

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 191  
3035733  
3045635

BETWEEN                      SEAPOOLMALO LOLI  
Applicant

A N D                              VIRGIN AUSTRALIA (NZ)  
EMPLOYMENT AND  
CREWING LIMITED  
Respondent

Member of Authority:      Nicola Craig

Representatives:              Michael O'Brien and Emma Moss, counsel and advocate  
for the Applicant  
Jessie Laphorne and Joseph Williams, counsel for the  
Respondent

Investigation Meeting:      18 and 19 September 2019

Submissions Received:      At the investigation meeting and 24 September 2019 for  
the Applicant  
At the investigation meeting for the Respondent

Date of Determination:      8 May 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Seaooloumalo Loli was unjustifiably suspended by Virgin Australia (NZ) Employment and Crewing Ltd (VANZ).**
- B. Mr Loli was unjustifiably dismissed by VANZ.**
- C. Within 28 days of the date of this determination, VANZ is to pay Mr Loli the following sums which have been reduced for his contribution, as remedies for his personal grievances:**

- (i) **\$440.87 gross as lost wages for the suspension;**
- (ii) **\$7,267.35 gross as lost wages for the dismissal; and**
- (iii) **\$10,000 as compensation for non-economic loss.**

**D. Costs are reserved.**

**Employment Relationship Problem**

[1] Seooloumalo (Seao) Asa Taliilagi Loli was employed by Virgin Australia (NZ) Employment and Crewing Limited (VANZ or the company) as a flight attendant.

[2] In June 2018 a VANZ captain reported to the company that a cabin supervisor had told him that another cabin supervisor had discovered Mr Loli in an “inappropriate interaction” with a passenger on board an aircraft.

[3] Mr Loli was suspended and an investigation begun. The initial issue was whether Mr Loli had engaged in oral sex with a passenger in the rear galley during a flight on 18 February 2018. This was later expanded to include an allegation about giving the same passenger beer which he was not entitled to and did not pay for, to gain favour with him, as well as preventing another flight attendant from coming into the galley to pursue her duties.

[4] In August 2018 Mr Loli, whilst still employed by VANZ, filed a claim in the Authority against the company.<sup>1</sup> He claimed that he had been subject to unjustified actions by VANZ to his disadvantage and that the company had breached its duty of good faith. Those claims related to Mr Loli’s suspension by VANZ and a disciplinary process which was in progress at the time. VANZ denied Mr Loli’s claims.

[5] Mr Loli was later dismissed as VANZ found the allegations to be substantiated and to individually and collectively amount to serious misconduct.

[6] Mr Loli lodged a further claim in the Authority. Although the issues in the second claim appeared to largely or entirely capture those in the first claim, as well as

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<sup>1</sup> File number 3035733.

add new claims, Mr Loli did not wish to withdraw the first claim. I decided to hear both claims together.

[7] Mr Loli applied to have his claims removed to the Employment Court. I decided not to remove the proceedings.<sup>2</sup>

[8] An investigation meeting was held on 18 and 19 September 2019. I heard evidence in person and by telephone. I heard from Mr Loli, a former flight attendant who was a passenger on the 18 February 2018 flight, the 18 February cabin supervisor, Conly Reti (VANZ Leader, Crew Development), Vivienne Vincent (Head of Cabin Crew) and Kate Davis (Employee Advisory Specialist). I also heard from the cabin supervisor on the 18 February 2018 flight by telephone from Samoa. Submissions from both parties were heard at the investigation meeting with Mr Loli's representative being given the right of reply after the meeting.

[9] This determination has been issued more than three months after the day on which the last information was revived. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act (the Act) was applicable.

[10] I have not recorded everything received from the parties but have stated findings, expressed conclusions on issues necessary to dispose of the matter, and specified orders made.<sup>3</sup>

## Issues

[11] The issues for investigation and determination are:

- (a) Was Mr Loli unjustifiably disadvantaged by VANZ's action in relation to his suspension?
- (b) Was Mr Loli unjustifiably disadvantaged by VANZ's actions in various other regards?
- (c) Was Mr Loli unjustifiably dismissed by VANZ?

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<sup>2</sup> *Loli v Virgin Australia (NZ) Employment and Crewing Ltd* [2019] NZERA Auckland 265.

<sup>3</sup> Section 174E of the Act.

(d) If Mr Loli establishes a personal grievance claim what remedies (if any) should he receive?

(e) If Mr Loli establishes a personal grievance claim, is he entitled to special damages regarding unlawful suspension and investigation leading to costs?

(f) Did VANZ breach its duty of good faith to Mr Loli?

(g) Did VANZ breach Mr Loli's employment agreement?

(h) If VANZ breached either or both of those obligations should penalties be imposed on it?

[12] The statement of problem in file 3045615 identified five groupings of disadvantage claims, covering the events regarding the suspension as well as the investigation process and speed.

[13] In addition, Mr Loli had initially pursued a discrimination personal grievance claim but in closing submissions on his behalf it was identified that this was not being pursued as a standalone claim.

### **Mr Loli's employment history**

[14] Mr Loli had a long term ambition to become a flight attendant. He achieved this in 2008 when he was appointed by Pacific Blue Airlines (now Virgin Australia). He flew on planes operating between New Zealand, Australia and the Pacific Islands. His employment was covered by a collective agreement between VANZ and the E tū union, dated December 2017.

### **The start of the investigation process**

[15] Having heard from the VANZ captain, Mr Reti interviewed the female cabin supervisor who had spoken to the captain. She referred to rumours of Mr Loli having oral sex with a passenger and a male cabin supervisor on the flight catching him but simply telling him off. She identified the other cabin crew.

[16] Mr Reti proceeded to conduct initial interviews with other crew on the 18 February flight. These were flight attendants I will refer to as A and B and the cabin

supervisor. Attendant A was an experienced flight attendant whereas B was a newer employee.

[17] The flight attendants reported hearing strange or slurping sounds from the rear galley while resting towards the back of the plane. Attendant A reported the cabin supervisor telling her that he had caught Mr Loli giving a passenger “head” in the galley. Attendant B said she had tried to enter the galley and Mr Loli had purposefully kept her away, telling her to go back to rest for another hour. Also Mr Loli had told her to give the passenger several complimentary beers and the cabin supervisor told her he had caught Mr Loli in “the act”.

[18] Mr Reti interviewed the cabin supervisor who denied being aware of a sexual act occurring on that flight.

