

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 359
3147102

BETWEEN

GARRY ROSS CURNOW
Applicant

AND

ADVANCED SECURITY GROUP
(STH IS) LIMITED
Respondent

Member of Authority: David G Beck
Representatives: Luke Acland and Lucy Ingham, counsel for the Applicant
David McLeod, advocate for the Respondent
Investigation Meeting: 16 June 2022 at Nelson
Submissions and Further Information Received: 30 June 2022 from the applicant with further information received 3 July 2022
6 July 2022 from the respondent with further information received 24 June 2022
Date of Determination: 3 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Garry Curnow was employed by Advanced Security Group (Sth Is) Limited (“ASG”) as a service technician, initially in Christchurch in April 2018 then in Nelson in the same role, from November 2019. Mr Curnow was summarily dismissed on 4 June 2020 for covertly recording co-worker conversations in the workplace when he was not present.

[2] Mr Curnow raised a personal grievance by his then lawyer's emailed letter, of 13 August 2020, alleging an unjustified dismissal and highlighting what he considered was an unlawful deduction from his final pay to reimburse training costs.

[3] ASG's lawyer responded by email of 5 November 2020 denying the grievance's validity. The parties subsequently attended mediation but the matter remained unresolved. In a Statement of Problem filed at the Authority on 27 July 2021, Mr Curnow claimed the dismissal was unjustified on both procedural and substantive grounds and recompense was sought for the deduction from his final pay.

[4] ASG filed a reply, asserting that Mr Curnow's dismissal was carried out in a procedurally fair manner following an investigation that confirmed his conduct to be sufficiently serious to warrant summary dismissal. ASG denied the unlawful deduction from Mr Curnow's final pay saying it was pre-authorised in a mutual bonding agreement.

The Authority's investigation

[5] The investigation took one day and I heard evidence from Garry Curnow, Hayden George, ASG's General Manager (via video conference) and Esther Nicolay, former ASG General Manager, People, Systems and Communications.

[6] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I carefully considered the helpful submissions and information received from both parties and refer to them where appropriate and relevant.

Issues

[7] The issues to be decided are:

- (a) Was Mr Curnow unjustifiably dismissed following a sufficiently fair and properly conducted investigation including a question of the admissibility and/or relevance of the content of the covert recordings?
- (b) Was a deduction made from Mr Curnow's final pay to cover training costs a lawful one?

- (c) If ASG's actions in dismissing Mr Curnow do not meet the standard of a fair and reasonable employer, what remedies should be awarded considering Mr Curnow's claims for:
- i. Lost wages and benefits.
 - ii. Compensation under s 123(1)(c)(i) of the Act.
 - iii. Reimbursement of a portion of training costs deducted from Mr Curnow's final pay.
- (d) If Mr Curnow is successful in all or any element of his personal grievance, should the Authority reduce any remedies granted because of any contributory conduct?
- (e) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[8] Mr Curnow commenced working for ASG in April 2018 in Christchurch, moving from another security firm he had been employed at since 2016. Mr Curnow described enjoying working for ASG in Christchurch and that he then moved to Nelson in November 2019 to be nearer his son and for potential career progression, hoping to get more involved in the sales side of the business.

[9] Unfortunately, Mr Curnow found the Nelson office to be a difficult working environment and he was advised no sales work would be made available to him. ASG witnesses accepted that co-worker conflict in the Nelson office pre-dated Mr Curnow's arrival.

[10] Mr Curnow says he got on well with his initial Nelson manager but became aware of tension between that manager and co-workers. ASG's Christchurch based Southern Region Manager had a session with Nelson staff in early December 2019 to discuss team concerns and to try to get them to focus on a better team culture.

[11] Ms Nicolay who was based in Auckland, then visited the Nelson branch in early March 2020, concerned the conflict was ongoing after she had received a bullying allegation involving the then Nelson manager. Ms Nicolay recalled meeting face to face with each staff member to try and gauge what the issues were and says the staff were “split’ in allegiances. Shortly afterwards, the Nelson manager resigned and Ms Nicolay, Mr George and another ASG director, visited Nelson on 11 March 2020 to further investigate matters of concern and to address the Nelson team.

[12] From this point in time, Mr Curnow’s reporting manager changed to a co-worker occupying a Team Leader role who he was having a difficulty in establishing a positive relationship with (on 9 March they had had a negative interchange that led to Mr Curnow proffering a ‘brokered’ apology to his Team leader). Mr Curnow says he offered his resignation to the Team Leader when he assumed additional responsibilities, fearing that personal tension between them was insurmountable. Mr Curnow says the Team Leader reassured him that no grudge existed and he decided not to pursue a resignation.

[13] For the period 25 March to 27 April 2020, New Zealand operated a level 4 lockdown to contain a COVID outbreak and whilst ASG employees were classed as essential workers, only some, including Mr Curnow, had to occasionally work “on-site” at client locations. Mr Curnow described ongoing tension during this period over operational matters between himself and co-workers and his Team Leader.

