

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 129  
5630168

BETWEEN                      HIROYOSHI TSUCHIYA  
   Applicant  
  
AND                                LAST RESORT NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:        Robin Arthur  
  
Representatives:              Brent Norling, Counsel for the Applicant  
   Scott Worthy and Julia MacGibbon, Counsel for the  
   Respondent  
  
Investigation Meeting:        2 and 3 February 2017 with oral closing submissions  
   heard by telephone conference on 23 February 2017  
  
Determination:                1 May 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. Last Resort New Zealand Limited (LRNZL) acted unjustifiably in its decision to dismiss Hiroyoshi Tsuchiya and how it went about making that decision.**
- B. In settlement of Mr Tsuchiya's personal grievance for unjustified dismissal LRNZL must pay him, within 28 days of the date of this determination, the following sums:**
- (i) \$11,000 as lost wages; and**
  - (ii) \$16,000 as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. LRNZL must also pay Mr Tsuchiya, within 28 days of the date of this determination, wage arrears of \$4,357.80.**
- D. From the total amount now due to Mr Tsuchiya LRNZL may**

**deduct only the following sums:**

- (i) \$1911.00 as the agreed share he would pay LRNZL for work visa fees; and**
- (ii) \$5492.50 as the amount he agreed he still owed in repayment of a loan from LRNZL.**

**E. Costs are reserved. If any costs issue is not agreed between the parties, a timetable has been set to lodge memoranda so the Authority may determine costs.**

### **Employment Relationship Problem**

[1] Hiroyoshi Tsuchiya was employed by Last Resort New Zealand Limited (LRNZL) from February 2015 until he was dismissed in May 2016. LRNZL is the New Zealand subsidiary of a Japanese corporation, Last Resort Corporation (Last Resort) which is in turn owned by Nova Holdings Corporation (Nova), also based in Japan. The New Zealand business provides support services for Japanese citizens attending English language schools. Its services include provided orientation activities for newly arrived customers, arranging transport to and from the airport, money exchange, travel bookings, providing mobile phones and SIM cards for purchase, and assistance with school placement.

[2] Mr Tsuchiya was appointed to a position with the job title of counsellor. According to LRNZL he was, around November 2015, promoted to the role of branch manager of its Auckland and Christchurch offices, replacing Maki Komatsu who was said to have been demoted from that role. Around this time Ms Komatsu was also appointed as a director of LRNZL. The relative status of Mr Tsuchiya and Ms Komatsu was a factor relevant in the subsequent dispute over why Mr Tsuchiya was dismissed.

[3] In April 2016 Ms Komatsu gave her notice of resignation. Without Mr Tsuchiya knowing about it, she then sent a report to a Last Resort manager in Australia accusing Mr Tsuchiya of “fraud” and “strange happenings”. Her report was referred to Motoko Harada, a director of Last Resort’s overseas subsidiaries. Ms Harada lives in Japan. On 3 May 2016 Ms Harada arrived unexpectedly at LRNZL’s Auckland offices. She had not visited the New Zealand business before.

[4] On arrival Ms Harada held a meeting with Mr Tsuchiya. Ms Komatsu had not yet left the business and she also attended the meeting. Ms Harada asked Mr Tsuchiya to respond to four allegations.

[5] The allegations were that Mr Tsuchiya:

- (i) had improperly arranged for him and Ms Komatsu to be paid salaries higher than authorised; and
- (ii) had not properly recorded sales of rental mobile phones and SIM cards; and
- (iii) had improperly given part of the proceeds of those sales to his wife Kazue Tsuchiya; and
- (iv) had not properly recorded currency exchange transactions made for LRNZ customers.

[6] Ms Harada also asked Mr Tsuchiya about arrangements for him to repay fees paid by LRNZL for his immigration visa and to repay a loan made to him from LRNZL funds to pay tuition fees for his wife, Kazue Tsuchiya, to attend a cookery school.

[7] Ms Harada sent Mr Tsuchiya home after the meeting. The next day Ms Harada arranged to meet with Mr Tsuchiya again. She asked for any further explanation from him. Dissatisfied with his responses she told him the situation was “unworkable”. He was asked to hand over his keys to the office and the business post box and to leave the office.

[8] In a letter to Mr Tsuchiya dated 9 May 2016 Ms Harada said he was dismissed, according to a translation of the letter from its original Japanese, for “recognized fraudulent behaviour”. The letter referred to the allegations about his salary level, recording of currency exchange transactions, recording of mobile phone and SIM card sales, and giving part of the profit of those sales to his wife.

