humiliation, loss of dignity and injury to feelings in the sum of \$25,000;
- reimbursement of lost wages;
- payment of all annual leave entitlements, wages and lieu days;
- a penalty against Mr Wilfred personally and the respondents for breaching the employment agreement by making a deliberate decision not to pay holiday pay in the sums of \$10,000 and \$20,000 respectively under ss. 4, 133 and 134 of the Employment Relations Act 2000;
- Ms Mokokoko seeks reinstatement.

[5] LFF and La Famia do not accept that the resignation of Ms Mokokoko and Mr Harpur was in the nature of a constructive dismissal.

[6] LFF and La Famia say that Ms Mokokoko and Mr Harpur were dismissed for serious misconduct outlined in Mr Wilfred's letter of 31 January 2011.

[7] LFF and La Famia say that Mr Harpur and Ms Mokokoko are not entitled to any of the remedies they seek. They accept there may be some holiday pay owing, but say there are serious difficulties with the records in relation to that. LFF and La Famia counterclaim against Ms Mokokoko and Mr Harpur for amounts that they say exceed any amounts owing.

Counterclaim against Ms Mokokoko

- Over inflated gross pay - \$1,442.25

- Holiday leave not properly accounted for November 2010 holiday – 5 days @ \$961.54
- Half of total Trents account - \$192.28
- 20% of salary overpaid – \$17,286.05
- Plasma TV (half of total) purchased without authorisation - \$1,100
- Unauthorised payment received for furniture - \$2,000

Counterclaim against Mr Harpur

- Over inflated gross pay - \$1,461.58
- Holiday leave not properly accounted for November 2010 holiday -5 days @ \$769.25
- Half of total Trents account - \$192.28
- Plasma TV (half of total) purchased without authorisation - \$1,100
- Bar takings missing - \$39,500
- 20% of salary over paid - \$12,153.83
- Unauthorised payment for freezer - \$300

[8] There is a possibility that criminal charges may be laid against the applicants for matters raised in the counterclaim. The Authority and the respondents would not have opposed an adjournment. The applicants wished to proceed with their claims and were advised by the Authority of the privilege against self incrimination.

[9] Although the personal grievances are considered separately it was agreed for cost effectiveness and efficiency, the grievances of Ms Mokokoko, Mr Harpur and the Financial Controller/Business Development Manager of Wilfred Investments Limited, Atarangi Glen (file number 5333625) would be heard on consecutive days. Ms Glen is Ms Mokokoko's sister.

[10] It was agreed evidence with respect to one grievance may be relevant to another. In order to deal with the matter in an efficient way, it was agreed that

evidence given in one case could be considered in another without the need for the same witness to give evidence two or three times.

The issues

[11] The Authority has to consider the following issues:

The applicants' claim for constructive dismissal

- What were the reasons for the resignation of Ms Mekomoko and Mr Harpur;
- Ms Mekomoko and Mr Harpur say that their claim for constructive dismissal falls into the third category of cases referred to by the Court of Appeal in *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 where a breach of duty causes the employee to resign;
- Was there a breach of duty on the part of LFF and La Famia at the meeting on 18 January 2011;
- If there was a breach of duty, then was the breach of such seriousness that it would have been reasonably foreseeable that neither Ms Mekomoko and Mr Harpur would have been prepared to continue to work under the circumstances?

Actual unjustified dismissal

- Were Ms Mekomoko and Mr Harpur actually dismissed by letter dated 31 January 2011;
- If they were dismissed then what were the reasons for the dismissal;
- The test to be applied with respect to justification is the former s.103A of the Employment Relations Act 2000 as the dismissal was prior to 1 April 2011. Objectively assessed were the employer's actions and how the employer acted what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred?
- If the dismissal either actual or constructive was unjustified then what remedies should be awarded and are there issues of mitigation or contribution and/or after discovered misconduct?

Holiday and lieu day payment

- Is there holiday pay owing, and if so, what is the amount?
- Were public holidays worked and is there payment for lieu days owing?

Penalty

Should a penalty be awarded against Mr Wilfred and LFF and La Famia for failing to pay holiday pay?

Counterclaims

- Should there be awards made with respect to the matters raised in the counterclaim?

What were the reasons for Ms Mokokoko and Mr Harpur's resignation on 18 January 2011?

[12] Ms Mokokoko resigned after attending a meeting on 18 January 2011 with Mr Wilfred and his wife Carolyn Wilfred. Ms Wilfred was accompanied at the meeting by Ms Glen. No reasons were given in writing for the resignation contained in Ms Mokokoko's email to Mr Wilfred and Mrs Wilfred of 18 January 2011. Thirty days notice under Ms Mokokoko's employment agreement was given with her last day being 15 February 2011. That was also to be Mr Harpur's final day.

[13] Ms Mokokoko said that she resigned because she was advised at the meeting that she was to be demoted immediately from her current position as general manager at Wigram Manor to a facility and functions manager and Mr Harpur to a bar manager. She advised Mr Wilfred at the meeting that he could not do this without a process including consultation and Mr Wilfred then became angry and said he could do what he wanted and Ms Mokokoko had to make a decision that evening whether to come on board or leave. Ms Mokokoko discussed the meeting with Mr Harpur and both of them decided then to resign.

[14] Mr Harpur said in his evidence that Ms Mokokoko got back from the meeting upset and said that Mr Wilfred had reduced his role to bar manager. He said he was also a general manager. He concluded that Mr Wilfred had treated Ms Mokokoko badly and decided to leave. He said in his evidence that the responsibility to manage

the kitchen/cooking may have been taken off him from what he understood but his role as bar manager would not have changed.