### **Mr Loli’s suspension**

[19] On 26 June 2018 Mr Loli was phoned and advised that there would be a meeting the following day. Mr Loli asked what it was about and Mr Reti replied that he was not in a position to tell Mr Loli that until the next day. Mr Reti said the matter was not a disciplinary process at that stage but could become one.

[20] The following day Mr Loli met with Mr Reti. Mr Reti asked dozens of questions about a flight on 18 February 2018, which Mr Loli answered. Mr Reti then told Mr Loli that there was an allegation that he had been involved in a sexual act with a passenger in the galley. Mr Loli strongly denied the allegation. He reports being shocked and very distressed although Mr Reti’s impression was of rather less impact.

[21] Mr Reti then left the room and after about half an hour came back and told Mr Loli he was suspended, handing him a letter confirming that. The letter indicated there would be a formal investigation into the allegations of misconduct and that Mr Loli was suspended on full pay with immediate effect while the investigation took place. He was directed to keep details of the matter confidential as far as possible.

[22] On 9 July 2018 VANZ again met with Mr Loli, who this time brought a union representative. The meeting was to discuss the proposed continuation of the suspension and hear Mr Loli’s feedback on that proposal. Mr Loli was given the opportunity to comment and stated that he did not believe the suspension should

continue any longer and gave reasons for that, including the emotional and financial impact, along with his willingness to maintain confidentiality if he returned to work.

[23] VANZ adjourned and decided to continue the suspension, noting the serious nature of the allegations. Mr Loli was notified of this verbally and in writing.

[24] Mr Loli remained suspended until September 2018 whilst VANZ undertook an investigation and disciplinary process. It is fair to say that both parties objected to aspects of the other's delay or conduct during the process.

### **Was Mr Loli's suspension unjustified?**

[25] The agreement covering Mr Loli's employment with VANZ allowed for suspension.<sup>4</sup> However, there are obligations on employers before they impose this serious measure which removes an employee from the workplace as well as potentially having financial implications.

[26] VANZ acknowledged in the interview on 9 July 2018 that there had been a lack of opportunity to respond or comment on the feedback regarding the suspension before the decision was made to suspend Mr Loli.

[27] Mr Loli was asked to come in the 27 June meeting about an undisclosed subject. Once there he was asked an extensive series of questions. The interview was fairly lengthy, running to five pages of notes. Only towards the end was Mr Loli was told what the serious allegations against him was. He was not asked about the prospect of suspension before he was told it was happening.

[28] There was no justification for deciding to suspend Mr Loli without hearing from him on that subject. The meeting on 27 June 2018 was arranged and provided an opportunity to hear Mr Loli's views on suspension but VANZ did not use the meeting for that purpose. Rather it was used only to undertake an initial questioning of Mr Loli before informing him of the allegation.

[29] VANZ did not meet its obligations before suspending Mr Loli and its action was unjustifiable. Mr Loli was significantly disadvantaged financially by his suspension as he missed out on allowances which were only paid when travelling. VANZ unjustly subjected Mr Loli to suspension which was to his disadvantage.

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<sup>4</sup> Clause 92 of the collective agreement between VANZ and E tū Inc 2017

[30] Mr Loli suffered financial loss as a result of his suspension. He was paid on base pay making a difference of \$881.73 gross per fortnight, compared to his average gross earnings over the previous 12 months. For the 12 weeks of his suspension this resulted in a \$4,870.30 gross shortfall.

[31] Mr Loli was suspended for a period of around two weeks before he was given the opportunity on 9 July to comment on whether he should be suspended. He comments in detail on the effects the suspension was having on him. At that point VANZ considered whether to continue the suspension. It rectified its previous error and its action from that point in suspending was justified.

[32] Mr Loli's lost remuneration for that period of two weeks amounts to \$881.73 gross. I consider the issue of contribution below under the dismissal grievance.

[33] I note the evidence regarding Mr Loli's compensation claim. Mr Loli was shocked and then distraught by the suspension. He spent some hours immediately afterwards in his car trying to process what had happened. He describes crying and praying, as well as worrying about his reputation, career, community and family. He stayed in his room for some time refusing to eat or come out. He contemplated ending his life as he could not face his friends and family. He would sleep during the day and ruminate at night. While I consider some of these events would have occurred without suspension simply on the basis of the allegations, Mr Loli's removal from his workplace was a significant factor.

[34] Mr Loli received numerous messages from crew members asking if the rumours were true. He was also aware of his situation being discussed in Samoa due to close links between crew members and their Samoan families.

[35] The effects on Mr Loli of suspension were significant however, in assessing the amount of compensation, I take into account that it should only cover the effects which occurred prior to his being properly consulted about suspension. I consider it appropriate to make a combined award with the dismissal grievance below.

### **Allegations formalised and investigation continues**

[36] On 11 July 2018 VANZ gave Mr Loli a letter setting out the particulars of the allegations against him and referring to provisions of the company's Code of Conduct and collective agreement alleged to be breached. The allegations against Mr Loli were, in summary:

- Allegation 1 - engaged in oral sex with a passenger behind a closed curtain in the rear galley during flight; and
- Allegation 2:
  - (i) removed cans of beer from the service cart at least three times and given them to a passenger who was not entitled to them in the absence of payment;
  - (ii) provided the beer for the purpose of "gaining favour" with the passenger; and
  - (iii) prevented a crew member returning to the galley and resuming her duties; telling her to go back on break for another hour.

[37] VANZ proceeded to conduct more interviews with relevant staff. The flight attendants and cabin supervisor from the 18 February flight were re-interviewed. Another staff member reported that a ground steward in Samoa had spoken to her about events which could be related. VANZ decided to hold off providing the statements received so far, in order to interview that staff member and the ground steward.

[38] In late July the cabin supervisor was suspended regarding his conduct in relation to events on 18 February 2018. He was eventually dismissed in September 2018 for failing to report the sexual act and failing to provide a truthful account of what occurred, when interviewed by VANZ.

[39] On 8 August 2018 VANZ wrote to Mr Loli confirming the two allegations and providing records of the interviews undertaken, correspondence between the parties to date and employment documentation (including the Code of Conduct and the employment agreement). A written response was sought by 5pm on Monday 13 August with a meeting time set for 16 August.

[40] Mr Loli's advocate Ms Moss sought an extension due to the volume of material supplied and a resulting delay in the meeting date. VAZN extended the written response date to 20 August followed by a meeting on 22 August.