[9] In his application to the Authority Mr Tsuchiya sought a finding that LRNZL’s actions in dismissing him were unjustified and orders for the payment of lost wages and compensation for embarrassment and humiliation caused to him. He

also sought wages arrears for salary between 1 and 9 May, holiday pay and payment of a notice period.

[10] LRNZL's statement in reply said he was justifiably dismissed for serious misconduct. In a counterclaim LRNZL sought orders requiring payment from Mr Tsuchiya for fees paid for his work visa, an outstanding amount of \$9990 loaned for his wife's tuition fees, \$7264.30 paid without authorisation to him as salary, \$1520 for unreported proceeds from phone and SIM card sales, and \$3483.10 for improperly calculated exchange rate commissions.

### **The Authority's investigation**

[11] For the purposes of the Authority's investigation written witness statements were lodged from Mr Tsuchiya, Ms Tsuchiya, Ms Harada, Ms Komatsu and Last Resort Corporation's Oceania business manager Yuto Kobata. Each witness attended the investigation meeting. Under oath or affirmation, they confirmed their statements and answered questions from me and the parties' representatives. Japanese was the primary language of each witness. The Authority provided an interpreter to translate questions and answers to and from them. Ms Harada was accompanied by her own interpreter.

[12] Statements were also lodged by Mr Tsuchiya's mother and two former employees of Last Resort, one in New Zealand and one in Japan. For the purposes of the Authority's investigation and determination of the issues involved, it was not necessary to take account of those three statements or question the people making them.

[13] At the end of the investigation meeting I made arrangements for the parties to lodge closing written submissions. With the parties' agreement I also talked with counsel for both parties and Ms Harada about whether the parties might still resolve this matter between themselves. The date for lodging their submissions was set for some weeks later to allow time for the parties to discuss those prospects. No resolution was reached so the parties lodged their written submissions. Counsel then made oral argument in reply to those submissions by telephone conference.

[14] As permitted by 174E of the Employment Relations Act 2000 (the Act) the written determination has stated findings of fact and law, expressed conclusions on

issues necessary to dispose of the matter and specified orders made. All evidence and submissions received was carefully considered but did not need to be set out in full in this determination.

### **The issues**

[15] The issues for investigation and determination were:

- (i) At the time of deciding to dismiss Mr Tsuchiya, had LRNZL adequately investigated, including by giving him an opportunity to respond and genuinely considering his responses, its allegations that he was responsible for:
  - (a) receiving a salary in excess of an authorised level; and
  - (b) discrepancies in commissions in the money exchange service; and
  - (c) discrepancies in funds from sales of SIM cards and mobile phones; and
  - (d) unauthorised payments to his wife Kazue from those funds?
- (ii) And, in light of whatever findings are made on issue (i), was LRNZL's decision that Mr Tsuchiya had committed serious misconduct one a fair and reasonable employer could have made in all the circumstances at the time?
- (iii) If not, what remedies should be awarded, considering:
  - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
  - (b) Compensation under s123(1)(c)(i) of the Act?
- (iv) If any remedies were awarded, was there any blameworthy conduct by Mr Tsuchiya that contributed to the situation giving rise to his grievance and that required a reduction of remedies under s 124 of the Act?
- (v) Was Mr Tsuchiya entitled to an award for arrears of wages for notice, annual leave and salary?
- (vi) Was LRNZL entitled to an order for Mr Tsuchiya to pay it:
  - (a) \$1911 advanced to him for a work visa; and
  - (b) \$9990 as an amount outstanding for money he borrowed to pay his wife's tuition fees; and
  - (c) \$7264 for salary paid to him without authorisation; and
  - (d) \$930 for funds received for mobile phone sales and \$590 for funds received from SIM card sales; and

- (e) \$3483.10 for improper calculation of exchange rate commissions?
- (vii) Should either party contribute to the costs of representation of the other party?

## **The law**

[16] Section 103A of the Act required LRNZL's actions to be assessed objectively against the test of justification:

- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
- (3) In applying the test in subsection (2), the Authority or the court must consider—
  - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
  - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
  - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
  - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
  - (a) minor; and
  - (b) did not result in the employee being treated unfairly.