22 May 2020 incident

[14] On the morning of Friday 22 May, Mr Curnow had a disputed verbal exchange with his Team Leader. Mr Curnow initially described it as him attempting to secure a commitment from his new manager to undertake a due annual performance review. Mr Curnow says he intended to use this forum (the review) to formally raise wider issues of concern. Mr Curnow says the Team Leader refused to carry out a performance review citing an unwritten head office directive to defer such reviews and that Mr Curnow was told not to discuss this further with head office. Mr Curnow says at this point he perceived that the Team Leader was trying to manage him out of the business.

[15] I did not hear any evidence from Mr Curnow's Team Leader who has since left ASG but I was provided emails that showed shortly after the 22 May meeting, he approached the Southern Region Manager based in Christchurch and initiated a complaint that Mr Curnow had been aggressive during their conversation.

[16] Mr Curnow, meanwhile, sent an email to Mr George early on Monday morning of 25 May. The email that was copied to the Southern Region Manager, another director and Ms Nicolay, was discursive. It initially, without specifically referencing the 22 May discussion with the Team Leader, obliquely referred to it, then described at length, issues Mr Curnow was having with his Team Leader both past and present. This included being critical of his Team Leader on systemic job allocation issues whilst affirming his desire to continue in ASG's employ. Mr Curnow suggested:

I would like to request an opportunity to engage in a documented process to evaluate my performance and to air any criticisms my team leader may have to restore good faith and less loss of productivity and sleep on my part. I would also invite ASGL to enquire with our customers whom I have serviced during my tenure as to their feelings on their experiences dealing with me. I also intend to address any character assassination that has taken place.

[17] Mr Curnow concluded the email by raising an allegation that an unnamed co-worker had been engaging in seriously defamatory comment about his state of mind and noted: "I can only hope his speculation was voiced around myself only and not to other team members or clientele". I observe the email did not end with a meeting request but objectively it demonstrated that significant ongoing matters were at issue that needed to be urgently addressed given ASG's awareness of the negative team dynamics.

[18] Mr George responded to the above, by an email of 10 am the same day. The email opened with "If you have specific concerns can you please raise them..." and proceeded to ask which co-worker was questioning Mr Curnow's state of mind and he asked for details around disputed work allocations. Mr George acknowledged: "You have serious concerns but I need you to be specific to enable a proper investigation". In addition, Mr George indicated that although remuneration reviews were on hold, "there is nothing prohibiting a review of performance" and he encouraged Mr Curnow to fill in an attached self-assessment review form. I observe in the circumstances at the time, this seemed a reasonable response.

[19] As the Southern Region Manager did not give evidence, the timing of when she disclosed the 22 May incident to Mr George, was not immediately apparent. Mr George initially recalled a discussion with the Christchurch manager on the following Monday (25 May) and that that was the same day he received Mr Curnow's email. However, after the investigation meeting, emails disclosed by ASG (at my request) revealed the Southern Region Manager emailed Mr George on 24 May around 5 pm to relate her conversation with the Team Leader about the 22 May incident. Instead of just relating the incident in dispassionate terms, the Southern Region Manager displayed a partisan attitude to Mr Curnow as related by the Team Leader to her, including a claim that another co-worker was having difficulty with Mr Curnow and that Mr Curnow was allegedly in contact with his recently departed manager. The Southern Region Manager finished the email with "Garry's performance has been worse than ever and constantly challenging and I need to now performance manage him".

[20] Mr George responded at 9:30 am on 25 May, with an equally partisan response asking the Southern Region Manager to get the Team Leader to complete a "written signed statement of what occurred", that "threatening staff is a serious allegation" and that the Team Leader had raised similar concerns about Mr Curnow's previous manager and Mr George then stated: "We have spent tens of thousands of dollars supporting this region due to behaviour issues and have a significantly disproportionate amount of problems".

[21] Mr George then went on to reference Mr Curnow's earlier email of 25 May saying, "we will need to investigate that as well" and that Mr Curnow was seeking an appraisal. Mr George then suggested the Team Leader be asked to complete an "independent assessment" on Mr Curnow's performance and that a follow up seeking a statement from another co-worker allegedly having problems with Mr Curnow, be obtained. Mr George ended the email with an invitation that the Southern Region Manager call him to discuss the matter further.

[22] I observe objectively, the email showed Mr George approached the matter without an open mind – he did not request a statement be obtained from Mr Curnow on his side of the incident and the suggestion that the Team Leader could complete an unbiased assessment of Mr Curnow is concerning. In addition, in responding to Mr Curnow later that morning, Mr George made no reference to the Team Leader's complaint and other allegations. What appears to have then occurred was a limited investigation of matters from the Team Leader's perspective or more bluntly put - ASG proceeded to build a case against Mr Curnow.

The first investigation

[23] The Southern Region Manager then approached the Team Leader on either the Monday or Tuesday, as an email from him of 27 May referred to him forwarding a statutory declaration the day before and that he wished to withdraw it as he had had time to think about the previous Friday's conversation with Mr Curnow. The Team Leader then attached another statement containing what he describes as a "more accurate account of the events that took place".

[24] I observe the two versions, of which neither were statutory declarations, are largely the same, except in the second version the Team leader uses more pejorative language and tellingly makes two references to being "threatened" – a descriptor not used in the first statement. The Team Leader also subtly changed the description of his interaction with the Southern Region Manager - from a "discussion" with her, to a "report' about Mr Curnow's behaviour.

