

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 493
3150425

BETWEEN RAHID AMIN
Applicant

AND HUTT AND CITY TAXIS
LIMITED
Respondent

3152401

AND BETWEEN HUTT AND CITY TAXIS
LIMITED
Applicant

AND RAHID AMIN
Respondent

Member of Authority: Rowan Anderson

Representatives: Matt Belesky, counsel for Rahid Amin
Gerard Dewar and Joshua Pietras, counsel for the Hutt
and City Taxis Limited

Investigation Meeting: 2, 3, 4 and 16 September 2022 at Wellington

Submissions received: 16 August 2022, 24 August 2022, and 12 September
2022 from Mr Amin
16 August 2022 and 13 September 2022 from Hutt and
City Taxis Limited

Determination: 31 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Rahid Amin, in addition to at various times being a shareholder and Board Member, was an employee of Hutt and City Taxis Limited (HCTL). Mr Amin claims

that he was engaged on a permanent full-time basis by HCTL as Manager, that he was unjustifiably disadvantaged in his employment, and that he was unjustifiably dismissed from his employment on 19 August 2021.

[2] Mr Amin says that he was unjustifiably disadvantaged in that he was suspended from his employment on 27 June 2021 and additionally in relation to the HCTL's investigation and its findings against him. He also claims that HCTL failed to act in accordance with its duty of good faith.

[3] HCTL claims that the dismissal was justified and that Mr Amin was dismissed for deliberately misleading the company as to the terms of his individual employment agreement (IEA) signed on 31 May 2021. HCTL also claims that the suspension was substantively justified on the basis that Mr Amin's conduct may have amounted to serious misconduct, and that any procedural defects were minor.

The Authority's investigation

[4] HCTL lodged a statement of problem that included a claim for damages and compensation said to arise out of a breach of duties owed by Mr Amin to HCTL. However, HCTL advised that it no longer pressed those claims. I confirmed this at the outset of the investigation meeting on 2 August 2022. As such, the claims made by HCTL did not require investigation or determination, although HCTL rely upon several similar issues in defence of the claims made by Mr Amin, and they also say they are relevant to the issue of contribution and costs.

[5] An investigation meeting was held between 2, 3, and 4 August 2022, with an additional day on 16 August 2022 necessary to hear from two remaining witnesses and for oral submissions.

[6] All witnesses at the investigation meeting answered questions under oath or affirmation. The Authority heard from the following witnesses for Mr Amin:

- (a) Rahid Amin, the applicant in matter 3150425.
- (b) Sarojini Devi, Mr Amin's partner.
- (c) Khalid Amin, Mr Amin's brother.

[7] And from the following witnesses for HCTL:

- (a) Kevin Braid, former Chairperson and member, HCTL.

- (b) Paul Swain, member and former Director, HCTL.
- (c) Philip Battenburg, member and former Director, HCTL.
- (d) Werdam Latchman Sami, Chairperson, HCTL.
- (e) Amarbir Singh, Director, HCTL.
- (f) Dani Gemmell, employee, HCTL.
- (g) Sahab Singh, Director, HCTL.
- (h) Harpreet Bhangu, former Director, HCTL.
- (i) Kalbhushan Joshi, Manager, HCTL.
- (j) Pankaj Kaushik, Director, HCTL.
- (k) Rajiv Anand, Director, HCTL.

[8] Counsel gave oral closing submissions and also lodged written submissions. In addition, two affidavits were lodged following the investigation meeting from Mr Amin and Mr Sami dealing with discrete matters arising during the course of the investigation meeting.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. The Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

The issues

[10] The issues identified for investigation and determination are:

- (a) Was Mr Amin unjustifiably dismissed?
- (b) Was Mr Amin disadvantaged due to unjustified actions on behalf of HCTL regarding:
 - (i) a suspension of 27 June 2021;
 - (ii) the instigation of the employment process; or
 - (iii) the outcomes of the employment process?
- (c) Is reinstatement reasonable and practicable under the circumstances?
- (d) If HCTL's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - (i) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and

- (ii) Compensation under s123(1)(c)(i) of the Act
- (e) Has HCTL breached any terms of Mr Amin's employment, or obligations owed to Mr Amin under section 4 of the Employment Relations Act 2000?
- (f) Should an Order be made for pre-litigation costs incurred by Mr Amin?
- (g) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Amin that contributed to the situation giving rise to his grievance?
- (h) Should either party contribute to the costs of representation of the other party.

Background

General background, the Commerce Commission, and Mr Amin's first period of employment

[11] Mr Amin became a member of HCTL and started working as a driver for them in 2012. He became a member of the Board in September 2018.