[15] I find that the reasons for the resignations were that Ms Mokokoko and Mr Harpur believed their respective roles were to be reduced and the conduct at the meeting concerned them.

Was there a breach of duty on the part of LFF and La Famia on 18 January 2011?

[16] There were differences between the evidence of Ms Mokokoko and Ms Glen and Mr Wilfred as to what was said at the meeting on 18 January 2011. Mrs Wilfred did not give evidence. Ms Glen took minutes although Mr Wilfred, when they were shown to him by Ms Glen, did not accept them as accurate.

[17] Mr Wilfred said that the meeting took place against a background of serious financial issues facing Wigram Manor. He said what he wanted to achieve from the meeting was a clear line of reporting between the managers and the Board. He also wanted to place himself more at Wigram Manor as he was concerned about the viability of the company/trust. He thought he was giving good news to Ms Mokokoko about the appointment of the new chef because that would remove the cooking/kitchen oversight from her and Mr Harpur that has been previously raised by them as onerous. He said that he was taken aback then by Ms Mokokoko's reaction when she told him that should that proposal not be changed then Ms Mokokoko and Mr Harpur would *quit*. He accepted that at that stage he did become *somewhat angry* when Ms Mokokoko said that she refused to accept any changes along the lines outlined could be made. He denied hitting the arms of the chair with his fists as Ms Mokokoko and Ms Glen said he did and said it was more likely done with his hand. I find it likely that Mr Wilfred said that as a director and trustee he was able to do what he liked and that he required Ms Mokokoko *be happy about working under the new restructured role and come on board or leave*. The meeting then ended.

[18] Ms Mokokoko accepted under questioning that previously Mr Wilfred had described the Wigram Manor business as in crisis. A review of the Wigram Manor business had been contemplated at an earlier stage – 5 January 2010 email. I find that the changes proposed in part at the meeting on 18 January 2011 were to attempt to address that the business was in serious financial trouble and Mr Wilfred wanted to have more managerial oversight. The evidence did not satisfy me that Ms Mokokoko

was clearly aware though that there would be a discussion at the meeting about any restructuring although there was a general matter on the agenda to *look and where to from here*.

[19] The concern for Ms Mokokoko was that she was to be immediately demoted from her role as general manager to manager facility and functions and Mr Harpur from his role as general manager to bar manager. I am not satisfied the word demotion was used by Mr Wilfred but that was the conclusion Ms Mokokoko reached. I turn then to the actual effect on Ms Mokokoko's and Mr Harpur's roles?

[20] Two main issues were raised at the meeting as concerned Ms Mokokoko. The first was that a chef was being appointed who would take over the management of the kitchen and the second was Mr Wilfred would have a more visible presence at Wigram Manor and more managerial oversight. In respect of that second matter the minutes taken by Ms Glen were to the effect that Mr Wilfred would have a more visible presence at Wigram Manager and take over the role of managing Wigram Manor immediately. I do not find it likely that Mr Wilfred said he would be manager in the sense of displacing Ms Mokokoko, Mr Harpur and the new chef from the day to day management and running of the Manor. Rather, he wanted increased oversight because of the difficulties facing the business. Ms Mokokoko and Mr Harpur had always reported to Mr Wilfred who had overall management of the Manor. What Mr Wilfred proposed in terms of his own increased oversight of the Manor was not a breach of contract with Ms Mokokoko and Mr Harpur.

[21] The chef being another manager was a change because previously the chef at Wigram Manor had been under their management. The evidence supported that Ms Mokokoko and Mr Harpur had found the extra responsibility of cooking onerous and that many cooks and chefs, the number 12 was put in evidence, previously working at Wigram Manor had resigned or been dismissed whilst Ms Mokokoko and Mr Harpur were managers. The actual effect was that there would be three managers in charge of different areas instead of two.

[22] Mr Wilfred was entitled to make a new managerial appointment but if it was to impact on Ms Mokokoko's and Mr Harpur's roles then there should have been consultation about that. Agreement by them to the proposed change was not required.

[23] I think it very likely that Ms Mokomoko when confronted with these changes reacted to them in a negative way and was resistant. Mr Wilfred I find was likely to have been sensitive to that because he expected a different reaction and because the financial situation facing Wigram Manor was serious. I find on balance it is more likely than not that Ms Mokomoko threatened if the proposal went ahead that she and Mr Harpur would resign and that Mr Wilfred's final comment about come on board or leave related back to that. The meeting quickly deteriorated with Mr Wilfred reacting by maintaining his views about his right to make changes and an expectation that Ms Mokomoko would come on board with them. Further he said that he could do what he wanted and became angry.

[24] The meeting and the conversation stopped being sensible and constructive. The evidence supported that aside from appointing another manager there was to be no change to Ms Mokomoko's hours and salary and that her management role would continue but be limited to accommodation and functions. A significantly different role was not proposed and was distinguishable for this reason from *New Zealand Performance & Entertainment Workers' Union v 93FM Independent Broadcasting Co Ltd* [1991] ERNZ 774. Consistent with Mr Harpur's job description and his primary focus he would continue to be the bar manager. Any breaches in my view relate to the procedural unfairness because the appointment of the new chef would have an impact on the extent of Ms Mokomoko's and Mr Harpur's management roles and there should have been some consultation about that. A conclusion about the actual impact on the roles of Ms Mokomoko and Mr Harpur was premature. Mr Wilfred, the evidence supported, asked Ms Mokomoko at the meeting to prepare a list of her duties as he was not sure what she did. There could be no complaint about Mr Wilfred having increased oversight at Wigram Manor.

Was the breach of sufficient seriousness that it was reasonably foreseeable that neither Ms Mokomoko nor Mr Harpur would have been prepared to continue to work?