[41] On 13 August 2018 VANZ wrote again setting out a further allegation (allegation 3) concerning events during suspension, along with documentation related to that allegation. As detailed below, in error this letter was not sent to Mr Loli and the allegation in it was later withdrawn.

### **Personal grievance and mediation request**

[42] Prior to receiving the witness statement, on 28 July 2018 Mr Loli's representative raised personal grievances on his behalf. The company replied on 6 August.

[43] Mediation regarding alleged unjustified suspension was sought on Mr Loli's behalf via the Mediation Service on 3 August 2018. VANZ declined this request on the basis that the disciplinary process was on-going.

[44] Mr Loli's first claim was then lodged in the Authority with the parties on 3 September 2018 being directed to mediation. Mediation was set for 19 September.

### **Information requests**

[45] Meanwhile the parties had become embroiled in information issues. Between 17 July and 28 August 2018 the parties' representatives exchanged correspondence regarding requests on Mr Loli's behalf for information. The relevance and availability of some of the information was in dispute.

[46] Having been represented by an advocate previously, Mr Loli then additionally instructed Mr O'Brien. Mr O'Brien wrote on 21 August 2018 informing VANZ of his instruction, raising concerns about the information provided and expressing a view that the failure to provide information was a breach of the duty of good faith. Further, Mr Loli was said not to be in a position to provide a response to the allegations or attend the proposed 22 August meeting, until the requested information was provided.

[47] On 24 August, after extending the timeframe to respond VANZ extended the timeframe for a written response to Tuesday 28 August 2018 with the response

meeting to on 30 August. The letter sets out the company's concern that Mr Loli may be attempting to delay his response by repeatedly requesting information which has already been advised is either unavailable or outside the scope of the investigation. Mr Loli was informed in the letter that if he did not provide a response within those timeframes that VANZ would be "forced" to make a decision on the basis of the information it had to hand.

[48] Following this there was a disagreement between the parties regarding Mr Loli being unable to provide a response due to pre-planned leave, with the company disputing that leave had been approved for the dates alleged. However, VANZ agreed to a short extension, with the written response on 30 August and a meeting scheduled for 31 August 2018. In the letter of 29 August extending those timeframes VANZ advised that it would not extend them further and that if no response was received a decision would be made on the basis of the information it had.

[49] In the meantime Mr O'Brien had objected on 28 August to Mr Reti as the decision-maker on the basis of alleged predetermination.

[50] On 30 August Mr O'Brien advised that he could not meet on 31 August due to a client commitment. He requested that VANZ contact him to arrange a suitable meeting time, describing it as extremely unhelpful for the company to continue to seek to unilaterally impose meeting times.

### **VANZ's preliminary view**

[51] On 5 September 2018 VANZ notified Mr Loli in writing of its preliminary view that the three allegations were established on the balance of probabilities, that they amounted to serious misconduct and that summary termination of Mr Loli's employment was the most appropriate outcome. Any response from Mr Loli was sought in writing by 12 September with a meeting set for 14 September at 10am.

### **Revocation of Allegation 3**

[52] On 7 September 2018 Mr O'Brien advised VANZ that neither he, Ms Moss nor Mr Loli had ever received the 13 August 2018 letter which set out allegation 3. The company later discovered that the email attaching the August letter had inadvertently been sent to an unknown third party, due to a typographical error in the recipient's email address.

[53] The company confirmed late on 10 September, that it acknowledged the error and had taken steps to negate any potential privacy breach. It revoked allegation 3 but advised that its preliminary view of the appropriate outcome remained the same. The timeframes were left in place.

### **Dismissal**

[54] On 12 September 2018 VANZ sought a response regarding Mr Loli's attendance at the meeting proposed for 14 September, with Ms Vincent to hear Mr Loli's response. Mr O'Brien advised that Mr Loli would not be attending but a meeting would be sought at another time.

[55] Mr O'Brien emailed VANZ on 13 September, replying to its 10 September email. This included an objection to the timeframe and a proposal of a 24 or 25 September meeting.

[56] Mr O'Brien also raised concerns regarding the impartiality of Mr Reti who had been leading the investigation and having acted inappropriately as regards a witness. Impartiality concerns were also raised regarding Ms Vincent who the company had identified to be the person making the decision on the outcome of the process. There was a further request for information already requested which VANZ had declined to provide.

[57] Via 17 September letter, VANZ did not accept the impartiality allegations, reinforced its views that the timetable was reasonable, the information irrelevant and the decision would go ahead on the information available.

[58] The same day Mr Loli's representative emailed VANZ noting that Mr Loli wanted to meet and asking Ms Davis to contact him about to discuss meeting times. There was a discussion between Ms Davis and Mr O'Brien which at least included Ms Davis saying she had not read the email and would consider it.

[59] Ms Vincent was sent documents including the 8 August 2018 letter of allegation and attached documents and Mr Reti's 5 September letter. Having reviewed them she reached a conclusion on 18 September and informed Ms Davis of her decision that the most appropriate outcome was summary termination of Mr Loli's employment. A decision was made to hold off informing Mr Loli to see if resolution could be obtain through mediation.

[60] The parties attended mediation in the morning of 19 September. At 10.10am during a mediation break, Mr O'Brien emailed VANZ seeking both a response to his 17 September email and a time and date to meet. Ms Davis was unable to recall whether she saw this email before taking the next step. VANZ made a decision to go ahead and issue the dismissal letter.

[61] At 11.15am on 19 September, following shortly after the conclusion of mediation, the company emailed Mr Loli, via his representative, a letter from Ms Vincent giving notice of summary termination of his employment for serious misconduct.

### **Reconsideration of dismissal decision**

[62] Mr Loli's representative responded that he was flabbergasted to have received the email and the company's finding. He sought a retraction of the decision and for a meeting to be set up for Mr Loli to respond to the allegations.

[63] On 21 September VANZ wrote noting that it would not retract its decision but would "as a matter of goodwill" consider any written submissions by Mr Loli and whether there may be "cause to reconsider its decision".

[64] A lengthy response from Mr Loli and a letter from his representative were provided on 26 September. These included Mr Loli pointing out inconsistencies between the two flight attendants' various statements, casting doubt on the credibility and reliability of the flight steward and suggesting malice on the part of others interviewed but less central. Photos were included. Mr Loli also offered to provide his phone for forensic analysis regarding photos.

[65] Ms Vincent did not consider there was anything which could not have been raised earlier. There were some new issues raised but she did not see these as sufficient to change the decision. By 11 October 2018 letter VANZ advised that it remained of the view that its decision to terminate Mr Loli's employment for serious misconduct was justified. The previous decision was confirmed.