[17] The test applies to the employer's inquiry and decision about whether misconduct has occurred and, if so, whether that misconduct was serious as well as the employer's ultimate decision in the light of that finding.<sup>1</sup> It contemplates there may be more than one fair and reasonable response or other outcome that a fair and reasonable employer might justifiably apply in the particular circumstances of any case.<sup>2</sup> A dismissal within the range of such fair and reasonable responses will be justified. However the statutory test allows the Authority to examine and, if warranted, find unjustified, an employer's decision as to consequence once

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<sup>1</sup> *Air New Zealand v V* [2009] NZEmpC 45 at [36].

<sup>2</sup> *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [23].

sufficiently serious misconduct is established.<sup>3</sup> And, further:<sup>4</sup>

... [a] failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. ... [H]owever, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[18] In the Authority's investigation of whether the dismissal of Mr Tsuchiya was justified, LRNZL had to prove to the standard of the balance of probabilities that it acted reasonably in both what it did to try and work out the facts of what had happened, and then making its decision that those facts warranted dismissal.<sup>5</sup> The nature and quality of LRNZL's evidence that it acted reasonably had to be commensurate with the gravity of its allegations about Mr Tsuchiya's conduct and the consequence of dismissal imposed on him.<sup>6</sup>

[19] Unauthorised possession of property and money belonging to, or under the control of, LRNZL was stated in its employment agreement with Mr Tsuchiya to be an offence constituting serious misconduct and giving rise to summary dismissal.

### **The roles and relative authority of Mr Tsuchiya and Ms Komatsu**

[20] Mr Tsuchiya began working for Last Resort in Japan before he was transferred to the Auckland office of its New Zealand business, LRNZL, in February 2015. He had a written employment agreement dated 1 April 2015. Mia Suzuki, LRNZL's director at the time, signed it. A schedule attached to the agreement described his position as a co-ordinator or counsellor on an annual salary of NZD\$33,000. It stated the purpose of his position was to undertake duties "as required by the director and manager". Ms Komatsu was the manager of the Auckland office at time.

[21] In August 2015 Nova took over the Last Resort business, including LRNZL.

[22] In September 2015 Mr Tsuchiya signed another version of the employment agreement. This version identified by Ms Harada as LRNZL's director. It was signed on her behalf by Ms Komatsu.

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<sup>3</sup> At [24].

<sup>4</sup> At [26].

<sup>5</sup> *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [20].

<sup>6</sup> *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [100] and [108].

[23] Ms Harada and Mr Kobata gave evidence that Last Resort employees (including those in New Zealand employed by LRNZL) were sent an organisation chart each month. This chart identified the positions employees held in the business hierarchy and any change to those positions. Individuals were not informed personally of any change by their manager. Instead they and other employees were expected to find out by looking at the chart. In her oral evidence Ms Harada said this practice might seem “a bit weird” but it was the company’s policy and part of its company culture.

[24] The October 2015 chart for the Auckland office of the Oceania Department of Last Resort’s Overseas Division showed Ms Komatsu in the position of Hosa (which translated, broadly, as assistant or advisor) and Mr Tsuchiya in the position of Shujiho (which translated, broadly, as assistant manager). Her name was listed above his on the chart.

[25] In the November 2015 chart Mr Tsuchiya was listed above Ms Komatsu. His name was preceded by the letters BM. His position was listed as Shunin (which translated, broadly, as person in charge). Ms Komatsu’s position was listed as Shuji (which translated, broadly, as manager or director).

[26] LRNZL submitted this showed Mr Tsuchiya was in a superior position to Ms Komatsu. It said he was responsible for the operation of its Auckland office from November onwards and Ms Komatsu took direction from him. This submission faced three difficulties in light of the following evidence.

[27] Firstly, around the time of this change, Ms Harada had also arranged for Ms Komatsu to be appointed as a director of LRNZL. She said this was because Ms Komatsu was the only person with permanent residence in New Zealand and Companies Office rules at the time required at least one such person be a director of a foreign-owned company. Ms Komatsu said she had agreed to take on the role on a short term basis only.

[28] However the effect of this change was that it was not apparent Ms Komatsu had been ‘demoted’ relative to Mr Tsuchiya, as LRNZL suggested. Rather she was, to any external observer of the company, now a director rather than merely a local manager.

[29] Secondly, no other evidence confirmed, as more probable than not, that Mr Tsuchiya was aware of the supposed change in his authority in the office, relative to Ms Komatsu, and had acted on it. He insisted she effectively remained in charge until she resigned in April 2016. She insisted Mr Tsuchiya was in charge from November onwards. Mr Tsuchiya denied having seen the chart. No evidence established he had.

