IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI ŌTAUTAHI ROHE

ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

[2022] NZERA 417
3136660

	BETWEEN	RENEE ANDREWS Applicant
	AND	CHIEF EXECUTIVE OF THE INLAND REVENUE DEPARTMENT Respondent

Member of Authority:	Philip Cheyne
Representatives:	Denis Asher, advocate for the Applicant Susan Hornsby-Geluk and Sally Togher, counsel for the Respondent
Investigation Meeting:	17 and 18 March 2022
Submissions Received:	22 March, 6 July and 13 July 2022 from the Applicant 25 March and 13 July 2022 from the Respondent
Date of Determination:	26 August 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Renee Andrews has worked for Inland Review Department (IR) for about 14 years, the last 11 of which as a customer services officer (CSO).

[2] In October 2020 Ms Andrews was assigned a task to check some work by another CSO. The CSO's work had included work for a client arising from the birth of the client's child. No specific instructions were given to Ms Andrews about the task. On 8 October 2020, Ms Andrews viewed the client's information and also viewed tax information for the

client's partner (Taxpayer A). The following day, Ms Andrews made some comments about that to other employees during a meeting and to another employee away from the meeting.

[3] Christopher Thomson is the direct manager of Ms Andrews' team leader. Concerns about Ms Andrews' comments were brought to his attention. The steps taken by Ms Andrews relating to the assignment were also reviewed. Mr Thomson wrote to Ms Andrews on 19 November 2020 alleging Ms Andrews' actions and comments might amount to serious misconduct. After a disciplinary process, Mr Thomson sent Ms Andrews a final written warning on 21 December 2020 based on his view that Ms Andrews' actions amounted to serious misconduct.

[4] Ms Andrews raised her personal grievance claim of unjustified disadvantage in January 2021. IR in response claimed the final written warning was justified. The parties participated in mediation but the matter was not resolved. Ms Andrews then applied to the Authority for a resolution of her personal grievance.

[5] Ms Andrews seeks reinstatement by way of removal of the finding of serious misconduct, an apology and appropriate redactions from her personal file. Compensation under s 123(1)(c)(i) is also claimed. IRD denies that it unjustifiably disadvantaged Ms Andrews and says she is not entitled to remedies.

The Authority's investigation

[6] With the parties' consent, I prohibit the publication of the names of any information that would tend to identify the client, the client's child, and Taxpayer A.

[7] Both parties, witnesses and representatives appeared remotely. This agreed approach avoided the possibility of adjourning the investigation meeting until all could safely attend in person. In large measure, the disciplinary process was documented by both sides. I am able to resolve the problem according to the substantial merits of the case despite not holding an in-person investigation meeting.

[8] It is not disputed that Ms Andrews' employment or a condition of her employment was affected to her disadvantage by IR's decision that Ms Andrews' actions amounted to

serious misconduct for which she would receive a final written warning. While the final warning is now expired, Ms Andrews' personal grievance claim must still be resolved.

[9] I need not set out a full record of the Authority's investigation process, or the evidence and submissions I heard. As part of the investigation meeting, both parties presented evidence and drew my attention to material to support the respective positions. I mean no disrespect if this determination does not fully record that. I will endeavour to state relevant factual findings, state and explain relevant legal findings and express my conclusions on the issues required in order to resolve the employment relationship problem.

[10] Overall, the issue is whether IR actions and how it acted were what a fair and reasonable employer could have done in the circumstances at the time. It will be useful to explain more about IR's disciplinary investigation. I will then assess whether IR sufficiently investigated the allegations, whether IR raised the concerns with Ms Andrews before it reached its decision, whether IR gave Ms Andrews a reasonable opportunity to respond before it reached its decision, whether IR genuinely considered Ms Andrews' explanation before it reached its decision and whether there are any other factors that should be considered. If IR's actions were unjustified, I will also consider what remedies are appropriate.

[11] After the investigation meeting, I raised a point with the parties for their further comment. Helpfully, the representatives responded promptly.

IR's disciplinary investigation

[12] Ms Andrews made some comments during a staff meeting (known as a "buzz meeting") on Friday 9 October 2020. Ms Andrews and others participated remotely. During the meeting, two of the participants messaged one another about their concern over Ms Andrews' comments. One of them (the Acting team lead - ATL) later spoke to Lisa Rangihuna, then emailed her after the weekend. Ms Rangihuna is Team Lead for the section in which Ms Andrews works. The email is dated 12 October. Ms Rangihuna reviewed the actions taken under Ms Andrews' computer user account, concluded that there was no proper reason for Ms Andrews to review the income prior to the 2021 tax year and referred her review and views to IR's integrity assurance section (IA). Ms Rangihuna's email to IA is dated 12 October. The case was documented by IA as a notification of potential

misconduct on 15 October. The IA advisor also prepared some notes about a potential breach of s 18 of the Tax Administration Act 1994.