[25] Further communication on 18 January 2011 after the meeting deteriorated and Mr Wilfred became angry would have been futile. Ms Mokomoko and Mr Wilfred are both strong personalities and clearly took firm positions during the meeting. Mr Wilfred's parting shot *tell me whether you will come on board or resign by this evening* was unreasonable.

[26] Employment law recognises that communication between employee and employer does not always have the hallmark of excellence. Sometimes things are said in the heat of the moment that on reflection should not have been said and were not meant. The law recognises that an employee following a heated exchange should be given an opportunity to cool down and explain their conduct to their employer rather than simply dismissed. Employment law should be even handed.

[27] Standing back there had to be some further communication between Ms Mokomoko and Mr Wilfred about the impact of the chef's management role on her role and that of Mr Harpur once heads had cooled. Without that communication I am not satisfied that what was proposed was a serious breach so that it would have been reasonably foreseeable to Mr Wilfred that Ms Mokomoko and Mr Harpur would not have been prepared to work with a third manager.

[28] I find that the resignations were premature in this case and that further communication was required. There were breaches of a procedural nature but I do not find they were serious enough without further communication to convert the resignations of Ms Mokomoko and Mr Harpur into a constructive dismissal. I do not find that the resignation of Ms Mokomoko and Mr Harpur amount to an unjustified constructive dismissal.

Were Ms Mokomoko and Mr Harpur actually dismissed and for what reason?

[29] On 31 January 2011 Mr Wilfred responded to Ms Coulston's letter of 27 January 2011 raising a personal grievance of unjustified constructive dismissal on behalf of both Ms Mokomoko and Mr Harpur in respect of the meeting on 18 January 2011.

[30] In the third paragraph on page 2 of the letter Mr Wilfred advised that Ms Mokomoko and Mr Harpur had committed acts defined as serious misconduct. He attached to the letter an email that he described as one of the serious breaches in confidentiality and misconduct. He said that additionally *your clients have entered the business premises and openly berated our new manager and other staff publically in a manner that is unprofessional, emailed the newly appointed manager with insults, and informed potential clients in writing that the business would be unable to provide service.* He described the conduct of Ms Mokomoko and Mr Harpur as falling within the category of conduct that deeply impairs or is destructive of confidence or trust that

is essential to an employment relationship. He further alleged that Ms Mokokoko and Mr Harpur had participated in a concerted public campaign to slander the business, the new manager and its directors. He also said that they have publicly stated that they intend to use the employment grievance process to destroy the directors and bankrupt the foundation and the businesses.

[31] Mr Wilfred then, on the final page of the letter, said that due to the instances of serious misconduct and breach of confidentiality by Ms Mokokoko and Mr Harpur he gave notice of termination of their resignation notice period and immediate dismissal. He asked for the return of keys and other items by 12 noon on Monday 31 January 2011. He said that both Ms Mokokoko and Mr Harpur were banned from the premises.

[32] In his evidence Mr Wilfred said that he dismissed Ms Mokokoko and Mr Harpur for the reasons in his letter. He said that he felt there was a deliberate campaign by them to destroy the business. He was concerned because Ms Mokokoko would destroy client relationships with Wigram Manor and the clients would stop coming. He said that he felt sabotage had been going on and that Ms Mokokoko had *anger/hatred towards him*.

[33] In conclusion I find that Ms Mokokoko and Mr Harpur were actually dismissed for the reasons in the letter of dismissal.

Were the employer's actions and how the employer acted what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred?

[34] Before Ms Mokokoko and Mr Harpur were dismissed by letter dated 31 January 2011 they were not asked to answer any allegation of misconduct in the knowledge of the likely consequence if the allegations were established. They therefore did not have an opportunity to deny the allegations or explain or mitigate their conduct to Mr Wilfred. This was not what a fair and reasonable employer would have done in all the circumstances. The dismissal was clearly procedurally unfair. It had none of the elements of procedural fairness required by employment law. The procedure deficiencies were not as described in the final submission of the respondents of a minor nature.

[35] I turn now to the substantial justification for the dismissal. I'll start with the emails. The only email attached to the letter of dismissal was from Ms Mokomoko to someone who had previously organised a function at Wigram Manor with Ms Mokomoko. The part of the email from Ms Mokomoko that Mr Wilfred took issue with states; *In saying that, my husband and I have resigned from Wigram Manor. We do not agree with recent behaviours from the Directors so are leaving in three week.* Another email relied on was to a person at BBX dated 26 January 2011 in which Ms Mokomoko said *At this stage I would imagine that we will not be [able to] accommodate your function as the new manager needs time to find her feet. But I will leave it to her to decide. Her name is Angela.* There was a further email sent by Ms Mokomoko to the new manager Angela Smalley dated 27 January 2011 in which she refers to a blog by Ms Smalley as airing dirty laundry on the Internet and about her son that he should keep opinion to himself on his facebook page.

[36] There was reference in the letter of dismissal to an incident where Ms Mokomoko berated the new manager in an unprofessional way. I heard evidence about this from Ms Smalley and Renee Taylor. Ms Taylor was employed on 30 January 2011 by La Famia to help Ms Smalley with a complete review of the Wigram Manor operation. Ms Taylor said that on 30 January 2011 she was reading the bistro menu and discussing with Ms Smalley what to have for dinner. She denied viewing the computer. She said that Ms Mokomoko became verbally aggressive and yelled out *I'm still the manager here get out.* Ms Taylor left the area and she said that she heard Ms Mokomoko continue to yell at Ms Smalley. Ms Mokomoko said that she told Ms Taylor to remove herself from the computer as it contained confidential information and she was not a staff member. It was not accepted by Ms Taylor that she was even looking at the computer. Ms Mokomoko said that Ms Smalley advised she was going to tell Mr Wilfred about the incident and she asked Ms Smalley if the woman was a staff member but Ms Smalley would not answer her. Ms Mokomoko immediately emailed Mr Wilfred and that in his response he said that either he or Ms Smalley should have advised Ms Mokomoko that Ms Taylor was a new staff member.