[30] Mr Kobata said he considered “the power balance” changed dramatically from November 2015 and he had told Mr Tsuchiya to exercise his authority and manage the branches. Mr Tsuchiya denied any such conversation occurred. There were some emails in evidence, written in Japanese, where Mr Kobata had added the initials BM (in the Roman alphabet) after Mr Tsuchiya’s name (in Kanji characters). However there were none where Mr Tsuchiya had used the title himself or that suggested he had more authority than Ms Komatsu.

[31] Mr Tsuchiya had, in the later months of 2015 or early 2016, signed some IRD forms that Ms Komatsu previously signed but this did not confirm she was now in an inferior position to him. Payslips for January, February and April 2016 listed Mr Tsuchiya’s occupation was “student counsellor/branch manager”. Ms Komatsu was the person who dealt with entries into the pay roll records system. In similar payslips for Ms Komatsu her occupation is listed as manager and, in January 2016, as director.

[32] Thirdly, what remained for assessment was the competing evidence of Mr Tsuchiya and Ms Komatsu. It was effectively a ‘he said/she said’ contest which did not persuade me, on the balance of probabilities, that Ms Komatsu was subordinate to Mr Tsuchiya and acted on instructions from him. Rather, more likely than not, Mr Tsuchiya and other staff in the office as well as the students arriving for placements in schools saw Ms Komatsu as LRNZL’s senior representative in the Auckland office at the time.

### **How the allegations arose and Ms Harada’s investigation of them**

[33] Ms Komatsu resigned from her position with LRNZL in mid-April 2016 because she got a new job. She had been looking for one for several months. She had planned to leave the company from December 2015. She did so because she got permanent residence status in New Zealand and was no longer tied to working for LRNZL.

[34] On 27 April Ms Komatsu sent an email to a finance administrator based in Last Resort's Gold Coast office in Australia making the allegations about Mr Tsuchiya's conduct. The email was forwarded to Mr Kobata and Ms Harada in Japan that day. The email also referred to sending separately what, in its English translation, were described as "data attachments for the proof". Ms Komatsu said these were the result of research by her. The attachments were tables about exchange transactions carried out by Mr Tsuchiya and Ms Komatsu for LRNZL clients on arrival in Auckland, tables setting out mobile phone and SIM card sales, copies of payslips, and documents relating to the payment of the visa fees and Mrs Tsuchiya's school fees.

[35] Ms Harada's evidence was that she could not figure out some parts of those documents so thought it best to go to New Zealand. She spoke by telephone to Ms Komatsu on at least one occasion to ask for any further information and told her she was coming to Auckland. Ms Harada said she intended her visit to be a "complete surprise".

[36] In her meeting with Mr Tsuchiya and Ms Komatsu on 3 May Ms Harada asked Mr Tsuchiya to respond to the allegations but did not show him any of the documents on which they were based. She had those documents with her in the room. She did not show him them in their meeting on 4 May either.

[37] Following the meeting on 3 May Ms Harada also talked separately with Ms Komatsu and two other staff members in the office, including questions about the information on which the allegations were based. The contents of those conversations, questions asked and any answers given, were not disclosed to Mr Tsuchiya for his comment.

[38] The process Ms Harada followed failed to meet the obligations to give Mr Tsuchiya information which could have an adverse effect on the continuation of his employment and to give him a reasonable opportunity to comment on that information before a decision was made. He did not have a proper opportunity to seek advice or thoroughly respond to the information said to impugn his conduct. He was subject to a surprise attack. When he was sent home to await a call to return the next day, he was not told of the prospect of dismissal.

[39] These defects in how Ms Harada carried out her inquiries, described further below, were more than minor and resulted in Mr Tsuchiya being treated unfairly.

### **Adequacy of the investigation**

#### *The salary payments*

[40] Ms Harada decided to prefer Ms Komatsu's account of events because she considered Mr Tsuchiya gave contradictory accounts of who had approved the higher monthly salaries paid to him and Ms Komatsu from November 2015. She said Mr Tsuchiya, when asked in the 3 May meeting, told her the previous director Ms Suzuki had approved the change. However, when Ms Harada said Ms Suzuki had not told her that and she could check with Ms Suzuki, Mr Tsuchiya then changed his story and said Ms Komatsu had told him the salary increase was approved. Ms Harada said she had turned to Ms Komatsu and asked if that was true. Ms Komatsu said no. Ms Harada's evidence was that, from that point, she lost trust in Mr Tsuchiya because she considered his change of story was "so incredible and unbelievable".