[13] Because Mr Thomson as manager was not available, another IR manager (Adam Cooper) was assigned as the case manager and decision maker to investigate the matter as potential misconduct under IR's code of conduct. There is an email and attachments from IA to Mr Cooper dated 15 October 2020.

[14] Mr Cooper interviewed the ATL. Typed notes of the interview show it was on 27 October 2020, with the notes signed on 18 November 2020.

[15] Mr Thomson became available again and took over responsibility as case manager and decision maker. He wrote to Ms Andrews on 19 November 2020 concerning alleged serious misconduct. The letter summarised the steps taken by a user under Ms Andrews' login to view information held by IR on a taxpayer's account (Taxpayer A). It referred to the concerns raised with IA that Ms Andrews may have accessed sensitive revenue information about the taxpayer on 8 October without an apparent business reason, that Ms Andrews may have disclosed sensitive revenue information of that taxpayer at the buzz meeting on 9 October and that Ms Andrews may have disclosed sensitive revenue information of that taxpayer to persons outside of the buzz meeting. It was alleged that the person using Ms Andrews' account:

> - accessed the account of *Taxpayer A* … and viewed … income for 2020, 2019, 2018, 2017 and 2016 without an apparent business reason, without the proper authority to do so and outside of your normal duties;
> - accessed and viewed the 2017 income tax return information of *Taxpayer A* …
>
> And may have:
>
> - disclosed sensitive revenue information of *Taxpayer A* at a team meeting on 9 October 2020; and
> - disclosed sensitive revenue information of *Taxpayer A* with other persons …

[16] Ms Andrews was cautioned that if the allegations were substantiated, she may have breached the employment agreement, IR's code of conduct, sections 6 and 18 of the Tax Administration Act 1994 and the State Sector integrity standards.

[17] A redacted tracking report and the ATL's 18 November 2020 signed notes were included in the attachments to the 19 November letter. There was also an offer to contact Mr Thomson to arrange to view the login activity. Ms Rangihuna's 12 October 2020 email to IA and IA's 15 October 2020 email to Mr Cooper were not included.

[18] A meeting was set for 26 November 2020.

[19] Taxpro Incorporated is a union with members who are IR employees. Taxpro and IR are party to a collective agreement. Ms Andrews, as a member of Taxpro, sought its assistance. Des Harris is a Christchurch representative for Taxpro. Mr Harris contacted Mr Thomson in response to the offer to view the login activity in advance of the meeting. Mr Harris also asked to see the primary caregiver's account activity around the same time, requested Mr Thomson to interview a second employee (Sandra McClelland) and gave the names of two further participants who could be approached.

[20] The contact between Mr Harris and Mr Thomson resulted in Ms Andrews and Mr Harris being allocated time to view the account activity, accompanied by Ms Rangihuna. The viewing with Ms Rangihuna present was the day before the first disciplinary meeting. I will return later to issues raised about this.

[21] The 26 November disciplinary meeting involved Ms Andrews, Mr Harris, Mr Thomson and an IR HR advisor. It took place via MS Teams and was recorded by agreement. A transcript was later produced. The transcript is in evidence. Ms Andrews had prepared a typed account of the steps she took when accessing Taxpayer A's account and provided a copy to Mr Thomson. It too is in evidence. The meeting lasted just over an hour. It ended with Mr Thomson inviting any further comment in writing by 30 November, leaving open the possibility of him seeking further information, sharing it (if appropriate), and then setting out his preliminary decision. Ms Andrews would then have an opportunity to comment on his preliminary view before he made a final decision.

[22] Mr Thomson asked Ms Rangihuna to check the steps taken by Ms Andrews on similar cases. Ms Rangihuna emailed her report to Mr Thomson at 9.49am on Tuesday 1 December. The evidence is that Mr Thomson made that request of Ms Rangihuna on or shortly before that day.

[23] Mr Thomson interviewed the ATL and another team member separately during the morning on 1 December 2020. There are typed notes of each interview, signed on 2 December by each interviewee. The notes are in evidence.

[24] Mr Harris and Ms Andrews provided Mr Thomson with a written response, following the meeting. By agreement, it was provided on 2 December, rather than by 30 November 2020. It is in evidence.

[25] Mr Thomson next arranged a further meting for 10 December 2020 with Mr Harris and Ms Andrews, for Mr Thomson to provide his preliminary view. When the meeting was being arranged, Mr Harris reminded Mr Thomson about his earlier undertaking to share any additional information (such as interview notes) before reaching a preliminary view. Mr Thomson then forwarded the interview notes of the ATL and the other team member, without expressly inviting Ms Andrews to respond.