[37] Mr Wilfred was also concerned that Ms Mokomoko was causing disharmony amongst other employees and that she had made comments about damaging the business and him financially.

[38] A fair and reasonable employer would be concerned about Ms Mokomoko's conduct but it was not the sort of conduct about which without a full investigation and hearing an explanation from Ms Mokomoko a fair and reasonable employer would have found amounted to serious misconduct. There was no information before the employer in this case that Mr Harpur was involved in the conduct that was of concern. Mr Wilfred in his evidence about any misconduct he relied on by Mr Harpur in reaching the decision to dismiss said he *understood Mr Harpur was a part of everything*.

[39] In conclusion a fair and reasonable employer for the reasons set out above would not have dismissed Ms Mokomoko and Mr Harpur in all the circumstances at the time the dismissal took place.

[40] Ms Mokomoko and Mr Harpur have personal grievances that they were unjustifiably dismissed from their employment. I shall shortly turn to remedies, but I firstly wish to deal with the issue of alleged after discovered misconduct.

[41] The Authority had before it allegations of misconduct that came to the attention of Mr Wilfred after the dismissal had occurred. The Employment Court held in *Carlton and United Breweries (NZ) Pty Ltd v Bourke* [1994] 2 ERNZ 1 that in equity and good conscience the Employment Tribunal had to take into account serious misconduct by a grievant in a remedies setting, notwithstanding that the employer was ignorant of the misconduct when it dismissed the grievant for other reasons.

[42] The Court of Appeal in *Ark Aviation Ltd v Newton* [2002] 2 NZLR, [2001] ERNZ 133 stated, although did not decide the issue at para. 45:

While it is not strictly in issue in the present case we should make it clear that we do not rule out the possibility that in some situations misconduct of an employee only discovered after a dismissal may be so egregious as to require the discretion to provide a remedy under s 40(2) not be exercised at all in favour of the employee whose grievance has been established.

[43] The Court of Appeal in *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] NZCA 128, [2008] ERNZ 155 at [104] concluded:

The subsequently discovered information could not be taken into account under s 124 but could and should have been taken into account when determining wages reimbursement and humiliation compensation under s 123.

[44] The above cases confirm that when looking at whether to take into account subsequently discovered misconduct it must be conduct of a truly significant and egregious nature. The Authority would need to be satisfied any such conduct was proven to the required standard. LFF and La Famia allege there was subsequently discovered conduct on the part of Ms Mokomoko and Mr Harpur that was continued, systematic and involved wide ranging dishonesty and that no compensation should be paid for any grievance made out.

[45] There was an allegation that a helmet in the Wigram Manor bar was stolen and disposed of by Mr Harpur and Ms Mokomoko. This was not discovered until after Mr Harpur and Ms Mokomoko were dismissed and could not have therefore been a factor relied on at the time of dismissal. Two emails were produced by LFF and La Famia from Ms Mokomoko to her brother about a helmet to support the allegation. The first email Ms Mokomoko said in her evidence referred to another helmet belonging to a relative and was not about the helmet in the bar. She provided documentation that supported there was another helmet. The second email from Ms Mokomoko to her brother referred more specifically to a helmet in the bar. There was an election by Ms Mokomoko and Mr Harpur not to answer questions about the second email.

[46] Ms Coulston in final submissions said that there has been a not guilty plea to a criminal charge laid about the helmet and the matter has been set down for a defended hearing. I do not find for reasons that will become apparent I need to make a finding about the helmet. The helmet did not appear in the counterclaim with a value attached so nothing further will be said about it.

[47] The Authority heard evidence from Mr Wilfred that it was discovered after the dismissal of Mr Harpur and Ms Mokomoko that they had purchased in November 2010 at auction a 42 inch Samsung Plasma television using 3000 BBX trade or barter dollars from La Famia's BBX Account. Mr Wilfred said that this purchase was without his authorisation. A complaint was laid about this with the police in early February 2011. There were delays as a result of the February earthquake so it was not until 3 August 2011 that the police searched Ms Mokomoko's and Mr Harpur's property and removed the television.

[48] Ms Mokomoko and Mr Harpur say in their evidence that on 7 July 2010 they asked Mr Wilfred for a pay review but were told by Mr Wilfred that he was not

making enough money for a pay raise. In July 2010 there was a BBX Expo held at Wigram Manor and they were told by Mr and Mrs Wilfred that if there was anything they liked at the Expo they could purchase an item with the BBX card and it would be considered a bonus in lieu of a pay increase. Ms Mokokoko and Mr Harpur said that they declined the offer at that stage. Subsequently their evidence was that they saw the television at another BBX expo held at Wigram Manor and Ms Mokokoko said that she telephoned Mr Wilfred about two days before the auction and obtained the consent of Mr Wilfred to purchase the television. Ms Mokokoko and Mr Harpur say that Mr Wilfred saw the television in their house and they did not try to hide it.