[41] Ms Harada was not required to approach her investigations with a completely blank mind. She could form tentative views, including preferring Ms Komatsu's account of events, but she also had to keep a sufficiently open mind to genuinely consider what was said and to deal reasonably with conflicting accounts.<sup>7</sup> Ms Harada's evidence did not establish, to the standard of proof necessary, that she engaged in any critical assessment of what Ms Komatsu said or whether Mr Tsuchiya's evidence was really contradictory. In an email Mr Kobata sent to Mr Tsuchiya on 27 April, Mr Kobata asked if Ms Suzuki had approved the salary increases paid to Mr Tsuchiya and Ms Komatsu before Nova took over Last Resort. Mr Tsuchiya replied that he believed the decision was made before the takeover but it was Ms Komatsu who handled the matter. In that way it was not clear that Mr Tsuchiya's explanation on 3 May was contradictory or a change of story at all. However Ms Harada took what he said as inconsistent and therefore unreliable in deciding on what was no more than a 'he said/she said' contest in the accounts of Mr Tsuchiya and Ms Komatsu. It was, more likely than not, a view she reached due to a 'halo' effect from the negative impression she had already formed on the basis of the allegations made by Ms Komatsu and that coloured all her judgements of what Mr Tsuchiya said.<sup>8</sup>

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<sup>7</sup> *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [59] and [67]. See also *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [20].

<sup>8</sup> *Ritchies Transport Holdings Limited v Merennage*, above n 7, at [66].

[42] A fair and reasonable employer could not have accepted and preferred Ms Komatsu's account, particularly on the salary issue, without more careful assessment. Ms Komatsu had received a higher salary from November 2015. Her account was that she doubted from that outset that the increase was approved by managers in Japan but Mr Tsuchiya had told her it was. Despite those doubts, she made no further inquiries or report of her concern until after she resigned in April 2016. Further, she not only received the higher salary but had carried out the task of keying those payments for herself and Mr Tsuchiya into the payroll system herself. On Mr Tsuchiya's account it was Ms Komatsu who made the change and told him it was approved. Ms Harada's inquiry made no critical assessment of Ms Komatsu's own interest and role in implementing the increase or having failed to raise her supposed concerns about it any earlier than she did.

*Alleged discrepancies in the commissions in the money exchange service*

[43] Ms Komatsu's oral evidence confirmed Ms Harada had the currency transaction table with her at the 3 May meeting, had referred to it as being "evidence" she had, but did not show it to Mr Tsuchiya. The result was Mr Tsuchiya got no proper opportunity to offer an explanation about the information Ms Harada believed showed irregularities. The accusation, in a simplified form, was that he wrote down a rate in LRNZL's record lower than the rate actually paid on each particular day by the bank that the company used. This would mean the client got slightly less from the transaction and slightly more was left as income for LRNZL as a result. However the extra revenue could not be accounted for and the implication was that Mr Tsuchiya had somehow kept those funds for himself. The table was prepared by a staff member in the office who had no detailed knowledge of the exchange arrangements and Ms Harada had not checked the calculations. She, and Ms Komatsu, relied on what the staff member had worked out. And, as became clear during the Authority investigation, no real inquiry was made about transactions recorded in those tables carried out by Ms Komatsu in which there appeared to be similar differences in the rates charged. For each transaction either Mr Tsuchiya or Ms Komatsu went to the bank in person. Her tentative explanation for differences in the rates on transactions she was recorded as making was that she had asked Mr Tsuchiya to make those entries for her and she did not understand what she called "a manipulated process". Having since seen the table that had been prepared analysing those transactions, Mr Tsuchiya's evidence was that the figures in it were not correct. He said, if he had

entered a different rate, money in the office cash box would not have reconciled, but it did. He said the daily cash box count was checked by two other staff. That explanation may or may not be correct. The problem for LRNZL, in justifying its actions, was that Mr Tsuchiya should have had a real opportunity to give such an explanation during Ms Harada's inquiry and have had its veracity assessed as part of that process. The result was that LRNZL's evidence was not sufficient to establish it has acted reasonably in inquiring into that concern.