[12] Mr Amin was employed by HCTL in the role of Manager on two distinct occasions. He first took up the role as a Manager on an 'acting' basis on 14 September 2020 following the resignation of the previous manager. That period of employment, including a variation extending the term of the employment, continued until 1 May 2021. That period of employment ended as Mr Amin was not prepared to continue in the role on the month-to-month basis on which his employment had been agreed.

[13] During Mr Amin's first period of employment a significant issue arose for HCTL relating to an investigation commenced by the Commerce Commission. That investigation related to allegations that HCTL, and four individual directors including Mr Amin, had engaged in prohibited anti-competitive behaviour between taxi companies. In summary terms, the allegations related to alleged attempts to engage with other taxi companies to introduce a minimum fare of \$25 for trips from Wellington Airport.

[14] Mr Amin, whilst in the role of Manager on an acting basis, but also beforehand when a Director, was involved to some degree in HCTL's alleged engagement in anti-competitive practices. The relevant level of Mr Amin's involvement is disputed as between Mr Amin and HCTL. Discussions had occurred at a board level prior to Mr Amin's first period of employment as Manager and there is evidence of the Board considering the issue and of others being involved in progressing the issue, including

the former manager. The Board also considered and voted on the matter on 5 October 2020.

[15] On 28 October 2020 the Commerce Commission wrote to HCTL advising that it had received complaints and containing a request for further information. Notification was subsequently given to the directors as to the Commerce Commission's investigation outcomes on 19 March 2021, following which it issued warnings to the relevant directors.

[16] The Commerce Commission proceedings remained a live issue for HCTL and as of 28 May 2021 HCTL's lawyers were seeking instructions as to whether to defend the proceedings issued against HCTL or otherwise as to how to respond regarding the any agreement, subject to approval of the court, as to a range of pecuniary penalties. Ultimately, the Commerce Commission proceedings were resolved costing HCTL more than \$200,000 including legal fees.

Mr Amin's employment from 31 May 2021 and related events

[17] Mr Amin was employed for a second time, commencing on 31 May 2021. At that time the Board comprised of Mr Amin, Sahab Singh, Mr Bhangu and Malkiat Manak. The Chairperson, Kevin Braid, had resigned on 30 May 2021. That Board, which included another director that resigned sometime earlier, had been elected on 23 April 2021. That followed the resignation of the previously constituted Board, apparently as a consequence of the Commerce Commission issues.

[18] The events relating to the IEA signed on 31 May 2021 are subject to significant dispute between the parties. In summary, Mr Amin claims that he was asked by the two other directors at the time, Sahab Singh and Mr Bhangu, to take on the managers role and that it was agreed he would do so on a permanent basis.

[19] HCTL claim the events of 31 May 2021 unfolded in the context of an urgent response being required from the Board to HCTL's solicitors and that Mr Amin misled Sahab Singh and Mr Bhangu, representing to them that the IEA signed provided that the employment would be for a fixed term of four months only. It also says that Mr Amin also represented to the two directors that the IEA had been prepared by HCTL's solicitor.

[20] Mr Amin says that there was no reason for him to agree to a limited term given that the manager role had been recently advertised on Trade Me as a permanent full-time position. Instead, he says he made clear to the Sahab Singh and Mr Bhangu that he needed the employment to be permanent and for a minimum of four months. HCTL acknowledge that the IEA was not a compliant fixed term employment agreement in terms of s 66 of the Act but submits that Mr Amin led HCTL to believe the employment would only be for a fixed term.

[21] On 1 June 2021 the Board terminated Mr Amin's employment but withdrew the termination later the same day. The Authority is not asked to consider that issue.

[22] The IEA of 31 May 2021 provided that Mr Amin would, in addition to wages, receive the Chairpersons salary. That was amended by variation on 18 June 2021 such that he would not receive the Chairperson's payment but would receive an increased hourly rate for the managers role.

Election of Mr Sami and suspension

[23] On 21 June 2021 Mr Sami was elected to the Board as Chairperson.

[24] An issue arose on 24 June 2021 when Amabir Singh emailed the other directors saying the Mr Amin had said a pair of keys had been stolen and suggested a lack of action on the part of Mr Amin as manager. Mr Amin responded stating that he had not said they were stolen, in effect, that he had otherwise acted appropriately.

[25] Mr Sami then emailed HCTL's solicitor on 25 June 2021 seeking confirmation as to whether they had been involved in drafting the IEA, noting that it had the firms name on it. A reply from the solicitor and exchange of further emails confirmed on 26 June 2021 that the solicitors had prepared specific IEA's previously, had not provided a template agreement, but that it would be easy to turn any specific agreement provided into a template.