[25] Mr George also indicated when questioned on events he left out of his written statement, that he also conducted an interview with the Team Leader and that the Southern Region Manager interviewed some of Mr Curnow's co-workers before they met with Mr Curnow – none of the interviews were documented and viewing the subsequent exchanges, nothing specific arising from the interviews was put to Mr Curnow.

[26] On 27 May, Mr George emailed the Team Leader's statement to Ms Nicolay who responded later that day setting out how to "conduct a fair investigation" including first that "an employee should be told details of the allegations". Ms Nicolay went on to say, "an investigation's purpose is to establish the facts" and then to ascertain such facts she suggested:

- Getting a statement from (the co-worker)
- Understanding there are other incidents that have occurred from (The Team Leader's) perspective
- Has (another female co-worker) been a witness to anything
- What impact has this behaviour had on (the Team leader)
- What impact has this behaviour had on (the co-worker)

[27] Ms Nicolay then said it was known that Mr Curnow had made “inappropriate comments” about a female co-worker and asked, “does that come into it as well?” and perhaps Mr Curnow should be asked about whether he has made comments to his ex-manager, “to undermine the business and employees?”.

[28] Turning to the issue of suspension, after describing the need to follow “a fair process”, Ms Nicolay concluded:

In our situation I believe we would be removing Garry from a situation where he can continue to intimidate or bully colleagues, I believe we should be taking the company phone off him.

[29] I observe again, that there was no suggestion that Mr Curnow be interviewed to gain his perspective of the situation.

[30] Mr George responded early the next day, thanking Ms Nicolay for helpful advice and noted Mr Curnow was on stress leave and that the Southern Region Manager had asked him “what he’s stressed about but he hasn’t responded”.

28 May letter, suspension and invite to meet

[31] By a 4:40 pm email of 28 May to his work email address, Mr George indicated that Mr Curnow was suspended on pay “with immediate effect” on health and safety grounds (implicitly his ongoing threat to co-workers) so ASG could investigate allegations of serious misconduct outlined in an attached letter. The attached unsigned letter from Mr George, drafted by Ms Nicolay, did not provide much detail other than to suggest

Further to the discussion we had with you on 9 March 2020 we have allegations regarding unprofessional conduct that set to undermine the viability of the branch, threatening behaviour and potential workplace bullying, which compromise the safety of our workplace.

[32] The letter suggested Mr Curnow could bring a “support person” to a 2 June meeting, warned Mr George he may be facing termination of his employment: “If the matter being investigated is deemed serious misconduct” and offered EAP support. The letter did not provide a copy of the Team Leader’s statement and such was only disclosed during litigation proceedings and the second version after the investigation meeting.

[33] On 29 May, by email, another co-worker who also did not give evidence at the investigation, provided a signed undated statement to the Southern Region Manager. This was likewise, not disclosed at the time to Mr Curnow and only produced by ASG at my direction after the investigation meeting.

[34] The co-worker statement contained serious allegations that Mr Curnow had been recording conversations between co-workers at team meetings and in personal interchanges with his Team Leader. The evidence provided by ASG witnesses curiously suggested that they were unaware of the extent of Mr Curnow's recording activity until they subsequently met with him and that it was a "revelation" – I find this to be somewhat inexplicable that the co-worker statement was not disclosed or even alluded to, in any correspondence prior to meeting Mr Curnow or afterwards.

2 June meeting

[35] By video conference on the afternoon of 2 June, Mr Curnow and his support person attended what was described by ASG as a: "Disciplinary investigation meeting". ASG was represented by Mr George, Ms Nicolay, and The Southern Region Manager. Ms Nicolay produced brief hand-written notes of the meeting during the investigation and a subsequent letter to Mr Curnow of the same day detailed what occurred at the meeting from ASG's perspective. At the meeting (from Ms Nicolay's notes) Mr Curnow disclosed he had recorded the conversation with his Team Leader-implicitly the 22 May conversation.

[36] After the meeting (that evening) Mr Curnow via Dropbox, provided Mr George two audio recordings, 13 references and a document setting out a claim he was being constructively dismissed.

2 June letter

[37] Following the meeting and receipt of the recordings, Ms Nicolay and Mr George drafted a letter dated 2 June, that was sent to Mr Curnow on 3 June. Mr George's letter first retrospectively set out the purpose of the meeting held earlier that day (2 June) – that being:

.... to discuss the allegations of serious misconduct. Allegations have been made by multiple staff and have been investigated over the course of the last week. The allegations are of serious misconduct as they are a repeat of similar behaviours that

were addressed in March this year, where staff members were verbally threatened and abused.

[38] Mr George then suggested that ASG had “previously discussed our expectations of behaviour” and then quoted extracts from company policies, a staff handbook and Mr Curnow’s employment agreement.