[49] Mr Wilfred denied that he gave any authority to Ms Mokokoko and Mr Harpur to purchase items for themselves using the BBX account of La Famia. He said in his evidence that the first he knew about the purchase of the television was when BBX contacted him after Ms Mokokoko's and Mr Harpur's employment was terminated to tell him that Ms Mokokoko and Mr Harpur bid on a television and were going to get it *hell or high water*. He said that he went to the police about the matter as there was no television he could find at Wigram Manor. He said in his evidence that he may have seen a television at Ms Mokokoko's and Mr Harpur's home but said he did not know it was purchased using BBX dollars from the La Famia account. As the police were unable to establish ownership a judgment from the District Court was requested under s 199(3) (a) of the Summary Proceedings Act 1957. At a subsequent hearing the television was returned to Wigram Manor. Mr Wilfred attended at the District Court hearing but neither Ms Mokokoko nor Mr Harpur did. There were issues for them about the cost of a representative. .

[50] I find on the balance of probabilities that Mr Wilfred did not authorise the purchase by Ms Mokokoko and Mr Harpur of the television. I did not find Ms Mokokoko and Mr Harpur's evidence credible about this matter. If, as Ms Mokokoko said, the purchase of the television was authorised by way of a phone call, then it is simply not credible that there was no accounting to Mr Wilfred subsequent to the purchase about the fact there had been a purchase of a television and the amount involved in the transaction.

[51] When asked about that at the Authority investigation meeting Ms Mokokoko said that she thought Mr Wilfred would record the television purchase. That evidence lacks credibility because Ms Glen said in her evidence that Ms Mokokoko retained

and had control over the BBX statements and accounts. I accept that evidence. Ms Glen said in her evidence that BBX was nothing to do with accounts but I do not accept that evidence. Transactions with BBX dollars attract tax and GST and would need to be accounted for. While Ms Glen then would update Mr Wilfred about the financial situation with respect to the La Famia and LFF she did not show him updated statements on the BBX account. Mr Wilfred said that he never got any statements about the purchase of the television at the BBX expo and I accept that evidence as likely in the circumstances outlined above. The purchase of the television as it appeared on the statement was more likely than not effectively concealed from Mr Wilfred.

[52] There were some other allegations about after discovered misconduct but I do not find that there is proof about those to the required standard. There was evidence that the bar takings almost doubled immediately after the dismissal of Ms Mokokoko and Mr Harpur on 31 January 2011 although there was no change to opening hours, stock and clientele. There is insufficient proof for the Authority to conclude on the balance of probabilities that cash was stolen from the bar prior to banking and retained for Mr Harpur's and Ms Mokokoko's own use. The evidence does not enable me to conclude that is the only reasonable explanation. There were other allegations that Mr Wilfred paid Ms Mokokoko and Mr Harpur for furniture and a freezer which he did not want and had he been clear they were in the summary of accounts to be paid given to him for approval by Ms Glen then he would not have authorised payment for them.

[53] There was an issue with the Trent's account used to purchase items for the Manor and an allegation that personal items appeared on the account which were not paid for. There were issues of proof about that. The evidence was not altogether clear on what items were personal and what were not so that the Authority was left without the required degree of certainty about that matter. Ms Mokokoko did accept that nappies for her child had been purchased and incorrectly coded on the Trents account to the bar. How the nappies were paid for was not clear to the Authority. In her final submission Ms Coulston stated that payment for the nappies was made to Ms Glen. That is not what I recorded as the evidence. Ms Mokokoko said that she agreed she purchased the nappies and that she would have given the money to the bar and there was a mistake in coding. I am unclear then as to how the bar takings would

have balanced. Ms Glen said that the coding was done by Ms Mokokoko and Mr Harpur and she did not take issue with what was written.

[54] In conclusion although other matters were raised I have relied solely on the after discovered conduct with respect to the unauthorised purchase of the television that I find was so serious that had it been discovered at the time of dismissal then it would have justified dismissal. The reason I find it was not discovered earlier was that the BBX statements confirming the purchase and the amount of BBX dollars for that purchase had been retained by Ms Mokokoko and effectively in that way concealed from Mr Wilfred until after the employment of Mr Harpur and Ms Mokokoko ended. I intend to take this conduct into account in assessing remedies under 123 of the Employment Relations Act 2000 for both Ms Mokokoko and Mr Harpur. I shall turn to remedies now.

Remedies

Ms Mokokoko

Wages

[55] I have found that Ms Mokokoko resigned on 18 January 2011 from her role with her last day for her employment of 15 February 2011. Her lost wages are therefore limited to that period. Her claim for that period is one week's wages for the last week of employment in the sum of \$961.54 gross. Mr Mokokoko is entitled to reimbursement of that sum but no further amount is payable to her for lost wages.

Compensation

[56] Ms Mokokoko was significantly affected by her dismissal. I would have found some contribution on her part under s 124 of the Act for her conduct relied on at the time of dismissal. Her email particular to BBX was unprofessional and objectively read may have resulted in a loss of custom. I prefer the evidence of Ms Smalley and Ms Taylor that she was quite rude to them and unnecessarily so

[57] Primarily though in assessing the issue of compensation under s 123 of the Act I have done so on the basis that Ms Mokokoko would have been justifiably dismissed had Mr Wilfred been aware of the unauthorised purchase of the television using the BBX dollars from the La Famia account. That was a serious breach of trust and

confidence from someone in the managerial position Ms Mokomoko was in. Taking into account the subsequently discovered information about the television I make no award for compensation for humiliation and loss of dignity under s 123 (1)(c)(i) of the Act.

Reinstatement

[58] Ms Mokomoko seeks to be reinstated into her position at Wigram Manor. Her dismissal took place before 1 April 2011 when reinstatement was the primary remedy. Reinstatement has to be practicable. The after discovered misconduct goes directly to the issue of trust and confidence. Ms Mokomoko referred to Mr Wilfred when she gave evidence as her *arch enemy*. I questioned her about this given reinstatement was claimed. She said that she had no animosity towards Mr Wilfred and suggested that he has forgiveness as a man of God. That was not my view of Mr Wilfred's evidence. I do not find that reinstatement is practicable.