**Consideration of dismissal grievance**

[66] Under s 103A of the Act the test for whether a dismissal is justified 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.

[67] In assessing whether Mr Loli was unjustifiably dismissed I focus on the information which was available to VANZ at the time it announced the dismissal on 19 September 2018. VANZ decided to hear and consider the information provided for Mr Loli after that but it explicitly stated that the dismissal decision stood. While the company could be seen as deserving credit for allowing further information to be provided and reconsidering, it was not prepared to reverse its decision and so must stand by the decision made on 19 September to dismiss on the basis of the information it had to hand at that point. In addition, after 19 September Mr Loli was no longer an employee and so VANZ no longer owed him a duty of good faith.<sup>5</sup>

**Procedural justification**

[68] I look firstly at whether VANZ acted in a procedurally fair manner in its undertaking of the process. This includes considering the questions outlined in s 103A (3) of the Act.

**VANZ's Investigation**

[69] Did VANZ sufficiently investigate the allegation against Mr Loli? I take into account the fact that it is a large employer with good access to human resources and legal services.

[70] VANZ certainly interviewed a number of possible witnesses, including one who was not an employee and was based in Samoa. Some witnesses were interviewed on several occasions. The questioning of witnesses was perhaps initially not especially detailed but once more information was received, more detailed interviews were undertaken with key witnesses. When additional possible avenues arose, the company expanded its interviewees. Detailed notes of the interviews were kept and witnesses asked to sign them to confirm their accuracy.

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<sup>5</sup> See for example *Idea Services Ltd (in stat man) v Barker* [2012] NZEmpC 112.

[71] However, there are criticisms raised on Mr Loli's behalf. In addition I note some lack of clarity in certain important witness statements, however I will deal with these when looking at the substantive justification for the dismissal.

*One passenger, two or three*

[72] VANZ chose not to attempt to speak to any passengers regarding this flight.

[73] In its allegations VANZ did not identify the passenger or passengers involved. The first allegation however, defines a guest (or passenger) as "the Guest". That description is then used in allegation 2. On their face therefore the allegations relate to the same person. This also fits with the reference to "gain favour" in the second allegation; another issue to which I will return below.

[74] However, during the investigation meeting it became apparent that VANZ representatives did not have the same view about whether one passenger was involved in both allegations. Mr Reti decided that it was one person. Ms Vincent was not certain whether the same person was in the two allegations. Ms Davis, who was liaising with Ms Vincent at the crucial times, thought that Mr Reti had never decided that they were the same person.

[75] In addition, VANZ did not pursue talking to the person who Mr Loli told the company during an interview was a friend of his who kissed him on disembarkation. According to Mr Loli this person was not the passenger who spent time in the galley nor the person given beer.

[76] The lack of common understanding between the investigator and the decision-maker is problematic for VANZ. These issues link to both the procedural and substantive aspects of justification.

*Seat number and identity of passenger/s*

[77] Witnesses were not able to clearly identify which seat the passenger, if it was one passenger, was sitting in. This is perhaps is not surprising as the issue was not raised with VANZ for some months after the flight.

[78] Mr Loli's evidence regarding the seat number of the passenger he says spent time in the galley with him talking, was not entirely consistent. On 27 June 2018 Mr

Loli referred to the passenger being in rows 12 or 13 (squashed between the seats), then later to him being in row 11 or 12. Towards the end of the interview he referred to row 12, then seat E (without a row), and then to the passenger being in 11E.

[79] In his witness statement for the Authority, Mr Loli said he had not identified to VANZ that the passenger was in 11E. Mr Loli accepted the accuracy of the notes and when asked in cross examination whether he had referred in the interview to seat 11E, confirmed that he had.

[80] Flight attendant A thought the passenger was in seat 12E, noting that she remembered clearly where he was sitting and the row of guys he was with. Flight attendant B did not categorically identify the seat of the passenger concerned.

[81] In any event neither of the passengers in 11E or 12E were entitled to complementary alcoholic drinks.

[82] VANZ refused to attempt to contact the passenger involved. Mr Reti says that from the company's perspective it was not about the passenger's identity, it was about where he was sitting. However, he accepted that from Mr Loli's perspective the identity was relevant to his defence. Mr Reti says that he could have contacted the passenger but VANZ decided not to because it wanted to protect its "brand".

[83] Ms Vincent did not consider the identity of the passenger to be critical. She and Ms Davis did not believe that a passenger would be willing or likely to respond to a question about whether they had been involved in a sexual act on the flight. She did not think it was significant to ask the passenger whether they had got complimentary drinks.

[84] Ms Davis did not consider the identity of the guest as relevant to VANZ's considerations. However at the investigation meeting she accepted that if the guest had denied being involved in a sexual act, that may have been relevant and the company would need to have considered whether the statement could be relied upon.

[85] The variable evidence over which seat the passenger was sitting in was not the only information VANZ had. An email from the staff member who reported the ground steward's involvement identified a named person as the passenger involved in the sexual act. However, VANZ appears to have taken no steps to follow up

regarding that name. This name was not mentioned to the ground steward or cabin crew other witnesses.

[86] Regardless of whether the sexual act was likely to be admitted to by a passenger, the issues of complimentary drinks should still have been pursued with him. In any event I am not satisfied that VANZ's concern about its brand was a sufficient reason not to attempt to speak to the passenger. In addition VANZ could have followed up with the witnesses which it had regarding the name provided in the email to see if this prompted more information. VANZ did not sufficiently investigate the allegations.

#### *Mr Loli's phone*

[87] Mr Loli suggested that VANZ should have arranged for a forensic analysis on his phone. VANZ's concern that photos could have been deleted was understandable and anything less than a forensic analysis would seem to keep that prospect open. In any event, Mr Loli did not volunteer to hand over his personal phone until the material sent to VANZ for reconsideration and so I discount this prospect when considering VANZ's dismissal decision.

#### **Information**

[88] Somewhat related to the question of the adequate investigation is whether Mr Loli was supplied with information which he requested.

[89] Mr Loli categorises the information requested as being in three groups: evidence to support the allegations near the start, general employment related information and supplementary information once the allegations and witness statements had been received. While that is broadly accurate, VANZ emphasises the number of pieces of information requested as well as their lack of apparent relevance.