[39] Mr George then set out: “The allegations we have received” in a series of bullet points that first suggested the interchange with the Team Leader on 22 May involved Mr Curnow being disparaging and threatening and that the Team Leader had subsequently called the Southern Region Manager and then “he took stress leave and has been afraid to return to work”. Mr George then alluded to: “Similar allegations” raised by an unnamed staff member, “including: talk of puppets, undermining the branch, threats to take Advanced Security to court” and a desire to get the previous manager back or the branch shut down.

[40] Mr George in a similar vein, then suggested: “All staff have concerns around aggravated and aggressive behaviour and feel unsafe when alone in the workplace with you” and that Mr Curnow had allegedly been in regular contact with his previous manager and, at further issue was “allegations of remote access to laptops and customer sites”. Mr George then went on to outline that whilst other, unspecified “minor allegations” had been made:

.... we believe that the matters relating to serious are outlined above. These need to be dealt with in the first instance as in good faith we must ensure we have a workplace that is safe for all employees.

[41] Mr George then briefly outlined Mr Curnow’s responses given during the 2 June meeting as largely denying elements of the above with Mr Curnow stating a belief that his Team Leader was unsuitable in the role.

[42] The letter then encouraged Mr Curnow to provide: “Any further information you may have that can help us resolve this matter ...”. The letter ended with no clear exposition of what was the next step in the process apart from a reference to an “ongoing investigation” that may amount to Mr Curnow’s dismissal.

Interim assessment

[43] I pause to observe that at this point in the process, Mr Curnow had objectively not been provided with sufficient information on ASG's seemingly multiple concerns. This was despite information, in the form of two co-worker statements and although not documented, the results of interviews with unnamed co-workers, being in ASG's possession before they convened the 2 June meeting and suspended Mr Curnow.

[44] I find that it is more likely than not, ASG approached the 'problem' of Mr Curnow with a degree of bias in favour of his Team Leader and pre-determination given they allowed no input on the decision to suspend and the investigation was cursory, haphazard, and poorly documented with information gathered concealed from Mr Curnow. I also observe that the involvement of the Southern Region Manager who the Team Leader reported to, was not appropriate and the Team leader's changed statement leads to reasonable speculation that he was likely coached in the content of such.

ASG's change of approach

[45] In evidence, the two ASG witnesses disclosed that after the 2 June meeting they sought legal advice from various sources (including the Police) on a belief that Mr Curnow's disclosure making several covert recordings of co-workers was potentially illegal. After receiving advice, ASG determined that the sole issue was now one of a significant trust and confidence breach having regard to their core business of electronic security. A business, in which ASG expected employees to be acutely aware of privacy issues to the extent that some including Mr Curnow, operated with certificates issued by the Ministry of Justice's Private Security Licencing Authority. Ms Nicolay confirmed that a decision was reached not to continue with the disciplinary investigation already underway.

[46] Mr George's evidence suggests the decision to terminate Mr Curnow's employment was then made between himself, Ms Nicolay and ASG's Chief Executive Officer.

4 June meeting

[47] ASG then invited Mr Curnow to a further meeting on 4 June at 11 am, the subject of the meeting was not disclosed to Mr Curnow prior to the meeting. Mr Curnow, with his

support person and the Southern Region Manager, attended the Nelson office and Mr George and Ms Nicolay joined the meeting by video conference.

[48] No recording of the meeting was made and Ms Nicolay in her written statement for the investigation, disclosed brief hand-written notes that were not a verbatim account of the meeting. The notes reveal Mr Curnow says he felt “compelled” to make the recordings and disclosed he had other recordings in his possession and that he had provided such to his solicitor. Further notes record that Mr Curnow was not party to the conversations and a breach of the Crimes Act was discussed.

[49] Mr Curnow says he was dismissed during the meeting and Ms Nicolay and Mr George did not contest this – Ms Nicolay’s notes indicate at the end underlined: “Termination of employment for serious misconduct”.

[50] Regardless of whether the dismissal was communicated at the meeting or not, at just after 5 pm on 4 June, Mr George forwarded an unsigned letter to the Southern Region Manager asking her to deliver it to Mr Curnow and effect his exit and handover of ASG property. The letter was then provided to Mr Curnow on the morning of 5 June. The letter is headed “MEETING INVESTIGATION OF SERIOUS MISCONDUCT BY GARRY CURNOW” indicating he had been summarily dismissed after a finding of serious misconduct.

[51] The letter set out the reason for dismissal as being:

Due to the illegal nature of covert recordings and the position of trust the electronic security holds we determined this in itself is deemed as serious misconduct, as such we have deemed it unnecessary to continue the investigation into other allegations made against you. Your employment conditions have been breached and has left us in a position as a fair and reasonable employer with not alternative but to determine that instant dismissal without notice is the appropriate action.

The aftermath of dismissal

[52] ASG deducted \$2,500 from Mr Curnow’s final pay relating to a bond for training costs (this was later reduced to a \$1,123 deduction).

[53] Following the dismissal, ASG made a complaint to the Police on 5 June, which led to Mr Curnow later pleading guilty and being discharged without a conviction on an offence of

“intentionally intercepting a private communication”.¹ The presiding Judge described matter as “tracking well into the minor end of offending”.