*Alleged discrepancies in funds from sales of SIM cards and mobile phones*

[44] Similar shortcomings were apparent in the concern that sales of SIM cards and mobile phones were not adequately accounted for. Ms Harada said proceeds of \$930 from the sales of phones and \$590 for the sales of cards were "missing". On 3 May Ms Harada had a table, provided by Ms Komatsu, setting out the various transactions on which this conclusion was based but it was not given to Mr Tsuchiya. Other staff were also involved in making sales to students. Ms Harada's evidence did not show any real inquiry to eliminate those other staff from being responsible for the alleged discrepancies. Mr Tsuchiya also suggested that the problem reconciling SIM card sales and proceeds might be because one telecom provider had given LRNZL some free cards, which were then given free to purchasers of phones, but the records assumed those transactions included a card sale, so some funds appeared to be missing.

*Alleged unauthorised payments to Mrs Tsuchiya*

[45] Another explanation for part of the shortfall in the funds from the phone and card sales was that some of the proceeds had been used to pay Ms Tsuchiya for work she did for LRNZL. On three Sundays she had worked with Mr Tsuchiya in dealing with groups arriving in New Zealand, which was a time when such sales were made.

[46] Mr Tsuchiya said his wife was paid in cash for this work and Ms Komatsu gave him the cash to pay Ms Tsuchiya. Ms Komatsu denied she did so.

[47] Ms Harada said she had considered Ms Komatsu's answer was trustworthy because Mr Tsuchiya "was solely in charge of this service and would have had authority for all transactions". This conclusion was based on the notion that Mr

Tsuchiya had what Ms Harada called “total authority” for the branch from November 2015. For reasons already given, the evidence did not establish that was so.

[48] Ms Komatsu’s oral evidence in the Authority investigation confirmed she knew Ms Tsuchiya worked on those Sundays. Ms Tsuchiya had been a Last Resort employee in Japan before coming to New Zealand. Her evidence was that Ms Komatsu offered her the Sunday work, said it was “for pocket money” and said she would be paid in cash. Ms Tsuchiya and Ms Komatsu had social contact outside of work, as was clear from some emails among the documents provided for the Authority investigation. This made what Ms Tsuchiya said about the informal arrangement with her more likely.

[49] LRNZL’s inquiry had not adequately discounted that Ms Komatsu was, in fact, involved in that informal arrangement but would not have wanted to disclose that to Ms Harada. Ms Harada’s inquiry failed to contemplate that prospect.

### **Flawed finding of serious misconduct**

[50] The result of those shortcomings in Ms Harada’s inquiry, and the conclusions she drew from it, was that her decision Mr Tsuchiya had committed serious misconduct was not one a fair and reasonable employer could have reached in all the circumstances at the time. Consequently Mr Tsuchiya had a personal grievance for which he was an entitled to an assessment of remedies.

### **Remedies**

#### *Lost wages*

[51] Mr Tsuchiya sought an award of lost wages for the period of eight months from his dismissal by LRNZL. Two points for resolution arose. One was to assess whether that was his period of actual loss and whether, during that time, he did enough to mitigate his loss. The other was what annual salary rate any such award should be based on – the \$49,000 rate paid from November 2015, which LRNZL said was not authorised, or the \$33,000 rate he was receiving prior to that increase.

[52] He got a new job in January 2017, as a sales representative. He had no other work or earnings during the time since his dismissal in May 2016 so lost eight months

pay as a result of his grievance. There was no suggestion he would have otherwise have left the LRNZL job during those eight months for some other reason.

[53] Having determined Mr Tsuchiya had a personal grievance and lost eight months' pay as a result, the Authority must order LRNZL to pay him at least three months' ordinary time remuneration.<sup>9</sup> The Authority may order a larger amount be paid, if his loss is assessed as being for more than three months, up to the eight months claimed. LRNZL disputed whether Mr Tsuchiya had done enough to offset his loss of wages, so this required an assessment of what he did during that time to find other work.

[54] His evidence was sufficient to warrant an award of lost wages for four months, not the whole eight months claimed.<sup>10</sup> In that time Mr Tsuchiya applied for only one other job, in May 2016. His explanation for not applying for more than one job was that he understood his visa requirements meant he could only apply for a job as a student counsellor. It was a small market and only one such job came up in that time. It was not until his wife left her cookery course and got a work visa that he was then able to change to a partner visa and apply for other categories of work. He said he taken advice from an immigration advisor about what he could and could not do. He and his wife had relied on the income from part-time work that Ms Tsuchiya got during that period.

[55] Mr Tsuchiya did not provide sufficient corroborating evidence to support this as an explanation for the whole period of lost wages claimed or why the visa change that did eventually enable him to get new work took eight months.