[90] Unlike with its witness statements, VANZ provided the information in dribs and drabs. While this could be seen as providing each piece of the information once it came to hand, it also may have given VANZ an impression that there were a larger number of requests than was actually the case.

[91] I do not find all the information which was sought on Mr Loli's behalf to be sufficiently relevant and available to VANZ. For example, the stock reconciliations

sought of alcohol coming on and off the plane were unlikely to have been helpful in terms of the allegation that a passenger was wrongly given free drinks.

[92] Although there is no obligation when information is requested to provide a rationale or basis for the request, not doing so early, particularly when the connection is not so obvious and the information more troublesome to obtain, can help contribute to disputes such as occurred here regarding what information was relevant.

[93] VANZ supplied what it considered relevant. However, what it was focusing on was the evidence it needed to make its decision. It did not appear to consider the matter from the perspective of Mr Loli's defence of the allegations. The prime example of this was the VANZ's position was that the passenger was not named in the allegations thus his involvement was not relevant to the investigation. It refused to provide the passenger's name, although various reasons were given for this at different point. Privacy concerns could have been dealt with by making arrangements for limited provision or use of the information.

[94] Whilst VANZ provided much of the information sought, its focus on its case rather than considering Mr Loli's defence was unsatisfactory.

### **Delays**

[95] Both parties accused the other of delays.

[96] VANZ took some time at the earlier stages. The allegations were not put in writing until informally by email on 5 July 2018. At that point there was no mention of issues with alcohol. It was not until 11 July that the allegations were fully formalised in a letter of that date, some 15 days after suspension.

[97] There was no partial provision of witness statements after the initial interviews, nor after the late June and early July interviews. The company decided to wait after 1 August 2018 until it got additional two witnesses' statement, before providing anything. No witness statements were provided until 8 August; almost six weeks after the suspension. From the evidence this appears to reflect an Australian practice of providing an allegations letter with few, if any, documents and then providing the bulk of documents later when a meeting is proposed.

[98] Whilst drip feeding statements may also be seen as undesirable, it was unfair to leave Mr Loli almost six weeks after the initial meeting on 27 June with no supporting evidence, despite requests for the same. Whilst I accept that interviewing witnesses in this industry is less straightforward than one where everyone is working together in one place, I do not think that completely excuses the failure.

[99] VANZ chose to run the process by waiting until all its witness information was ready before delivering it. However, it not seem prepared to extend the same courtesy to Mr Loli, expecting him to respond even before issues about document requests had been resolved.

[100] A lot of material was supplied by the company on 8 August 2018 (150 plus pages) and a response sought within about three working days.

[101] In a situation where there had been no witness statements or summary of such provided previously, there were multiple witnesses and 150 pages of documents supplied, it was unreasonable for VANZ to expect a reply in three working days. Although the company agreed to an extension, my sense is that VANZ saw itself as being generous in allowing extensions in a situation where, at least to start with, it had set an unreasonable timeframe.

[102] Although VANZ granted further extensions in some instances these were very short extensions, such as a day from 30 to 31 August.

[103] There were also lengthy periods of time being taken in the later period in terms of the provision of Mr Loli's response to the allegations. Mr Loli did not meet with his lawyer in person Mr O'Brien in person until 19 September. VANZ understandably thought that having had the information since early August, most of a response could have been prepared by early or mid-September but this appeared not to have been the case.

[104] I see both parties as contributing to the length of time this matter took to get from suspension to dismissal.

#### **Mr Loli's opportunity to provide response**

[105] VANZ clearly gave Mr Loli a number of opportunities to provide written responses and attend meetings. The issue of the allegation 3 created some

complications but was resolved within a few days by VANZ withdrawing that allegation. Mr Loli and his representatives chose to hold off supplying a written response, mostly because information sought had not been provided, albeit with VANZ explanations that it was not relevant or obtainable. Holding off in this way was a somewhat risky approach when VANZ had made it clear that it was intending to go ahead with a decision, having offered opportunities for comment and meeting.

[106] However, I focus on events towards the end of Mr Loli's employment and particularly on meeting times. Mr O'Brien had indicated on 30 August that it was extremely unhelpful to unilaterally set meeting times and asked for discussion. And yet VANZ proceeded to unilaterally set another meeting time.

[107] On 17 September Mr O'Brien emailed that a meeting was sought and asked to be contacted discuss meeting times. This was a reasonable request from a busy practitioner in a situation where times VANZ had previously set had been unsuitable. Ms Davis agreed at the investigation meeting that Mr O'Brien's request was reasonable.

[108] That day, Ms Davis and Mr O'Brien had a discussion, some of the contents of which is disputed. In any event Ms Davis indicated that she had not read Mr O'Brien's email and would consider it.

[109] They were both at the mediation on 19 September. During a break Mr O'Brien emailed indicating that Mr Loli was anxious as to when the meeting would occur. The email also mentioned that some significant "highly relevant" information relating the veracity of some of the witnesses. This would be presented at the meeting. Times on four days the following week were suggested. It is not clear whether Ms Davis saw this before sending the dismissal letter.

[110] In these circumstances, although VANZ had provided extensive opportunities previously, it did not give Mr Loli an opportunity at that crucial point, to provide meet with the decision-maker when it should have.

### **VANZ's consideration of Mr Loli's response**

[111] VANZ did consider the response Mr Loli had made in his earlier interviews and the written material. However, as already found it did not give him proper allowance at the end of the process to meet with the decision-maker.

### **Investigator and decision-maker**

[112] The investigation was undertaken by Mr Reti. Ms Vincent then took over as senior manager to make the final decision on the action had been undertaken. Mr Loli and his representatives appear to have believed that Mr Reti's stepping back amounted to a replacement of him to allegations of bias they had raised. It is perhaps unfortunate that the process was not clearly spelled out by VANZ early on. In any event I am satisfied that this process of a direct line manager investigating and a more senior manager making the final decision, is a normal VANZ process. The same process was undertaken with the cabin supervisor where there appears to have been no allegation that Mr Reti's involvement was inappropriate.

[113] I have considered several cases regarding decision-makers and the involvement of others in the process.<sup>6</sup> The Court has not prevented the severing of the investigation part of the process from the decision-making part. The decision-maker must turn his or her mind to what is reported to them and also to what the employee has to say in reply. An employer would be unwise not to allow the employee a chance to speak face to face with the decision-maker.

[114] In some cases supplementary requirements from an employer's delegation or employment policies or employment agreements may be of significance.