[54] A referral to the Private Security Personnel Licencing Authority also led to a finding of misconduct but no disciplinary penalty or sanction was imposed; with the Authority considering that there had been no previous complaints about Mr Curnow’s technical ability, work or competency and no evidence that his actions damaged ASG’s reputation so, the sanction of dismissal by ASG was deemed sufficient punishment.

[55] Further, after Mr Curnow was discharged without conviction, ASG applied to the NZ Security Association seeking (unsuccessfully) to have Mr Curnow’s security licence revoked and the parties are also engaged in an ongoing issue before the Human Rights Review Tribunal concerning the provision of personal information.

[56] By way of a letter of 13 August 2020, Mr Curnow raised a personal grievance of unjustified dismissal and a claim that the bond deduction was unauthorised and unlawful. ASG responded on 9 September, denying the grievance but indicating a willingness to attend mediation. The parties subsequently attended mediation but the matter remained unresolved and an application was made to the Authority on 28 July 2021.

Should the Authority consider the content of Mr Curnow’s covert recordings and if so, what weight should be given to this evidence?

[57] I am satisfied that after abandoning the initial disciplinary investigation, ASG dismissed Mr Curnow for the act of making the covert recordings, that he admitted. Therefore, the content of the recordings had no bearing on the decision to dismiss. It is only the fact the recordings were made covertly that is relevant.

Was the dismissal justified?

[58] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer’s actions were what a fair and reasonable employer could have done in all the

¹ Section 216B(1) Crimes Act 1961.

circumstances at the time the dismissal occurred. A dismissal must be enacted in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[59] Section 103A details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner - these summarised are:

- (a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee;
- (b) did the employer raise the issues of concern with the employee prior to deciding to dismiss;
- (c) was the employee afforded a reasonable opportunity to respond to identified concerns;
- (d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- (e) any other contextual factor the Authority regards as appropriate to consider.

Applying factors identified by the Act

Resources

[60] ASG is a well-established, nationwide specialist security solutions company with over two hundred and fifty employees operating from 16 offices. My finding is that Mr George who handled the investigation and made the decision to dismiss, had no problem with resources and ongoing access to specialist HR support in the form of Ms Nicolay who assisted him in the dismissal process. Ms Nicolay also confirmed additional external legal advice was accessed during the latter stages of the dismissal process.

[61] From this perspective, I must hold ASG to a reasonably high but not pedantic standard when assessing procedural fairness issues and their awareness of legal obligations.

The suspension

[62] I find the suspension was not enacted in a procedurally fair manner as Mr Curnow was afforded no opportunity to comment on any proposal to suspend. In the circumstances, I find the suspension was pre-determined and ASG has not made out any substantive reasons

for suspending Mr Curnow. At the relevant time ASG had insufficient information on which to base the decision to suspend and they could have handled their subsequent investigation in a much more even-handed manner given Mr Curnow had himself identified issues of concern.

Sufficiency of investigation

[63] The first issue is given that ASG categorised the initial allegation against Mr Curnow as one of threatening behaviour and bullying (potential serious misconduct) and the second allegation that led to his dismissal as potentially criminal conduct, one would have expected very careful and well documented investigations to proceed and whilst I do not expect them be “akin to a judicial inquiry”² I do have to consider if the investigations were sufficient given the serious level of the second allegation.

[64] I find, overall that the standard of the investigations fell woefully short of procedural fairness and the defects were not minor and resulted in Mr Curnow being treated unfairly. My reasons for this finding are discussed below.

Procedural defects

[65] Where potential serious misconduct is involved, it is wise to separate the investigator from the decision-maker – this did not occur. Mr George involved himself in the initial investigation and gathered evidence, as well as being the ultimate decision-maker.

[66] From the outset, ASG had knowledge of a dysfunctional team in the Nelson office and the complexity of co-worker conflict and yet chose not to engage an independent investigator. Worse still, the involvement of the Southern Region Manager was a mistake as she was clearly not impartial in her view of Mr Curnow’s Team Leader and was objectively involved in assisting the Team Leader to shape his evidence against Mr Curnow. I could also infer from the emails between the parties, that Mr George was aware of this conflict.

[67] From the outset, Mr Curnow was not properly advised of the serious initial allegations until after the evidence against him had been gathered and even then, no digestible information was disclosed to Mr Curnow for comment on. This was a significant breach of ASG’s good faith obligations. Mr Curnow attended the first disciplinary meeting unaware of the full extent

² *A Limited v H* [2016] NZCA 419; [2017] @ NZLR 295 at [25].

of allegations made against him and was presented with little to inform him on the extent of ASG's concerns. This was compounded by the meeting not being properly documented and additional allegations being advanced in the follow up letter of 2 June, that in part were not discussed during the meeting. Mr Curnow was then misled to believe ASG was conducting an ongoing investigation yet nothing of substance to support this was disclosed.

[68] Turning to the second distinct issue that led to the summary dismissal (the covert recordings) - Mr Curnow was not placed on notice of the fresh allegations nor afforded an opportunity to seek legal advice. Given ASG contemplated referring the matter to the Police and then subsequently made such a complaint, it was essential that Mr Curnow be warned of such a potential consequence and he was not. This was a basic and inexplicable error.