[26] Mr Thomson's preliminary view is comprehensively set out in a letter dated 10 December 2020.

[27] I will summarise the letter. Mr Thomson accepted that Ms Andrews had a valid business reason to review Taxpayer A's income for 2021 and possibly for 2020, but not the earlier years of 2016 - 2019. Mr Thomson considered that Ms Andrews had viewed the earlier years out of curiosity because of who Taxpayer A is. He considered that Ms Andrews did not have a valid business reason to check Taxpayer A's income for 2017 – 2019. Ms Andrews' actions may constitute a breach of s 6 of the Tax Administration Act 1994. Mr Thomson considered that this allegation was substantiated in part.

[28] Mr Thomson considered that Ms Andrews viewed Taxpayer A's 2017 income tax return information without a valid business reason, without proper authority and outside her normal duties. Mr Thomson did not accept it was a randomly selected year chosen in order for Ms Andrews to satisfy herself as to the original client's entitlements. Mr Thomson considered that Ms Andrews went further than necessary for work purposes in order to satisfy her curiosity. Her actions may constitute a breach of s 6 of the Tax Administration Act 1994. Mr Thomson considered that this allegation was substantiated.

[29] Mr Thomson considered that Ms Andrews had not disclosed Taxpayer A's identity or salary in her comments during the "buzz meeting". Similarly, Mr Thomson considered that Ms Andrews had not identified Taxpayer A's identity or salary by what she said to the colleague outside the buzz meeting. Mr Thomson considered that these allegations were not substantiated.

[30] Mr Thomson's view was that the substantiated allegations meant that Ms Andrews may have breached the employment agreement, IR's code of conduct, s 6 of the Tax Administration Act and the State Sector Standard of Integrity and Conduct. Mr Thomson thought that Ms Andrews' actions without a proper business reason and authorisation for the level of access to taxpayer information, amounted to serious misconduct. Some of Ms Andrews' actions demonstrated poor judgment and decision making. His preliminary view was that a final written warning would be an appropriate outcome.

[31] Mr Thomson invited Ms Andrews' response by 14 December 2020. Mr Harris and Ms Andrews responded in writing on that date. On 15 December 2020 Mr Thomson acknowledged the responses and attached Ms Rangihuna's "similar cases" report that he had received on 1 December 2020. It had not been disclosed earlier. Mr Thomson stated that he now thought it was relevant, based on Ms Andrews' submission. Mr Thomson asked for written comment by Thursday 17 December 2020. Mr Harris responded by email on 17 December 2020.

[32] In his letter of 21 December 2020, Mr Thomson confirmed his view that Ms Andrews did not have a valid business reason to check Taxpayer A's income for the 2019, 2018 and 2017 years to the extent she had. Mr Thomson considered this was done without proper authority and outside Ms Andrews' normal duties and her actions constituted a breach of section 6 of the Act. Mr Thomson also confirmed his view that Ms Andrews did not have a valid business reason to access and view Taxpayer A's 2017 income tax return information to the extent that she did. Ms Andrews did that without proper authority and outside her normal duties and her actions constituted a breach of section 6 of the Act. Mr Thomson confirmed his view that Ms Andrews breached the employment agreement, the IR code of conduct, the Act and the State Sector standards. Ms Andrews actions amounted to serious misconduct. Ms Andrews actions showed poor judgment and decision making. However, Mr Thomson

retained trust and confidence that Ms Andrews would in the future carry out her responsibilities free from the conduct that had been substantiated. Mr Thomson confirmed that Ms Andrews would be given a final written warning, effective for twelve months.

Justification: Did IR sufficiently investigate the allegations?

[33] Given the employment agreement, the Code and the statutory context, the allegations were serious and Ms Andrews' risked summary dismissal if IR could justifiably conclude that her actions comprised serious misconduct. Given that, and with the resources available as a large state sector employer, IR was obliged to fully investigate the allegations made against Ms Andrews.

[34] What the user logged on with Ms Andrews' details did on 8 October 2020 and that it was done by Ms Andrews was not in dispute. The user's actions between 8.21am and 8.50am are described in the narrative of access. The narrative states that Ms Andrews was "quality reviewing a case for a peer who is training" in the specific tax credit. Later, it refers to the colleague being "quality assessed". On 26 November 2020 Mr Thomson referred to Ms Andrews receiving "the item … for quality checking". Ms Andrews stated that she "received a quality check for a new child trainee, who was training in FAM" and later that "it's a quality check".

[35] Mr Thomson was told by Ms Adcock on 1 December 2020 that she had been told by Ms Rangihuna that Ms Andrews' actions on 8 October were "part of a QC check". In Mr Thomson's interview of Ms McClelland there was mention of "quality checks" and "quality checking". Ms McClelland outlined steps she might take with a "quality check", although she said she had not done any for "a while". Mr Harris on 2 December 2020 repeated that Ms Andrews received "an item for quality checking".