Holiday pay and lieu days

[59] The submission of the respondents is that there should be no holiday pay paid in the circumstances to either applicant because of their dishonesty. That was a point that Mr Wilfred felt strongly about. It is not a sustainable argument. There is a statutory entitlement under the Holidays Act 2003 to holiday pay for an employee and there is no ability to restrict or exclude the employee's entitlements under the Holidays Act.

[60] The accounts and payroll for LFF and La Famia was initially the responsibility of an accounts manager Maree Whitworth. From about August 2009 Mr Wilfred took over this responsibility which was then taken over by Mr Harpur in or about September 2009. Mr Harpur said that he had limited experience in the area and only received minimal training. That was disputed by Mr Wilfred. Ms Glen took over the accounts and processing pays from in or about March 2010.

[61] The wage and time records report show as at 13 May 2011 Ms Mokomoko had a holiday pay entitlement of 58 days. Ms Coulston says Ms Mokomoko's holiday pay should be based on that report in an analysis of amounts owing in document 38 but that is not correct because Ms Mokomoko was dismissed on 31 January 2011. I find the correct starting place for calculation of holiday pay owing at 31 January 2011 is

52.42 days – see document 4.7. Ms Mokokoko was paid \$50,000 per annum and her daily pay is \$192.30 gross.

[62] There are two main issues I find with the holiday pay that need to be resolved. Having heard the evidence I can deal with them in short order. The first is that there were some double entries in the pay system. I do not find that resulted in Ms Mokokoko being paid twice but I accept Ms Smalley's evidence that it in all likelihood impacted on the assessment of the holiday pay entitlement to the extent of .4 of a day. I am satisfied that an adjustment can fairly be made on that basis.

[63] The second matter was a concern that Ms Mokokoko took five days leave over a period established to be from 11 November to 22 November 2010 and said that the balance was a combination of an anniversary day, 2 days in lieu and rostered days off. The holiday records are inaccurate. Although Ms Mokokoko and Mr Harpur were away together and the dates were able to be verified Mr Harpur is recorded as having leave from 29 November to 3 December 2010 and Ms Mokokoko from 15 November to 19 November 2010. It is of concern that days in lieu taken over that time were not recorded. In fact the only public holiday recorded as worked and then only by virtue of the payment of time and a half over the entire period of employment is Canterbury Anniversary on 15 November 2009. This must have been recorded when Mr Harpur was doing the payroll records. Ms Glen should have been told the basis of the whole leave so that it could be recorded on the records.

[64] I have to do the best I can. Over the period from 11 November 2010 to 22 November 2010 (both days inclusive) I have allowed for two days off leaving ten working days. 12 November 2010 was a public holiday as it was Canterbury Anniversary day so that day was not required to be taken as annual leave leaving nine days. Five were taken as annual leave and Ms Mokokoko says that she took the balance as days in lieu or as compensation for rostered days off worked. I do not accept the later explanation as reasonable because Ms Mokokoko was on a salary. I intend to proceed on the basis that two days not taken as annual leave were days in lieu of working public holidays. One of these was recorded as having been worked (15 November 2010) and I am prepared to accept that there was in all likelihood another public holiday worked. The claim for 15 days in lieu though was not made out. The evidence in support of that was wholly unsatisfactory and unreliable. That

leaves two days that should be deducted from the leave balance. An adjustment is to be made on the basis of those two days.

[65] I am not satisfied that there was evidence to support an adjustment be made because of a concern that Ms Mokomoko did not work the hours she was paid to work. The evidence about that when there was payment of a salary was speculative and had never previously been raised as an issue. It is indeed odd that Ms Mokomoko had no sick days showing in the time and wage records when the evidence was that over the years and in her final week she had been unwell. I have to balance that however with the fact that she had a sick leave entitlement and because no sick leave had been taken previously and/or recorded that had accumulated to 15 days. The failure to record sick leave for the last week of work whilst unsatisfactory therefore has no financial consequence. Then there was the concern that no leave had been recorded although Ms Mokomoko had given birth to her child whilst employed by the Trust. I accept that is unusual but seemed to raise no eyebrows at the time. I was advised by Ms Mokomoko that she simply continued to work. I do not adjust the records on that basis.

[66] Ms Mokomoko is entitled to holiday pay for 52.42 days at \$192.30 per day which is \$10,076.52 gross less .4 of a day for the double processing. $\$192.30 \times .4 = \76.92 and two days leave in November of \$384.60. There is an amount due to Ms Mokomoko of \$9615.00 gross for holiday pay and I so order.

[67] Ms Mokomoko is entitled to interest on the sum of \$9615.00 gross from 31 January 2011 until the date of payment at 5% being the rate prescribed under s 87(3) of the Judicature Act 1908 under clause 11 of the second schedule to the Employment Relations Act 2000.

Penalty

[68] I have considered the issue of a penalty in this case. It is a serious issue to fail to pay holiday pay when an employee leaves. There was a breach in that regard and a deliberate decision not to make a payment of holiday pay to Ms Mokomoko. Mr Wilfred said in evidence that he did not want to pay over a large sum of money to Ms Mokomoko if money was found to be owing to him as a result of any criminal case or under the counterclaim. That is not an adequate excuse not to pay a statutory entitlement to an employee even if somewhat understandable. When I stand back

however and consider all the circumstances in this case including some irregularities with the wage and time records that did raise a concern as to the correct calculation of holiday pay I am not minded to impose a penalty.