[69] I also observe no investigation into the context of how the recordings were made or what they revealed, was undertaken by Mr George – ASG simply communicated a hasty decision to dismiss Mr Curnow at the second 4 June meeting. This was also inexplicable, as Ms Nicolay revealed that prior to meeting Mr Curnow, legal advice was sought on the issue of covert recording and whilst a view had been formed by ASG that such was illegal, none of this was put to Mr Curnow prior to meeting him on 4 June. I could not detect a reason why ASG considered the dismissal had to be enacted so swiftly. Having disclosed he had made the recordings to a co-worker and ASG knew this from that co-worker's statement of 29 June, there was no danger of ongoing recordings as Mr Curnow had been suspended.

Did ASG give Mr Curnow a reasonable opportunity to respond to their concerns prior to dismissing him?

[70] Further, the moving immediately to a summary dismissal decision without a break in the meeting being taken to consider the situation and the evidence Mr George gave, leads to a reasonable implication that the matter had already been pre-determined. This breached ASG's obligation under s 103A(3)(c) of the Act to allow Mr Curnow a "reasonable" opportunity to respond to their concerns or genuinely consider any explanation proffered by Mr Curnow.

Other factors

[71] Further, other contextual matters such as Mr Curnow's difficult situation with his Team Leader, his technical competence, and the fact of him moving into a team that was already known to be dysfunctional do not appear to have been considered. In evidence, on the latter point ASG disclosed they had considered an option of closing the Nelson branch and Mr George suggested he was surprised at the level of Mr Curnow's involvement in the conflict that he knew was longstanding. Other potentially mitigating factors such as the impact of dismissal on Mr Curnow's domestic situation were not explored and alternatives short of dismissal were not considered.

Justification

[72] At best, one could say that the issues were reasonably clear cut and Mr Curnow was afforded a limited opportunity to explain his actions to the decision-maker so, no further investigation was necessary as the actions in question (recording co-worker conversations) had been admitted by Mr Curnow prior to the 4 June meeting and were not contested in any material sense at the disciplinary meeting³. I, however, find that ASG's hasty approach did not inform them of any potential contextual mitigating issues or afford Mr Curnow any effective opportunity to advance such.

[73] This was a summary or instant dismissal that required first that ASG find that Mr Curnow had engaged in serious misconduct. Guidance on how "[B]ehaviour that deeply impairs or is destructive of confidence and trust" is to be assessed is outlined as follows in the Employment Court decision *Emmanuel v Waikato District Health Board*.⁴

[58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing or destructive

³ It has been suggested that when serious misconduct is admitted by an employee, it is not necessary for the employer to spend more time investigating the matter: *Murphy and Routhan t/an Enzo's Pizza v van Beek* [1998] 2 ERNZ 607 (EmpC). See also *Smith v Datamail Ltd* ERA Wellington WA125/09, 2 September 2009; *Reynolds v Mount Cook Airline Ltd* [2013] NZERA Christchurch 155 (where the Authority expressly referred to *Enzo's Pizza* and confirmed its continuing legal relevance under s 103A).

⁴ *Emmanuel v Waikato District Health Board* [2019] NZEmpC81 at [58]-[62].

of, the basic confidence or trust essential to the employment relationship, justifying dismissal. What must be evaluated are the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

- [59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.
- [60] It is essential to the maintenance of the necessary trust and confidence in the employment relationship that employees are honest and open with their employers. It will be a serious breach of an employee's obligations to his or her employer to mislead the employer in response to specific inquiries based on the employer's concerns. The duty of good faith also includes that parties to an employment relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other. Where an employee provides misleading information to his or her employer on a matter that the employee knows is important to the employer that usually will deeply impair or be destructive of the basic confidence or trust that is an essential of the employment relationship. It will almost inevitably amount to serious misconduct.
- [61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant in this context.
- [62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate.

[74] The above guidance on approaching a summary dismissal, involves applying the same justification test in s103A of the Act but the seriousness of the misconduct must be so

destructive of the employer's trust in the employee or substantial in its level of seriousness that no notice is warranted before dismissing – thus the sanction of summary dismissal is reserved for the most serious cases of misconduct.

Assessment

[75] Notwithstanding my criticism of how the decision was reached by ASG, I would not go as far as to suggest that summary dismissal was not substantively a decision open to a fair and reasonable employer in all the circumstances. Whilst I have found that a fair and reasonable employer could have approached this more fairly and paused to consider wider factors before making the decision, the assumption that serious misconduct was at issue is reasonably and objectively evident. This is because I find that the act of Mr Curnow covertly recording conversations he was not involved in, was behaviour that irrevocably destroyed the trust his employer was entitled to place in him. Unlike cases where, for example, covert recordings are made in the context of disciplinary meetings that the Authority has previously held to be not in good faith but “not every breach is destructive of trust and confidence”,⁵ this is distinguished as a surreptitious act in a circumstance where Mr Curnow was not under scrutiny. Mr Curnow gathered selective evidence to support a complaint that could have been approached using the existing employment agreement's dispute resolution provision.

[76] Further, the recording that Mr Curnow was a party to, is distinguishable from a disciplinary context in that Mr Curnow initiated the conversation and left the other participant vulnerable to being provoked.