[56] The appropriate salary level on which to calculate the four months' lost remuneration awarded was the pre-increase gross amount of \$33,000. While this determination has not found LRNZL was justified in concluding Mr Tsuchiya was responsible for the payments to him and Ms Komatsu of higher salaries from November 2015 onwards, neither had the evidence established LRNZL had contractually committed itself to such an increase. For reasons explained further below, this did not require Mr Tsuchiya to pay back amounts he did receive but it did

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<sup>9</sup> Employment Relations Act 2000, s 128.

<sup>10</sup> Employment Relations Act 2000, s 123(1)(b) and s 128.

limit the rate at which the lost wages should be awarded. The appropriate award of lost wages for four months was \$11,000 gross.

*Compensation for humiliation, loss of dignity and injury to feelings*

[57] Mr Tsuchiya sought \$25,000 compensation under s 123(1)(c)(i) of the Act. His evidence in support of that claim was sufficient to warrant an award starting from the level of \$12,000.

[58] He was upset by his dismissal, how it happened and the financial stress from the period of unemployment that followed. He also felt humiliated by having to leave the workplace suddenly, without explanation, and when he met people he knew through his previous work in the relatively small Japanese community.

[59] His evidence was supported by what Ms Tsuchiya said she observed after her husband's dismissal. She said he lost his appetite and suffered from sleeplessness, and troubled sleep. She said he began groaning in his sleep and sometimes awoke "like he was frightened by something".

[60] One further factor, increasing the injury to feelings and humiliation Mr Tsuchiya experienced, warranted an increase to the level of the award.

[61] Immediately following his dismissal Last Resort served a notice on Mr Tsuchiya's mother in Japan demanding she pay JPY 1,952,822 (about NZD \$25,000). According to a translation of the notice this was demanded because Last Resort said Mr Tsuchiya had "converted a part of sales and claimed his personal expenses to the company without an approval". The notice said Mrs Tsuchiya would be subject to a criminal complaint if she did not pay the compensation demanded within ten days.

[62] Last Resort's demand relied on a deed of warranty Mrs Tsuchiya signed in August 2012. Its terms said she would pay compensation if Mr Tsuchiya violated his employment agreement or caused damage to the company in the following five years.

[63] LRNZL's evidence was that such deeds were common practice and lawful in Japan. Whether or not that was so was not relevant for the Authority purposes in New Zealand. Neither was Mrs Tsuchiya's reported upset at these events or the legal fees she incurred in resisting the demand. She did not pay Last Resort any money.

[64] Compensation cannot be awarded for distress caused to a family member of a person who has been found to have been unjustifiably dismissed. What was compensable was the upset and humiliation Mr Tsuchiya understandably experienced as a result of Last Resort subjecting his mother to those demands. Made three days after the letter of dismissal was sent to Mr Tsuchiya, the demand to his mother has to be seen as a measure calculated to increase his humiliation and shame at being dismissed. An increase of \$4000 in the level of distress compensation awarded was warranted as a result of the company causing him that upset through actions this determination has found LRNZL was not justified in taking.

### **Reduction for contribution?**

[65] The Authority must consider the extent to which actions by Mr Tsuchiya contributed to the situation giving rise to his grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.<sup>11</sup>

[66] LRNZL submitted reductions were required for blameworthy conduct by Mr Tsuchiya, including authorising his own salary increase and the discrepancies in phone and card sales and foreign exchange transactions. For reasons already given, its evidence in support of those propositions fell far short of justifying his dismissal or a reduction in the remedies granted for its unjustified actions. It relied on the notion that Mr Tsuchiya had clear authority and responsibility during that period, which LRNZL's evidence did not establish.

[67] LRNZL's evidence for the Authority investigation left considerable doubt as to whether Mr Tsuchiya alone, or he and Ms Komatsu together, or Ms Komatsu alone were responsible for the questioned activities and administration practices in the branch. None of those three prospective explanations were sufficiently established as being more probable than not. On that basis no reduction of remedies awarded could fairly be made.

[68] Neither was Mr Tsuchiya responsible for the shortcomings in the inquiry LRNZL conducted into its concerns. No reduction of remedies awarded to him was required.

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<sup>11</sup> Employment Relations Act 2000, s 124.

## **Wage arrears**

[69] Mr Tsuchiya sought three amounts as arrears of wages – pay for period from 1 May until the issue of his dismissal letter on 9 May, the one month’s notice period in his employment agreement and holiday pay for the 42.2 days showing as accrued to him on his last pay slip.