Mr Harpur

Wages

[69] Mr Harpur resigned on 18 January with his last day for employment of 15 February 2011. His claim for this period is one week's lost wages in the sum of \$769.23 gross. He is entitled to reimbursement of that sum but no further amount is payable for lost wages.

Compensation

[70] Mr Harpur was significantly affected by his dismissal. He found another role though very quickly. Mr Harpur did not contribute at all to his dismissal and I would not have made any deduction under s 124 of the Act in that regard.

[71] I have taken into account in assessing compensation under s 123 of the Act the after discovered misconduct about the unauthorised purchase of the television. Had Mr Wilfred known about that then it was of such a serious nature that he would have been justifiably dismissed. Taking that into account I make no award for compensation for humiliation and loss of dignity under s 123 (1) (c) (i) of the Act.

Holiday pay and lieu days

[72] Ms Coulston has again taken the holiday pay owing to Mr Harpur as at 13 May 2011 as 31.050 days but his employment was terminated on 31 January so that cannot be the correct figure. I find that the correct starting point for calculating holiday pay owing as at 31 January 2011 is 25.47 days as in document 4.7.

[73] Mr Harpur was paid \$40,000 per annum by way of salary and his daily rate of pay is \$153.85. There were two payments made to Mr Harpur after he commenced work. These appeared to be irregular to Ms Smalley. I accept that they initially looked unusual however Mr Harpur was able to satisfactorily explain them at the investigation meeting and therefore these have no effect on holiday pay.

[74] The evidence that Mr Harpur was overpaid by 20% is speculative. He was not required to keep timesheets and there is no clear direct evidence that the hours consistently worked were below what was expected. Any claim on that basis was not established. That has no effect on the calculation of holiday pay.

[75] I accept that double entries were made for Mr Harpur's pay in December on two occasions. He had no control over this but the evidence supports this had the effect of overstating his gross earnings and this in turn flowed through to his holiday pay. There is said to be an over calculation of .8 of a day or \$123.08. I accept that.

[76] For reasons I have explained with respect to Ms Mokokoko's leave for the November holiday I make a two day adjustment for Mr Harpur's leave for that period. There are no other lieu days owing I find. The evidence about them was wholly unsatisfactory and unreliable.

[77] Mr Harpur is entitled to holiday pay for 25.47 days at \$153.85 per day which is \$3918.55 gross less .8 of a day for the double processing; $\$153.85 \times .8 = \123.08 . Two further days are deducted at $\$153.85 \times 2 = \307.70 . There is an amount due to Mr Harpur of \$3487.77 gross for holiday pay and I so order.

[78] Mr Harpur is entitled to interest on the sum of \$3487.77 gross from 31 January 2011 until the date of payment at 5% being the rate prescribed under s 87(3) of the Judicature Act 1908 under clause 11 of the second schedule to the Employment Relations Act 2000.

Penalty

[79] I do not impose a penalty for the same reason set out when considering this issue for Ms Mokokoko.

Counterclaims

Over inflated gross pay

[80] I have dealt with this issue when addressing holiday pay and although I accept that the double processing did have a limited effect on the holiday pay the evidence supports Ms Mokokoko and Mr Harpur were not actually paid twice. I have also dealt with the issue of the November holiday.

Trents account

[81] The total claim under this head against both Ms Mokokoko and Mr Harpur is \$384.56. This is for items on the Trents account that were considered to have been purchased by Ms Mokokoko and Mr Harpur for their own use rather than for use at Wigram Manor. The evidence about many of the items that make up this claim was not strong. I accept Ms Coulston's submission that this was highlighted by the reference to it being unlikely that there would be purchase of a small packet of baking soda. The Authority could not be satisfied about that and many of the other matters to the required standard. Ms Mokokoko said that she reimbursed Wigram Manor for the nappies that clearly would not have been a purchase for the bar. I could not be satisfied in the absence of financial records at or about that date that although the purchase was unsatisfactory she had not made a reimbursement. The Trents account claim fails.

Plasma TV

[82] The Samsung 42 inch television cost \$3000 BBX dollars. Internet prices were obtained from Noel Leeming, Dick Smith and Bond and Bond for an almost identical television to that purchased by Ms Mokokoko and Mr Harpur although a 43 inch. The three prices from the different retail outlets for the same television averaged out at \$782.38. The increase in television size I find pricewise would not disadvantage the applicants in this case. On the basis that a BBX dollar is the cash equivalent of one New Zealand dollar La Fama claims \$1100 each from Ms Mokokoko and Mr Harpur being \$3000 less the sum of \$782.38 as the respondents have possession of the television. Ms Coulston's submission is to the effect that there is nothing to support that the value of the BBX dollar is the equivalent of a New Zealand dollar if in fact it has any value at all. Ms Coulston referred to Mr Harpur's evidence that Wigram Manor provided function facilities to BBX for about \$1000 and in return Wigram Manor received \$3000 which would support a value less than one New Zealand dollar.

[83] I do not accept that there is no value to the BBX dollars. Clearly goods and services are purchased using the dollars. There is some support for one BBX dollar being the equivalent of one New Zealand dollar in the Court of Appeal judgment in *BBX Financial Solutions PTY Limited and Trade Management (2010) PTY Ltd (in Liquidation) v Wayne Andrew Wallace* [2011] NZCA 667 at [75]. I proceed to

consider any loss to La Famia on the basis that one BBX dollar is equal to one New Zealand dollar.

[84] Ms Mekomoko and Mr Harpur made an unauthorised purchase of a television using 3000 BBX dollars from the account of La Famia. The television is now in the possession of La Famia so part of the loss to La Famia from the unauthorised purchase has been mitigated in that way.