[77] Whilst I cannot re-run or “stand in the shoes” of the employer conducting a disciplinary inquiry, I can assess whether the decision to categorise the conduct as sufficiently serious to warrant consideration of summary dismissal was objectively a course open to a fair and reasonable employer at the outset - here I find it was.

Finding

[78] Notwithstanding the above, I find in the overall circumstances the significant procedural deficiencies and lack of fair process render the dismissal unjustified. ASG's

⁵ See the discussion in *Nicol v Canterbury Concrete Cutting NZ Ltd* [2018] NZERA Christchurch 180 at paras [83] – [85].

advocate suggested in submissions that: “Any criticism of this process is not relevant to the ultimate decision” because of Mr Curnow’s clear breach of the law. Apart from the fact that I must apply statutory factors, I do not agree with this submission on the supposed irrelevance of fair process. In *Ruffell v Women’s Refuge Sexual Assault Resource Centre Marlborough Inc* the Employment Court before going on to describe minimum procedural requirements (now codified in s 103A of the Act), indicated:

As this Court has held many times, it is wrong to say that such a failure is merely procedural for procedure is power and, in some cases, a deprivation of procedural rights is effectively a deprivation of all rights. It is well to bear in mind that in a free and democratic society some of the most important rights we possess are procedural in nature.⁶

[79] However, Mr Curnow did not act in good faith and the summary dismissal of Mr Curnow for engaging in covert recordings of co-workers could be viewed as substantively justified on the ground that he engaged in serious misconduct that destroyed his employer’s trust and confidence in him without any compelling mitigating circumstances.

[80] Whilst this concept may appear frankly odd to ASG, the concept of a dismissal being potentially substantially justified but procedurally unfair and therefore overall being unjustified, is well established having been identified by the Court of Appeal thirty five years ago in *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW* a judgment delivered by Woodhouse P, holding that a dismissal could be found to be a lawful exercise of an employer’s right but “unjustifiable” by virtue of the way in which the matter was handled.

[81] Having made an overall finding of unjustified dismissal and breaches of good faith requirements (including the inappropriateness of the suspension), Mr Curnow is entitled to consideration of remedies that I discuss below. Mr Curnow’s lack of good faith will be considered in the context of his contribution to the situation.

[82] I stress, this finding should not be taken as condoning Mr Curnow’s actions in covertly recording conversations he was not participating in and the sometimes problematic, nature of recording conversations a person is participating in, without the other party’s permission.

⁶ *Ruffell v Women’s Refuge Sexual Assault Centre Marlborough Inc* [2002] 1 ERNZ 409 at [63].

The training bond deduction

[83] Mr Curnow made no further submission on an assertion that deducting \$1,123 from his final pay to cover training costs was not lawful. To resolve this matter, I look at two issues – did Mr Curnow owe the money and was there a valid provision in Mr Curnow’s employment agreement allowing the deduction to be made.

[84] Clause 9.4 of Mr Curnow’s employment agreement under: “Training” notes: “prior to this training occurring, the employee will be required to sign a bond document with the training costs amortised over an agreed period”. Whilst Mr Curnow’s employment agreement (cl 15.5) had a clause headed: “Deductions from salary/Wages” it was confined at the time of termination to “any overpayment made to the Employee for leave taken in advance”.

[85] ASG provided two documents entitled “Training Bond Agreement”, one was dated 1 April 2019 and the other 6 November 2019 both signed by Mr Curnow and ASG Managers. The bond period was specified as 24 months

[86] Also provided was a separate unsigned document, headed “Training Bond Policy and Agreement”. There was some confusion over the documents as the first agreement referred to training costs of \$980 for training between 9-12 April 2019 and the second agreement referred to a “relocation Bond” to the value of “up to \$3,000”. No evidence was provided on how much training costs had been paid out on Mr Curnow’s behalf. There was also reference to the bond being proportionally reduced (e.g., by 50% after 12 months).

[87] Notwithstanding the somewhat opaque provision described, even if there was a bond debt owing to ASG, the deduction from Mr Curnow’s final pay can only be made in accordance with s 5 Wages Protection Act 1983. Such a deduction, if the employment agreement clause permits (and here no provision existed), can only be made in consultation with Mr Curnow and the deduction is not unreasonable.⁷ On the latter, it is arguable that the purpose of the clause was to allow ASG to recover training costs should Mr Curnow voluntarily leave and here ASG brought the employment to an end.

⁷ Section 5(1)(a) Wages Protection Act 1982 enables a deduction to be made based on an employment agreement’s general deductions clause. Section 5(1A) of the same act codifies the common law position and it requires an employer to consult before making a deduction and that the deduction must not be “unreasonable”.

[88] I find the employment agreement's general deductions clause did not cover this circumstance and there was no prior consultation before the deduction was made. I conclude the deduction was not lawful and the amount deducted must be paid back to Mr Curnow.