[36] Central to an investigation of IR's concerns was whether Ms Andrews could properly view the IR records for Taxpayer A to the extent that she did, having been tasked to quality check another employee's actions for the client. Mr Thomson concluded that Ms Andrews had checked records to that extent out of curiosity, not for work, because of Taxpayer A's "prominence". The extent of checking by other employees in similar circumstances and

whether Ms Andrews had conducted other "quality checks" to a similar extent previously was important, to enable Mr Thomson to justifiably reject Ms Andrews' explanation.

[37] The 1 December 2020 9.49 am "similar cases" review by Ms Rangihuna was the extent of IR's investigation on the latter point. Ms Rangihuna's review is the basis of her evidence that in those cases Ms Andrews' "appears to have taken a much "lighter" approach" than in the case of Taxpayer A.

[38] There was also limited investigation into the extent of checking by other employees in similar circumstances. Mr Thomson asked Ms Adcock and Ms McClelland about "quality checks".

[39] In response to the 15 December disclosure of Ms Rangihuna's "similar cases" review, Mr Harris observed that it lacked detail so Ms Andrews was not able to provide a substantive response.

[40] I note that Ms McClelland had told Mr Thomson on 1 December when interviewed at 10.30am that while it "would really depend" on what she saw, she might go back one year but "That's probably as far as I would go". Ms McClelland had expressed the view that Ms Andrews was "very thorough, but would not look at anything she shouldn't."

[41] Mr Thompson did not investigate the work practice point further. Despite that, in the 21 December 2020 final decision letter, Mr Thomson concluded:

> I do not agree that there was insufficient detail to provide a substantive response. These were quality checks that you undertook around the same time as Taxpayer A's accounts. …it seems clear to me from these other QC cases that you did not apply your 'established consistent normal work habit' nor did you apply the same 'extra diligence in identifying risk customers".

[42] Maarten Bazuin, an IR employee and the chairperson of Taxpro, gave detailed evidence of the role now of a Quality Reviewer. Previously, Ms Andrews had quality review tasks allocated to her under an earlier quality review regime but had not done that work for some years before this event. There is no reason to doubt Mr Bazuin's evidence. It adds weight to Ms Andrews' explanation that "quality checking" allowed her to take the actions she did in reviewing Taxpayer A and was consistent with her work practice.

[43] In response, in evidence IR sought to characterise the task assigned to Ms Andrews as "comping", a "comp check" or "Quality check for a colleague". However, the task had not been characterised in this limited way during the disciplinary investigation. The parameters of the task assigned to Ms Andrews, the extent of checking it reasonably allowed for, and Ms Andrews' typical approach to similar tasks were matters that IR was obliged to fully investigate as part of its disciplinary process.

[44] I find that IR did not sufficiently investigate whether Ms Andrews' review of Taxpayer A was inconsistent with her "normal work habit" and practice of "extra diligence" when quality checking more generally.

[45] I consider the consequence of this below.

Did IR raise its concerns before it made its decision?

[46] As part of good faith, an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment, must provide the employee with access to relevant information and an opportunity to comment prior to the decision.[1] Ms Andrews risked dismissal, so this statutory duty arose here. In determining whether IR's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time,[2] I need to be satisfied that IR complied with this statutory duty.

[47] I must also consider whether IR raised the concerns it had with Ms Andrews before it warned her.[3] "Relevant information" and "the concerns" are not synonymous, but typically would overlap. "Relevant information" includes supportive information as well as the basis for the concerns. While it is possible that "relevant information" could be provided without the disclosure of the documents containing it, care would be needed to ensure that what was provided properly conveyed context and understanding.

[48] Concerns as raised with Ms Andrews were set out in Mr Thomson's letter of 19 November 2020 and the interview on 26 November 2020. Concerns were

[1] Employment Relations Act 2000 s 4(1A)(c).
[2] Employment Relations Act 2000 s 103A(2).
[3] Employment Relations Act 2000 s 103A(3)(b).

comprehensively restated in the 10 December 2020 "Preliminary findings" letter. IR through the disciplinary process also provided Ms Andrews with information it considered was relevant to its concerns.

[49] Several documents were first produced in evidence in response to my inquiry during the investigation meeting. There is an email at 1.24pm 15 October 2020 from the IA senior advisor to Mr Cooper with the subject line "Notification of Potential Misconduct – Case Reference […]". It states that "important documents covering what has happened" are attached. They were: "NOTIFICATION OF POTENTIAL MISCONDUCT" (notification form); 12 October 2020 emails from the ATL to Ms Rangihuna and then from Ms Rangihuna to IA; and "Notes on Potential Breach of s.18 Tax Administration Act 1994". The email to Mr Cooper with the attachments was forwarded to Mr Thomson when he assumed responsibility for the disciplinary investigation. Mr Thomson had regard to the contents, as required by the 15 October 2020 email. I need to assess whether these documents included relevant information and whether it was provided to Ms Andrews.