[85] The averaging of the cost to purchase three new comparable televisions is \$782.33. On the basis that the television could have been purchased for \$782.33 but 3000 BBX dollars were used to purchase the television. I find that there is a loss to La Famia of \$2217.67. That is a little more than the amount claimed of \$1100 per applicant but I shall order what is claimed. The loss I find to La Famia is \$2200.

[86] I order both Miriama Mekomoko and Tom Harpur to pay the sum of \$2200 to La Famia being the loss from the unauthorised purchase of the television using 3000 BBX dollars mitigated in part by the ordered return of the television..

Furniture

Miriama Mekomoko

[87] Mr Wilfred paid Ms Mekomoko \$2000 for furniture that he says he had no interest in buying and would never have purchased. He says the payment was made following the presentation to him of a weekly spread sheet for the payment of creditors on 22 September 2010. The spread sheet included Ms Mekomoko as a creditor in the sum of \$2000 but it was not pointed out to him specifically that Ms Mekomoko was one of the creditors or he would have questioned the basis of any payment. He therefore approved payment to the creditors on the spreadsheet that included Ms Mekomoko. Mr Wilfred said he had never seen an invoice for the furniture until after Ms Mekomoko was dismissed. Mr Wilfred did recall a discussion with Ms Mekomoko about whether she could store the furniture at the Manor but he said he had no interest in buying it and no-one presented an invoice to him.

[88] Ms Mekomoko said in her evidence that she had an agreement earlier in February 2010 with Mr Wilfred that he would purchase furniture from her. Ms Mekomoko said that she and Mr Harpur had a large amount of furniture in storage that Mr Wilfred wanted to purchase for use in the Manor. Ms Mekomoko said that

Mr Wilfred advised he could not pay for the items at that time but would when the Manor made some real money.

[89] Ms Mokokoko said an invoice was prepared, exhibit 10 of the bundle. That document was headed up with the GST number of La Famia. I find that it was prepared in all likelihood by Ms Glen following receipt of a handwritten invoice from Ms Mokokoko. It then listed the furniture items with a corresponding value besides them. Each sum was reduced to allow a GST component.

[90] I conclude from discussions between Ms Mokokoko and Mr Wilfred in February 2010 that Mr Wilfred was aware that there would be some furniture that belonged to Ms Mokokoko and Mr Harpur on the Wigram Manor premises. There was no agreement I find from La Famia to purchase any of the items and no agreement as to what the price would be for that furniture.

[91] After a general discussion in February 2010 about furniture Ms Mokokoko appeared on a spreadsheet of La Famia showing creditors as at 28 September 2010 with no further discussion about whether La Famia wanted the furniture or the basis of any pricing. Ms Mokokoko said that she used comparable trade me prices to set the price for each item. I find on the balance of probabilities that Mr Wilfred unwittingly approved the payment of Ms Mokokoko. Nevertheless he did approve the payment. I accept that it was not until after Ms Mokokoko's employment had ended that he realised he had made the payment and the basis for that payment.

[92] I have carefully considered what to do about the situation. Ms Mokokoko said that she did not want the furniture returned. Mr Wilfred could not when I asked him identify whether all of the furniture was at the Manor. He could recall the whereabouts of some of it. I am of the view an order for return of the furniture and full reimbursement would cause further litigation and difficulties. I am not satisfied that there is evidence of a loss. Mr Wilfred, albeit unwittingly, approved payment for the furniture. He has had some use of it. This claim does not succeed.

Freezer

Tom Harpur

[93] On 26 January 2010 La Famia paid to Mr Harpur the sum of \$300 on another invoice describing the item as a large freezer in the kitchen. Mr Wilfred said that he

never agreed to purchase the freezer and did not need it. He said that he was not sure if the freezer was actually at the Manor. There is a handwritten invoice dated 19 January 2011 with respect to the freezer with the words written on it *borrowed on 31 January 2009* and then a typed invoice dated 26 January 2011 which includes La Famia's GST number. The evidence from Ms Mokokoko was that Mr Wilfred agreed to purchase a large freezer from her mother Anita in February 2010 and the cost was agreed at \$300.

[94] Mr Wilfred said that, as with the furniture, the payment to Mr Harpur was not specifically brought to his attention and he was again misled into paying it. Mr Harpur should have discussed payment of this amount with Mr Wilfred in an open and straightforward way. That did not happen. Nevertheless payment was approved.

[95] The freezer may or may not be at the Manor. If it had clearly been established that it was not then I would have ordered full reimbursement but that could not be established. I am not satisfied that this claim is made out. Mr Wilfred did approve the payment and was unable to establish whether this was a freezer in use at the Manor or not.

20% of salary overpaid and missing bar takings of \$39,500.

[96] I do not find either of these claims to have been established for reasons I have set out earlier.

[97] In conclusion therefore the counterclaims against Ms Mokokoko and Mr Harpur are made out with respect to the television. The other claims do not succeed.

Exchange of cheques

[98] Mr Brown was concerned about his clients not getting paid what was due to them. He suggested an exchange of cheques be ordered. I am not going to make an order as such but I make a practical suggestion that Mr Brown attend Ms Coulston's office or the other way around and that there be a settlement style transaction undertaken.

Costs

[99] I reserve the issue of costs. Both parties have had some success and that will no doubt be referred to in submissions. The applicants have been successful though in a finding that their dismissals were unjustified.

[100] Ms Coulston has until 28 November 2012 to lodge and serve submissions as to costs and Mr Brown had until 19 December 2012 to lodge and serve submissions in reply

Helen Doyle
Member of the Employment Relations Authority