[115] I turn to what VANZ did. It used one person, Mr Reti, consistently to investigate the allegations. Detailed records of the interviews were kept and these, along with correspondence between the company and Mr Loli's representatives, were made available to the decision-maker Ms Vincent. An eight page letter from Mr Reti to Mr Loli on 5 September set out details of the investigation and his findings from the investigation about each of the allegations. Ms Vincent also saw that letter and viewed her role as including assessing whether an adequate investigation had occurred. Mr Loli was offered an opportunity to meet with Ms Vincent.

[116] I have not identified any unfairness arising from VANZ's use of a split investigation and decision-making roles, other than the issue about whether the same passenger was involved in the two allegations.

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<sup>6</sup> See for example, *Ioane v Waitakere City Council* [2003] 1 ERNZ 104, *AFFCO New Zealand Ltd v Nepia* (unrep) Wellington WC 25/07, 28 September 2007, and *Timu v Waitemata District Health Board* [2007] ERNZ 419

**Predetermination**

[117] It seems likely Ms Vincent met with the cabin supervisor regarding his disciplinary case on 14 September. By the time she came to decide on Mr Loli's fate, Ms Vincent had already decided that the cabin supervisor had failed to report being aware of the sexual act and having lied about having seen it to Mr Reti when interviewed.

[118] That being the case she had already decided that the cabin supervisor had witnessed the sexual act, the issue was already decided before she considered whether the investigation was adequate.

**Conclusion on procedural justification**

[119] I have identified that VANZ failed in an important aspect of its investigation, namely to attempt to contact the passenger involved. It also failed to inform Mr Loli of the identity of the passenger, particularly in circumstances where there were two allegations and there is confusion regarding whether the same person was found by Mr Reti to be involved in both. VANZ did not provide Mr Loli with a meeting with the decision-maker at the end of the process, as it should have. I am also concerned that Ms Vincent made a decision that she accepted the cabin supervisor had lied before she considered whether she was satisfied with the investigation into Mr Loli was adequate and what the appropriate outcome for him was.

[120] I have considered whether these matters can be considered minor and not resulting in Mr Loli being treated unfairly<sup>7</sup> but do not find that they were.

**Substantive justification**

[121] It is not for me to make findings here about whether or not the alleged events occurred. Rather I must determine whether a fair and reasonable employer would have reached the conclusion that the events occurred.

[122] The allegations here are serious. The standard of proof is the civil one, the balance of probabilities, not the criminal, beyond reasonable doubt, standard.

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<sup>7</sup> Section 103A(5) of the Act.

However, where, as in this case, the charge is serious, the evidence to support it “must be as convincing in its nature as the charge is grave”.<sup>8</sup>

[123] VANZ found that both allegations were upheld and that individually and collectively they amount to serious misconduct. I will therefore examine whether the company had sufficient basis to establish that either or both of the allegations were established on the balance of probability taking into account the gravity of the allegations. If one or two allegations are established I will then look at the issue of serious misconduct.

### **Allegation 1**

[124] The allegation that an employee had oral sex with a passenger in a plane’s galley during a flight is a serious one.

[125] There was no direct evidence supporting the allegation from either of alleged participants in the sexual activity that it had occurred. Mr Loli denied it. VANZ decided not to attempt to contact the passenger to check what, if anything, he had to say. A person who was reported to have seen the act, namely the cabin supervisor, denied that he had.

[126] What there was, was evidence from others that they believed it had occurred or had been told it had occurred. There was also circumstantial evidence, for example, of curtains being closed. Was there enough?

### *Flight attendants*

[127] The flight attendants’ evidence regarding the noises heard was somewhat problematic. There were references to hearing lots of saliva “mushing around”. However attendant A accepted initially that the noises could have been eating but focused in later interviews on the possibility of them being sexual. Attendant B referred to the possibility of the noises being kissing, so did not necessarily conclude that oral sex was occurring. Kissing alone would have put this allegation in a different light.

[128] Attendant A’s statement at one interview suggested she may have been the cabin supervisor open the curtains and confront Mr Loli. However, in another

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<sup>8</sup> *New Zealand (with exceptions) Shipwrights etc Union v Honda NZ Ltd* [1989] 3 NZILR 82 at [84].

statement she said that she had not. Attendant B who was with her at the time did not say that she had seen the cabin supervisor open the curtains and confront Mr Loli.

[129] The attendants gave differing evidence as to when the cabin supervisor told them that he had caught Mr Loli in the act. Attendant A said it was in the galley as attendants A and B and the cabin supervisor were getting ready for the second service. Flight attendant B said the cabin supervisor told her at the end of the flight when they were cleaning. The differing evidence was not put to the other attendant.

[130] Importantly attendant B thought that it was possible that the cabin supervisor was just joking about Mr Loli having engaged in a sexual act on the plane. She said “I guess it’s all an assumption from what we thought had happened.”

[131] Further, when asked whether the cabin supervisor had ever told her “what he had witnessed in a way that was not a joke” she replied no. She did remain confident about what the cabin supervisor had told her.

[132] Mr Reti’s impression was that flight attendant A was relieved to be talking about what had happened; feeling like she would have trusted in the cabin supervisor to provide report. Mr Reti felt that flight attendant B, who was a relatively new employee, was questioning whether VANZ was the right organisation for her.

[133] VANZ considered that the intent of the flight attendants did not change. Mr Reti reported that both attendants believed a sexual act had occurred from the noises, which was then confirmed by the cabin supervisor’s comments.

[134] No one suggested that either attendant A or B had some improper motive.

#### *Cabin supervisor*

[135] The cabin supervisor indicated when interviewed that nothing unusual had happened on the 18 February 2018 flight that he was aware of, except for Mr Loli being kissed by a passenger during disembarkation. He described Mr Loli as being kissed on the lips, although this was denied by Mr Loli and that passenger, who is Mr Loli’s friend.

[136] The cabin supervisor confirmed to Mr Reti that it was his suggestion to the cabin crew to pull the galley curtains fully closed to ensure their meal breaks were not

disturbed or lavatory smells. The lavatories are immediately between the last row of passenger seats and the curtain to the galley.

[137] Mr Reti interviewed the cabin supervisor again on 9 July 2018. He denied that he had even made such comments as jokes, maintaining that he had not said them.

[138] Mr Reti found the cabin supervisor seemed evasive, giving short answers. The impression was quite different to that the cabin supervisor gave on other occasions Mr Reti dealt with him.

[139] The cabin supervisor's view is that VANZ were pressuring him to change his statement to comply with the flight attendant's statements. However, am not satisfied that there is sufficient evidence to support this view and I disregard it.