[50] The 15 October 2020 email included relevant information and set out IR's concerns about Ms Andrews' conduct. However, that relevant information and those concerns were sufficiently covered by Mr Thomson's letters and were canvassed at interview, prior to the final decision.

[51] The notification form includes a description of the potential misconduct, which I will paraphrase as it was relevant information. It refers to concerns that Ms Andrews told a meeting that she had come across a "very famous" type of taxpayer's account, told team members that being the nosey person she was she checked the taxpayer's income, told them the person's name and monthly earnings and may have disclosed income details to other staff outside of her current team. It refers to Ms Rangihuna's review of the access and actions on Ms Andrews' user account, the finding that the user had a business reason to access the client and the taxpayer's accounts, but had no reason to access and view the taxpayer's income details for previous years. It states that Ms Rangihuna had confirmed that Taxpayer A's earnings were similar to the figure reportedly communicated by Ms Andrews. It states that the information allegedly provided by Ms Andrews to the meeting may amount to a breach of s 18 of the Tax Administration Act 1994. Looking up a taxpayer's information except as part

of the employee's specific duties is "unauthorised access", not permitted and may amount to serious misconduct under the Code of Conduct.

[52] The taxpayer is described as "a prominent New Zealand" member of an identified profession in the 19 November 2020 letter and "a prominent New Zealander" in the 10 December 2020 letter. Ms Andrews was asked during the 26 November 2020 meeting about who she understood Taxpayer A to be and at what point in her access she realised the person's identity. In the 10 December 2020 letter, Mr Thomson concludes that it was not necessary for Ms Andrews to check "further back than 2020" and that she did that "out of curiosity because of who the prominent" member of the profession is. The characterisation of Taxpayer A as "very famous" by the Acting Team Leader and repeated by IA was relevant information. It and Ms Andrews' use of the word "nosey" contributed to Ms Rangihuna's and IA's suggestion that Ms Andrews knew she had no business reason for all her actions. Describing Taxpayer A to Ms Andrews as "prominent" during the disciplinary process, was not full disclosure of relevant information.

[53] IA's summary of the ATL's 12 October 2020 email notification and the email itself were relevant information. They express the basis of IR's concerns. The ATL's email notification includes the account that Ms Andrews "spoke up to say that she had come across a very famous" member of a profession. It sets out an account of what Ms Andrews then said to the meeting attendees. The ATL's interview notes dated 18 November 2020, which were disclosed, did not fully provide the relevant information set out in the 12 October 2020 email and repeated in the IA summary.

[54] The ATL sent her email to Ms Rangihuna and several hours later Ms Rangihuna sent that email and her review of the access and actions on Ms Andrews' user account to IA. Ms Rangihuna's access review was relevant information. IR attached a tracking report to the 19 November 2020 letter, but it did not include the commentary provided by Ms Rangihuna. IR offered and Ms Andrews arranged to review her on-line access. However, the issue was why Ms Andrews had taken those steps, not what she had done. Screening a review in late November 2020 of what Ms Andrews had done more than a month earlier, but without Ms Rangihuna's 12 October 2020 commentary, was not full disclosure of relevant information. I also accept Ms Andrews' evidence, that screening the review for her and her

representative to view in the presence of Ms Rangihuna, limited her opportunity to discuss with her representative why she had viewed the information. I find that by not providing Ms Andrews with a copy of the 12 October 2020 emails, IR had not given her access to relevant information.

[55] In her 12 October 2020 email, Ms Rangihuna expressed her view that "it isn't incorrect" to check the partner's income for 2021 financial year. She also expressed the view that:

> There would be no reason Renee would need to review the income for any years prior to 2021 as the child was born in the 2021 year and therefore this is the only year we would need to review for any WfFTC eligibility. With Renee using the works 'being nosey' it also suggests she knows she had no valid reason for reviewing [Taxpayer A's] income.

[56] Ms Rangihuna's view is reflected in the IA's notification form. I accept that IR clearly raised its concern about whether Ms Andrews had a business reason to access Taxpayer A's information. However, IR did not disclose Ms Rangihuna's view, as above. The view of Ms Andrews' direct manager was relevant information. Ms Andrews should have been provided with the 12 October 2020 email that conveyed that view and an opportunity to comment on that information, before IR made its decision.