Remedies

Lost wages

[89] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Curnow should I find that he has established a personal grievance and s 128(2) of the Act mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[90] Here I find Mr Curnow's lost remuneration was attributed to the personal grievance. Mr Curnow gave evidence that the circumstances of his dismissal and the aftermath made it impossible to secure a job in the security industry. Mr Curnow says he tried for jobs in several local security firms with no success and after one month of unemployment he found fruit picking work in the horticulture industry from September 2020. Mr Curnow sought lost wages in the amount of \$60,296.93 to reflect what he would have been paid during an eighteen-months period if he had not been dismissed by ASG. Mr Curnow's counsel suggested it was appropriate to exercise discretion under s 128(3) of the Act to award lost wages beyond three months.

[91] Given the above and reflecting the circumstances of the dismissal, I consider overall justice is best served by awarding Mr Curnow three months lost wages (thirteen weeks calculated at \$33.00 per hour for a forty-hour week) in the amount of \$17,160.00 (gross) together with holiday pay of 8% and the employer's 3% Kiwi saver contributions.

Compensation for hurt and Humiliation

[92] Mr Curnow gave convincing evidence of the distressing impact of the suspension and summary dismissal and the uncertainty and anxiety it created at a difficult time to find immediate alternative employment, and the upset it caused him to reasonably perceive the unfairness of the actions of his Team Leader and management not addressing the dysfunctionality of the workplace (albeit through evidence he had obtained in an illegitimate

manner). It is evident however, that the upset was somewhat driven by Mr Curnow's strong sense of outrage.

[93] Nevertheless, I am convinced that at the time, despite a lack of medical evidence, Mr Curnow suffered humiliation, loss of dignity and injury to feelings due to ASG taking a partial approach to the initial investigation and then failing to adequately allow Mr Curnow to get appropriate representation and to explain his actions and the context for such. Mr Curnow described ongoing distress and being in a very dark place with his partner having to stop working to be with him at home. The manner by how the dismissal was enacted was less than ideal and the handling of the first issue was particularly deficient and objectively led ASG to have a view of Mr Curnow that was perhaps 'one dimensional'.

[94] Considering all the circumstances, leading up to the dismissal, awards made by the Authority and Court in similar situations and how AGL effected the dismissal, I consider Mr Curnow's evidence warrants a level of compensation in the sum of \$14,000 under s 123(1)(c)(i) of the Act.

Contribution

[95] Section 124 of the Act states that I must consider the extent to what, if any, Mr Curnow's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess this, I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*.⁸

[96] I have found that Mr Curnow did not act in good faith and he engaged in blameworthy misconduct that he naively considered appropriate when he had not explored the alternative of first making a formal complaint about his co-workers' conduct, before resorting to recording private conversations. Whilst such conduct was inexcusable, ASG should likewise carefully reflect upon their contribution to the situation including, developing better processes for dealing with endemic co-worker conflict and disciplinary investigations. This, however, does not excuse Mr Curnow's methodology of evidence gathering by covert means. In giving evidence, Mr Curnow did not appear to accept the inappropriateness of his actions and

⁸ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

preferred to concentrate on highlighting ASG's deficiencies in approach and his co-worker actions.

[97] Overall, I find Mr Curnow did significantly contribute to the situation giving rise to his personal grievance but I have balanced this up with my finding that ASG's approach was procedurally deficient. Mr Curnow cannot be blamed for the deficiencies in process that robbed him of the time for reflection and seeking of legal advice which may have led to him adopting a different or less belligerent approach to the final disciplinary meeting – a meeting he was given no warning of the possibility he would be dismissed at.

[98] On balance, given the significant contribution to his own downfall, I find a 30% reduction in Mr Curnow's compensatory remedy under s 123(1)(c)(i) of the Act is appropriate in line with cases where a reasonably significant reduction is warranted. I do not reduce Mr Curnow's lost wages awarded as I have already taken several overall factors into account in reducing such and it would be inequitable to reduce the sum any further.

Summary

[99] I have found that:

- (a) Garry Curnow was unjustifiably dismissed.
- (b) Advanced Security Group (Sth Is) Limited failed to adhere to good faith obligations and basic procedural fairness steps in effecting Garry Curnow's dismissal.
- (c) Advanced Security Group (Sth Is) Limited must pay Garry Curnow the sums below:
 - i. \$17,160.00 (gross) lost wages;
 - ii. \$1,372.80 (gross) holiday pay owed on the above amount;
 - iii. \$514.80 (employer Kiwi saver contribution);
 - iv. \$9,800 compensation without deduction pursuant to s 123(1)(c)(i) of the Act;
 - v. \$1,123 (net) being reimbursement of an unlawful deduction from Garry Curnow's final pay.

Costs

[100] Costs are at the discretion of the Authority and are reserved. The parties are encouraged to make an agreement on costs. If no agreement is achieved and the Authority must determine costs, Garry Curnow has fourteen days following the date of this determination to make a written submission on costs and Advanced Security Limited has a further fourteen days to provide a response. All submissions must include a breakdown of how and when the costs were incurred and supporting documentation establishing such.

[101] Costs will not be considered outside of the above timetable unless prior leave to do so has been sought by either party. The parties can expect the Authority to determine costs, if required to do so, by applying a notional daily rate unless identified circumstances require a discretionary departure from this approach. ⁹

David G Beck
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1