#### *Disembarking passenger*

[140] Mr Loli was seen being kissed by a disembarking passenger. In his interview on 27 June 2018 he identified this as a friend of his, providing a little information about him and distinguished him from the passenger who had spent time in the galley.

[141] Mr Reti thought that the passenger who had kissed Mr Loli was the same one as supposedly involved in the sexual act but had not sought to follow up with Mr Loli's friend.

#### *Ground steward*

[142] In addition VANZ had a statement from a ground crew member that Mr Loli had shown him an explicit photo in a plane's galley showing the naked lower half of a man's body with Mr Loli kneeling next to him. The steward said Mr Loli told him he had oral sex. He thought Mr Loli did this because he was showing off.

[143] Mr Loli calls that a complete fabrication, saying his phone was in his carry on luggage for the duration of the flight, as required by the Code of Conduct. Whilst still employed, Mr Loli had not been asked to product his phone but equally had not volunteered it.

[144] The steward also said he recognised the passenger from having checked him in, on the basis of the island shirt he was wearing. This seemed surprising, given that

the steward reporting checking in hundreds or thousands of people on a day and the seeing of the photo was said to be possibly some weeks after 18 February.

[145] There was sufficient evidence provided in the ground steward's interview to suggest he had a negative attitude to Mr Loli. There was some suggestion from witnesses that this was an aspect of Samoan culture but caution would still have been reasonable.

### **Conclusion on allegation 1**

[146] Clearly Mr Loli was in a situation, behind curtains with a passenger for an extended period, which could raise questions but questions are not enough.

[147] The evidence as to whether VANZ had enough to conclude, given the seriousness of the allegation, is finely balanced. There was evidence of sounds, but the nature of them was somewhat unsatisfactory. The flight attendants thought they heard something suspicious but they had both also heard stories previously which might have made them suspicious of Mr Loli.

[148] One attendant gave seemingly contradictory statements about whether she had seen the cabin supervisor open the curtain and see Mr Loli and the guest together. Her later and fuller statement indicates she did not. Attendant B who appears to have been with A at the time the cabin supervisor would have opened the curtains, does not report this. On balance I find there was not satisfactory evidence of the attendants being aware of the cabin supervisor catching Mr Loli. Rather the attendants' statements were that they had been told by the cabin supervisor that he had caught Mr Loli.

[149] One of the attendants, B, considered that the cabin supervisor's comments could have been a joke and "I guess it's all an assumption from what we thought had happened.

[150] There was also some reason to have doubt about the ground steward's evidence both in terms of his recollection of the passenger on the basis of a shirt some weeks later and his animosity towards Mr Loli.

[151] I am not satisfied that VANZ had sufficient information to safely conclude that the sexual act had happened.

**Allegation 2**

[152] This allegation has three components:

- (i) the giving of beer from the service cart to a passenger on at least three occasions without payment when he was not entitled to it;
- (ii) providing the beer for the purpose of gaining favour with the passenger; and
- (iii) preventing the flight attendant from the entering the galley and resuming her duties,

*Giving the beer*

[153] Giving beer in itself would usually not be problematic if the passenger was entitled to it, so this allegation requires a finding that he was not.

[154] Flight attendant A reported having seen two Corona cans on the bench when returning to the galley. When she did a service the guest asked for Corona when we told him the price he asked for Seao. She said the guest was not entitled to complementary drinks.

[155] Flight attendant B reported Mr Loli indicating during the first service (before the alleged sexual incident) that the passenger was a “hottie” and the flight attendant should look after him. She was not asked to expand on what that meant or what she did as a result. She also said, although it is not clear when this occurred, that Mr Loli told her that he had given the guy a Corona and “if he wants one, give it to him, it’s all been sorted”. She thought the passenger was rather intoxicated by the end of the flight. The sexual act however, was alleged to have happened fairly early in the flight.

[156] Attendant B said she actually witnessed Mr Loli giving the passenger Corona and not receiving compensation. She also understood Mr Loli to have asked her to give free drinks to the passenger when he said “[l]ook after the hottie in seat ra ra and he’s drinking a Corona”. They had no conversation about the passenger’s fare class. She did not believe he was on the flexi list (free drinks) list.

[157] Mr Loli did not always identify a seat but when he did it was 11E and 12E. He said that he checked the schedule and the passenger was entitled to complimentary alcohol.

[158] Mr Reti says he was relying on the seating map and Mr Loli and the other two flight attendant's account of the delivery of alcohol. He decided the passenger was in seat 11E on account of flight attendant A and B's evidence, as well as Mr Loli's account.

[159] In fact attendant A identified the passenger as being in seat 12E. However, the passenger in seat 12E was not entitled to complimentary alcohol either. On the balance of the evidence I conclude VANZ was entitled to decide that Mr Loli did supply or arrange to be supplied for free alcohol to a passenger who was not entitled to it

#### *Favour*

[160] The second aspect of allegation 2 is that Mr Loli provided the beer to the passenger "for the purpose of gaining favour with him".

[161] Ms Davis said at the investigation meeting that the reference to "gain favour" in allegation 2 was not intended to relate to gaining sexual favours. I found that unlikely. Allegation 1 concerns alleged oral sex. The first part of allegation 2 concerns the provision of beer and the third part to preventing the flight attendant from entering the galley and returning to her duties. The reference to favour in a non-sexual context in this scenario seems most unlikely.

[162] The use of the word favour appears to have come from attendant B's first statement where she reports that Mr Loli was consistently "shown favours to the guest" and goes on to refer to beers. However, the way VANZ has described the allegation is that Mr Loli was trying to "gain favours" from the passenger. The suggestion that a passenger was plied with free alcohol to gain sexual favours is a very serious one.

[163] The evidence which VANZ had does not provide a solid basis to support this allegation. The preponderance of the evidence is that the alleged sexual act was believed to have occurred relatively early in the flight and that only modest amount of beer had been supplied at that point. VANZ did not have a solid basis on which to

conclude that alcohol was supplied with the intention of gaining (sexual) favour with the passenger.

*Preventing flight attendant from entering galley and resuming duties*

[164] Mr Loli accepted at the investigation meeting that he had allowed the flight attendants an hour and three quarters break. He accepted this was unusual but said he was wide awake so let them have longer. This could potentially have been something which have been something which VANZ initiated disciplinary action over but it did not. Rather it took the lengthy break as a sign that something untoward was going on.