[57] IR submits that the non-disclosed material was administrative in nature and formed part of IA's initial review, rather than being obtained for the purposes of the employment investigation. The submission extends to the 12 October 2020 email. I do not accept this submission. Ms Rangihuna had "technical expertise", and her view was influential. Some of the relevant information in the non-disclosed material was provided to Ms Andrews by other means, but not the view of Ms Rangihuna that had been expressed at the outset.

[58] IR also submits that Mr Thomson put to Ms Andrews, IR's concerns about whether she had valid reasons for reviewing income for years prior to 2021. I accept this was so. However, IR was obliged to provide access to relevant information and to raise its concerns. There is an overlap, but each of the obligations must be met. The relevant information default is not answered by the way Mr Thomson raised IR's concerns, without reference to Ms Rangihuna's view.

[59] Ms Andrews viewed income tax return information for Taxpayer A for a specific year. Ms Andrews was asked why and her explanation was to the effect that it was "a sample return to look at the overall income". Mr Thomson questioned Ms Andrews further on the point, suggesting that she would have checked a more recent year had that been her intention. In evidence, Mr Thomson confirmed that the year held specific relevance for Taxpayer A and the taxpayer's profession. I find that Mr Thompson rejected Ms Andrews' "sample year" explanation at least partly because of the year's relevance.

[60] Mr Thompson knew that Taxpayer A was "very famous". However, the person was described to Ms Andrews as "prominent". She had not at first recognised the person, not being a follower of the profession. Ms Andrews said that she then realised who it was when she looked at Taxpayer A's current tax year, because the screen gave additional information. Mr Thompson came to the view that Ms Andrews viewed information further back than 2020 "out of curiosity because of who the prominent" [4] person was. That included curiosity about the specifically relevant year. However, Mr Thompson (and IR) did not raise with Ms Andrews the connection in his mind between Taxpayer A's identity and the specific year that caused him to reject her sample explanation.

[61] IA prepared notes on a potential breach of s 18 of the Tax Administration Act 1994 and provided them to Mr Cooper. They were forwarded to Mr Thomson so were part of the information considered by Mr Thomson. The notes were process guidance for the manager, given the possibility that what Ms Andrews "allegedly provided … to her team" could "also represent a breach of s.18 of the Tax Administration Act 1994." The 19 November 2020 letter to Ms Andrews included reference to the potential application of s 18 of the Act, so she was able to obtain legal advice on that point. To the extent IA's notes regarding s 18 were "relevant information" or expressed "concerns", covered by s 4(1A)(c) or s 103A of the Employment Relations Act 2000 respectively, I find that there was sufficient provision of relevant information and raising of concerns by Mr Thomson in his communications.

[62] In summary, some relevant information was not provided to Ms Andrews for her to comment on before the decision to warn her. The information informed IR's concerns, so IR's concerns were not fully raised with Ms Andrews before the warning.

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[4] See 10 December 2020 preliminary findings letter (bundle of documents 138).

Did IR give Ms Andrews a reasonable opportunity to respond?

[63] It is not necessary to rehearse the steps taken by IR during the disciplinary investigation.

[64] IR gave Ms Andrews a reasonable opportunity to respond to the concerns to the extent the concerns were raised with her in the correspondence, meeting and exchanges.

[65] However, that does not detract from the findings set out above that IR had not provided Ms Andrews with all relevant information and had not fully raised its concerns.

Did IR genuinely consider Ms Andrews explanation?

[66] Expressed broadly, Ms Andrews' explanation was that she checked the client's and Taxpayer A's records to satisfy herself that neither of them had IR tasks or issues that were outstanding. Ms Andrews drew attention to IR's business transformation, the broad-based role description now applicable to CSOs, a "whole of job" approach and a "Right From The Start" ethos. Ms Andrews' explanation was that she was properly meeting these expectations by taking the steps she did regarding Taxpayer A. Ms Andrews explained that her actions with respect to Taxpayer A matched her usual work pattern. Ms Andrews supported that by reference to the encouragement and praise she had received from IR over a number of years for the thoroughness of her work and the positive results she had achieved. Her explanation was that her use of the word "nosey" at the Teams meeting referred to the standard inquisitive approach she took to her work. She had not intended any implication that her access was improper or without a business reason.

[67] Mr Thomson considered Ms Andrews' explanation, but concluded that Ms Andrews did not have a valid business reason to check Taxpayer A's income for 2019, 2018 and 2017 years "to the extent that you did". Mr Thomson also concluded that Ms Andrews did not have a valid business reason to access and view Taxpayer A's [specific year] income tax return information "to the extent you did". Mr Thomson considered Ms Andrews took these steps without the "proper authority" and outside of her normal duties.