[70] The notice period, if it were due to be paid, is covered by the award of lost wages already made. LRNZL accepted the other two amounts were due to him, at the rate applicable for his approved annual salary of \$33,000. For reasons already given in relation to the lost wages award, the \$33,000 rate was the right rate for calculating the wage arrears.

[71] Accordingly wage arrears of the following amounts are owed: \$542.46 for six working days that fell in the period from 1 May to 9 May and \$3815.34 for the 42.2 days holiday pay.

## **LRNZL’s counterclaims – what does Mr Tsuchiya still owe the company?**

### *Advance for a work visa*

[72] LRNZL said Mr Tsuchiya still owed \$1911 for half the cost of his work visa. Mr Tsuchiya submitted he should not have to pay this amount. In an email to him on 28 July 2015 Ms Suzuki, LRNZL’s director at the time, agreed the company would pay half the fees, which totalled just over \$3800. However Mr Tsuchiya said Ms Komatsu later told him the company would meet the full amount. Ms Komatsu denied this was correct and said Mr Tsuchiya had agreed to pay half the fee.

[73] The evidence of Mr Tsuchiya was not sufficient to displace the arrangement apparent from Ms Suzuki’s email. LRNZL was entitled to have Mr Tsuchiya refund the other half of the full fee that it had paid on his behalf.

### *Repayments still due for tuition fee loan – \$5492.50 or \$9990?*

[74] Mr Tsuchiya borrowed \$19,990 from LRNZL to pay tuition fees for a culinary diploma course Ms Tsuchiya began in January 2016. He said Ms Komatsu had authorised the loan. Ms Komatsu denied doing so.

[75] By the time of his dismissal he had already paid back more than half of this amount. At issue was whether or not he should also pay an amount for commission that LRNZL would have charged the institution at which Ms Tsuchiya enrolled, if she were an ordinary client of LRNZL.

[76] Mr Tsuchiya accepted he still owed \$5,492.50 but disputed any liability to also pay an amount equivalent to the commission, which was \$4,497.50.

[77] LRNZL's evidence did not establish that it would normally collect a commission on such an enrolment by a family member of one of its employees. From her previous work for Last Resort in Japan Ms Tsuchiya said she understood it was not its policy to take a commission in those circumstances. There was insufficient information about the arrangement made to clearly establish Mr Tsuchiya was obliged to also pay for the commission amount. He must pay (or have deducted from what LRNZL owes him) only the \$5492.50 that he acknowledged was still outstanding.

*Refund of salary paid without authorisation?*

[78] LRNZL sought an order requiring Mr Tsuchiya to repay \$7264 that it said was the amount of extra salary paid to him without proper authorisation.

[79] While the evidence confirmed there was no documented authorisation from head office in Japan for the higher salary amounts paid to Mr Tsuchiya and Ms Komatsu from November 2015, it did not establish he was responsible for initiating the increase or he knew he should not get it but took it anyway. It remained possible that Mr Tsuchiya's explanation, that he understood Ms Suzuki authorised the increase because that was what Ms Komatsu told him, was correct. Neither his account nor Ms Komatsu's was compellingly established as not only being possible but also being more probable than not, and more probable than the other person's account.

[80] Significantly LRNZL had not sought any repayment of the higher salary amounts Ms Komatsu received, despite her supposed disquiet and doubt over several months that the payments were due to her. If it did not seek repayment from her, it was not just Mr Tsuchiya should have to repay amounts he may have reasonably believed were authorised for payment.

*Money for SIM card and phone sales and exchange rate commissions*

[81] No order is made for Mr Tsuchiya to pay any of the amounts LRNZL described as unexplained or discrepancies in revenue from phone and card sales or exchange commissions. For reasons already covered in this determination Ms Harada's inquiry did not establish Mr Tsuchiya was to blame for whatever shortcomings there appeared to be in the records of those transactions.

**Costs**

[82] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Tsuchiya may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum LRNZL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[83] The parties could expect the Authority assessment of costs to start from its usual notional daily rate of \$3500 that was applicable at the time Mr Tsuchiya's application was lodged on 20 June 2016. Unless particular circumstances or factors required an upward or downward adjustment of that tariff, such as a without prejudice offer to settle for an amount greater than achieved in the Authority determination, that would result in an award of \$8000 as a contribution to the costs of representation. This amount applies the tariff for the two day investigation meeting and allows a further \$1000 for the telephone conference to hear oral closing argument.

Robin Arthur  
Member of the Employment Relations Authority