[165] Mr Loli accepted, if not that he prevented B from entering, at least told her that she could continue her break. He accepted that the passenger was in the galley for an extended period and that the flight attendant had had a considerably longer break than was allowed.

[166] I find that there was sufficient evidence for VANZ to uphold this part of allegation 2.

**Conclusion on allegation 2**

[167] The dismissal letter refers to allegation 2 being substantiated. In the absence of any statement that only part of the allegation was upheld, VANZ must be taken to have upheld all three components of the allegation.

[168] I have found that VANZ had a sufficient basis to conclude that beer was supplied to someone who was not entitled to it and that the flight attendant was prevented from undertaking her duty. These would have justified some disciplinary action. However, the evidence was not sufficient to uphold what appears to be the most serious allegation; providing alcohol to gain (sexual) favour.

[169] I conclude that a fair and reasonable employer would not have concluded that allegation 2 was upheld in the form that it was presented

**Conclusion on dismissal**

[170] Having concluded that were procedural inadequacies and that allegation 1 was not substantiated, as well as a part of allegation 2, I conclude that Mr Loli was unjustifiably dismissed by VANZ.

## **Remedies**

### *Lost wages*

[171] Mr Loli applies for reimbursement of lost wages. He applied for a number of jobs with airlines and other organisations in the travel industry. He was unsuccessful finding work in New Zealand or Australia. He eventually decided to return to Samoa and was able to find work although at a much lower rate of pay than he had enjoyed with VANZ.

[172] He claims lost wages of \$14,534.70 gross covering the period between 20 September and 17 December 2018 when he was without any work. This was based on his previous average earnings. After that he was employed in Samoa but at a lower rate and he claims the difference between his Samoan pay and his previous average earnings with VANZ.

[173] Under s 128(2) of the Act I must award Mr Loli three months' ordinary time remuneration. This is not a case where it is appropriate to exercise my discretion to award a sum greater than three month's remuneration as I am not satisfied that his employment would have continued for that longer period.

[174] Subject to the consideration of contribution Mr Loli would be entitled to \$14,534.70 gross as lost wages.

### *Compensation*

[175] Mr Loli was very affected by his dismissal. A career as a flight attendant had been a long time ambition and he very much enjoyed the role and the opportunities it provided. He describes himself as heart broken when this was taken away.

[176] Mr Loli maintained a high profile due to his role with VANZ and his acting work. This meant that that many people heard about his suspension and dismissal and made contact questioning him about what had happened. He did however acknowledge that he had contact from many staff members expressing concern to him.

[177] Mr Loli emphasised the length of the procedure and the negative effect this had on him. He describes the devastating effect on him personally, socially, professionally and emotionally.

[178] Mr Loli's friend, the former flight attendant, spoke of supporting Mr Loli. He describes the impact of the process as devastating on Mr Loli, who struggled to find other work and was ashamed and embarrassed. He noticed Mr Loli change dramatically, avoiding people, losing weight and becoming depressed. The friend had recently visited Samoa and met with Mr Loli who was working there but finding life in Samoa a struggle with a sense of loss. Mr Loli expressed being too embarrassed to go back home to Auckland.

[179] I have concluded that an appropriate amount of compensation for non-economic loss for both grievances is \$20,000, before consideration of any contribution by him.

### **Contribution**

[180] Under s 124 of the Act I must consider whether Mr Loli's actions contributed to the situation giving rise to his suspension and dismissal. In order to make a deduction for contribution Mr Loli's conduct must be both causative of the outcome and blameworthy.<sup>9</sup>

[181] Mr Loli allowed a passenger to spend a considerable period of time in the galley, around an hour and a half by his own admission. He remained there with the curtains fully closed, even if it was the cabin supervisor who had initially closed them in that manner.

[182] Mr Loli gave the passenger a number of free drinks, which on the balance of the evidence, the passenger was not entitled to. Mr Loli insisted that flight attendant B take an additional break, well beyond what she was entitled to. These actions were serious and blameworthy. They could have resulted in some disciplinary action in themselves without the sexual act allegation and contributed to cabin attendants' and

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<sup>9</sup> *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]

VANZ's sense that some impropriety had occurred. They were causative of the situation in which VANZ decided to dismiss.

[183] I assess Mr Loli's contribution to situation as meriting a 50 % reduction in his remedies under both grievances.

[184] After deducting for contribution, I order VANZ within 28 days to pay Mr Loli the following sums as remedies for his grievances:

- (i) \$440.87 gross as lost wages for the suspension;
- (ii) \$7,267,35 gross as lost wages for the dismissal; and
- (iii) \$10,000 as compensation for non-economic loss.

### **Other disadvantage claims**

[185] I consider that the other aspects of disadvantage suggested on Mr Loli's behalf have been captured in the suspension and dismissal grievances. Mr Loli is also entitled to raise the issue about his personal information being accidentally sent to a third party as a privacy matter, if he has not done so already.

### **Special damages**

[186] In the statement of problem<sup>10</sup> Mr Loli sought special damages in relation to the unlawful suspension and investigation through to dismissal and confirmation of dismissal. There was some lack of clarity regarding which aspects of the present situation would justify an award of special damages.

[187] I accept that special damages may be available on occasions, such as that in *Stormont v Peddle Thorp Aitken Ltd*<sup>11</sup>. There a "bright line" was described as being able to be drawn between the legal costs for representation during a redundancy process which had been found to be fundamentally flawed and instigated for the dominant purpose of securing a departure and costs in respect of the proceedings.

### **Good faith and breach of agreement**

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<sup>10</sup> In file 3045615.

<sup>11</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71

[188] I consider that the good faith issues raised on Mr Loli's behalf have been captured by the personal grievance claims and wish to avoid the prospect of Mr Loli double dipping for grievance remedies and penalties. Alternatively any issues cannot be described as deliberate, serious and sustained in such a way as to justify a penalty under s 4A of the Act.

[189] Similarly, the submission that the relevant collective agreement was breached by failing to meet with Mr Loli is also a matter which has been a basis of the finding of unjustified dismissal and a similar double-dipping argument applies here.

### **Costs**

[190] Costs are reserved. The parties are invited to resolve the matter.

[191] If they are unable to do so Mr Loli shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. VANZ shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[192] The parties could expect the Authority to use its notional daily tariff as a starting point and consider adjustments upwards or downwards from there. Mr Loli's success in only some of his claims may also be considered.

**Nicola Craig**  
**Member of the Employment Relations Authority**