[68] I refer to the earlier finding that IR did not sufficiently investigate whether Ms Andrews' actions with respect to Taxpayer A were different from her actions in similar

circumstances. I also refer to the earlier findings that IR did not provide access to all the relevant information. In light of those findings, I cannot say that IR genuinely considered Ms Andrews' explanation, before deciding to issue her with a final written warning.

Justification?

[69] I must not determine an action to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being unfairly treated.

[70] I am referred to *A Ltd v H*.[5] In that case, the Court of Appeal held that the approach of the Employment Court in determining whether the employer had sufficiently investigated allegations against the employer was wrong in law. The Employment Court had found that the employee's explanation had not been adequately investigated, given the different approach taken by the employer to testing the complainant's account as opposed to the employee's account. The Employment Court had held the defects in approach were not minor, but were significant breaches of natural justice.

[71] In *A Ltd v H*, the Court of Appeal at [47] accepted that there may be circumstances when an employer might be required to challenge a complainant in a more rigorous manner. However, in that case, nothing turned on the interviewing technique adopted. The case was contrasted with *De Bruin v Canterbury District Health Board*.[6] In *De Bruin* the Employment Court had also held that the employer had not sufficiently investigated matters. However, the Court of Appeal noted at [39] that the circumstances were different.

[72] In the present case, IR insufficiently investigated an aspect of Ms Andrews' explanation, did not provide access to some relevant information and did not fully raise its concerns.

[73] I agree with the submission that the real issue was why Ms Andrews went as far as she did in reviewing Taxpayer A's records. Either Ms Andrews did so out of "curiosity" without a valid business reason or she attended to the assigned task in a thorough manner in keeping

[5] *A Ltd v H* [2016] NZCA 419.
[6] *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110.

with her usual practice and IR's business model. Ms Andrews had a lengthy and unblemished work record. To be able to fairly discount Ms Andrews' explanation, IR needed to fully disclose relevant information and the basis for its concerns. IR's defaults were not minor procedural defects and did result in Ms Andrews being unfairly treated.

[74] I find that the warning was unjustified and Ms Andrews has a personal grievance.

Remedies

[75] Ms Andrews seeks the removal of the finding of serious misconduct, and appropriate redacting of her personal file. There is a submission for IR that removal and redaction fall outside the scope of remedies available under s 123(1) of the Employment Relations Act 2000 so are not within the Authority's jurisdiction. I am referred to the Public Records Act 2005 which it is submitted requires the retention of records, but I was not taken to the specific statutory provision in support of the submission.

[76] IR also submits that the Authority has no power to order an apology. The statutory remedies do not permit such an order. More must be said about the potential effect of reinstatement, removal and redaction.

[77] Under s 17 of the Public Records Act 2005 every public office must create and maintain full records of its affairs in accordance with normal, prudent business practice. Section 18 prohibits the disposal of public records except with the authority of the Chief Archivist given in accordance with the Act. That prohibition does not apply if the disposal of a public record is required by or under another Act.

[78] Under the Public Service Act 2020, the Employment Relations Act 2000 applies to the public service. I am satisfied that a reinstatement order by the Authority made in reliance on s 123(1)(a) of the Employment Relations Act 2000 is not constrained by the Public Records Act 2005.

[79] In *Creedy v Commissioner of Police*,[7] the Employment Court confirmed that reinstatement is a remedy available to an employee who has been disadvantaged unjustifiably

[7] *Creedy v Commissioner of Police* [2011] NZEmpC 104.

in employment. In unjustified disadvantage grievance cases involving formal warnings, reinstatement has long been available as a remedy. For example, in *New Zealand Amalgamated Engineering etc IOUW v Alliance Freezing Co (Southland) Ltd*,[8] the Labour Court ordered reinstatement and required that the formal entry of a final warning in the employee's personal record maintained by the employer be "wholly expunged". The Court of Appeal upheld the Labour Court's finding that a final warning can give rise to a personal grievance, without comment about the form of remedy.[9]

[80] The Authority has ordered reinstatement in cases about warnings: see for example *X v Secretary for Justice* and *Moxon v Pathways Health Limited*.[10] In *X*, the Authority ordered reinstatement but accepted the employer's submission that the Authority's powers were unlikely to extend to the destruction or disposal of records. In *Moxon*, reinstatement by way of retraction was sought. An order was made that for all purposes the employee should be regarded as having never received the warning. Dealing with a challenge to the costs determination in *Moxon*, the Employment Court referred with apparent approval to the reinstatement order.[11] I proceed on the basis that the form of reinstatement order made in *Moxon* is available in an appropriate case.

[81] Section 124 of the Employment Relations Act 2000 requires me, in deciding the nature and the extent of remedies, to consider the extent to which the employee's actions contributed to the situation that gave rise to the grievance and if those actions so require, to reduce remedies. To amount to contributory behaviour, the actions must be causative of the outcome and blameworthy.[12]

[82] IR submits that remedies should be reduced substantially.

[83] IR says that Ms Andrews misunderstood her role and obligations regarding client confidentiality. However, the evidence of a colleague is that Ms Andrews, in doing her work,

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[8] *New Zealand Amalgamated Engineering etc IOUW v Alliance Freezing Co (Southland) Ltd* [1988] NZILR 1287 at 1307.
[9] *Alliance Freezing Co (Southland) Ltd v New Zealand Amalgamated Engineering etc IOUW* [1989] 3 NZILR 785.
[10] *X v Secretary for Justice* [2011] NZERA Christchurch 177 at [122] and *Moxon v Pathways Health Limited* [2011] NZERA Christchurch 151 at [81].
[11] *Pathways Health Limited v Moxon* [2013] NZEmpC 18. See also Rebecca Atkins (ed) *Employment Law* (online looseleaf ed, Thomson Reuters) at ER123.01.
[12] *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

would not look at anything she should not view. I do not accept that Ms Andrews misunderstood those obligations.

[84] IR refers to Ms Andrews' actions volunteering taxpayer information in a team meeting, telling colleagues that she was nosey and drawing back from the discussion. Mr Thomson concluded that Ms Andrews did not disclose sensitive revenue information either during or outside the buzz meeting. Mr Thomson also considered that Ms Andrews may have been prompted by the ATL during the meeting to provide more details. Those actions were not causative of the personal grievance. I do not accept that by calling herself "nosey" and drawing back from the conversation, Ms Andrews' acted in a blameworthy manner.

[85] IR also submits that Ms Andrews' claim about her work practice, which it found to be unsubstantiated, supports a reduction in remedies. Given the earlier finding that IR did not adequately investigate the point, the evidence does not establish blameworthy behaviour, causative of the personal grievance.

[86] I find there is no basis to warrant a reduction in remedies.

[87] Section 125 of the Employment Relations Act 2000 applies in this case as Ms Andrews seeks reinstatement and she has a personal grievance. I must provide reinstatement wherever practicable and reasonable. Here, reinstatement is both practicable and reasonable. IR is to reinstate Ms Andrews to the position she was in before the warning dated 21 December 2020. Ms Andrews' personal file is to be redacted to reflect that. Reinstatement has the effect of removing the "finding" of serious misconduct, without more.

[88] Ms Andrews seeks compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000. IR submits that compensation should be at the lower end. I am referred to the recent Employment Court judgment in *Mikes Transport Warehouse Ltd v Vermuelen*.[13] The Court referred to a five-step approach: identifying the harm; its extent; where it sits in analogous cases; assessing which band the case sits in regarding quantum of compensation; and identifying a fair and just amount in the particular case. The award of compensation for

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humiliation, loss of dignity and injury to feelings to settle the personal grievance can then be identified.

[89] Ms Andrews' evidence is that the toll on her emotional, mental and physical state has been devastating. Ms Andrews now expresses a sense of distrust of IR's decision-making capabilities. Her view is that IR's conduct towards her was not consistent with its values. Ms Andrews expresses feelings of betrayal, sadness and anxiety. Ms Andrews' sleeping pattern has been affected and she suffers migraines (frequency and severity) more now that was previously was the case. Ms Andrews says that she suffered extreme bouts of depression and refers to paranoia and insecurity and a sense of distrust. I accept this evidence, but note that it does not extend to establishing a clinical diagnosis of any illness. To some extent, the evidence is of an exacerbation of pre-existing problems. The evidence does not establish that the effects described by Ms Andrews are likely to be long-lasting and persist beyond the resolution of her personal grievance claim.

[90] Overall, I assess the harm as falling within a midrange. I was not referred to any analogous cases, but I consider that the proven harm is not towards the more serious end of such cases. I assess $20,000.00 as the level of compensation required to remedy the proven harm.

Summary and orders

[91] Ms Andrews has a personal grievance in that her employment was affected to her disadvantage by IR's unjustified action of issuing her with the final written warning on 21 December 2020.

[92] To remedy that personal grievance, the Chief Executive of Inland Revenue Department is to reinstate Renee Andrews, pursuant to s 123(1)(a) of the Employment Relations Act 2000. Ms Andrews' personal file is to be redacted by removing reference to the final written warning. Ms Andrews should be regarded as having never received the warning dated 21 December 2020.

[93] To further remedy that personal grievance, the Chief Executive of Inland Revenue Department is to pay Renee Andrews compensation of $20,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[94] Costs are reserved. If the matter is not resolved between Ms Andrews and IR, a party who claims costs may lodge and serve a memorandum, within 14 days. The other party may then lodge and serve a memorandum in response within a further 14 days. I will determine costs on the papers.

Philip Cheyne
Member of the Employment Relations Authority