[26] On Saturday 26 June 2021 a further issue arose whereby the Board were receiving complaints and urgently decided to make a change to HCTL's systems. To arrange that, HCTL says that attempts were made to contact Mr Amin to have him implement the required change. Mr Amin says that he was not required to work weekends and was not in a position to undertake the required action.

[27] This was followed by HCTL engaging Joseph Richardson, employment relations advocate. HCTL say that Mr Richardson, after reviewing Mr Amin's IEA, pointed out that the IEA described his employment as being for a 'minimum' of 4 months, a position that it says the Board was not aware of prior.

[28] It was in that context that Mr Amin was subsequently suspended from his employment as of 27 June 2021. The letter requested Mr Amin attend an investigation meeting on 30 June 2021.

Investigation and dismissal

[29] Mr Amin obtained and provided a medical certificate on 28 June 2021 confirming that he was under significant stress and may need to take stress leave from work. Despite that, Mr Amin provided an initial email response to Mr Sami on 29 June 2021, including recording that he considered he did not have sufficient information such as to be in a position to respond on 30 June 2021.

[30] Despite Mr Amin's response on 29 June 2021, the meeting proceeded on 30 June 2021. At the commencement of the meeting there was an exchange regarding whether Mr Amin had been advised that he could bring a support person to the meeting. Despite that, the meeting proceeded for a period of time with Mr Richardson asking Mr Amin a number of questions before the meeting was finally adjourned.

[31] On 1 July 2021 Mr Richardson sent Mr Amin a letter seeking to reschedule the meeting on 7 July 2021. The letter included additional allegations as follows:

...

- The employment Agreement dated the 31st of May was not, in fact, prepared or approved by the Company's solicitor as the Directors were led to believe.
- The term of the agreement was represented to be for a maximum period of four months. The written terms provide a "minimum" of four months.
- Your actions in inducing the employer to re-enter an employment agreement with you in these circumstances may have breached your obligations of fidelity to Hutt and City Taxis.

[32] On 6 July 2021 counsel for Mr Amin wrote to Mr Sami, amongst other things, advising that the scheduled meeting would need to be rescheduled and further information provided. Approximately one hour after that email was sent, Sahab Singh emailed Mr Sami making various allegations about what had occurred on 31 May 2021.

This was followed later that day by an email from Ms Dani Gemmell containing her recollection of events on 31 May 2021 when asked to sign as a witness to the IEA.

[33] Mr Amin was removed as a director of HCTL on 7 July 2021.

[34] Counsel for Mr Amin wrote to counsel for HCTL on 8 July 2021 raising a number of matters, including challenging the procedural and substantive basis for the suspension.

[35] On 12 July 2021 counsel for HCTL wrote confirming a meeting would take place on 14 July 2021. That letter advised that Mr Amin would be required to address issues relating to both the Commerce Commission matters and the IEA at the meeting.

[36] A meeting ultimately took place on 15 July 2021 which largely involved exchanges between legal counsel.

[37] On 30 July 2021 counsel for HCTL wrote to counsel for Mr Amin providing preliminary views and proposed outcomes as to allegations made. The preliminary findings in that letter related to allegations as to the IEA, and do not appear to have contained findings as to the allegations previously made regarding Mr Amin's role in the Commerce Commission/price fixing matter. The letter did not confirm as such that those allegations had been withdrawn. The letter attached statements from Mr Bhangu and Sahab Singh dated 27 July 2021 that had not previously been provided.

[38] Counsel for Mr Amin responded on 4 August 2021 noting surprise that preliminary views had been formed notwithstanding that the investigation meeting had been adjourned and that they had anticipated it would be reconvened. The letter also noted issues arising from the two statements provided on 30 July 2021, including significant similarities indicating alignment and prior discussion between the witnesses.

[39] On 12 August 2021 counsel for HCTL communicated its findings and conclusions relating to HCTL's investigation. The letter of 12 August 2021 included findings as to Mr Amin's conduct relating to the IEA and concluded that Mr Amin "...is in breach of his duty of good faith to his employer constituting serious misconduct" and that "...our client believes the relationship of trust and confidence has ended".

[40] Counsel for Mr Amin wrote on 16 August 2021 raising a personal grievance and also seeking clarification as to whether, having regard to HCTL's letter of 12

August 2021, Mr Amin's employment had been terminated. HCTL responded via their counsel on 19 August 2021 confirming that Mr Amin's employment was terminated with immediate effect.

[41] A personal grievance for unjustified dismissal was raised on 20 August 2021.

Was Mr Amin unjustifiably disadvantaged in his employment?

[42] Mr Amin identified three unjustified disadvantage claims in his statement of problem. Those claims related to a suspension from employment, the instigation of an investigation and the making of allegations as part of an 'employment process', and findings made by HCTL as to Mr Amin's conduct as contained in the letter dated 12 August 2021.

[43] The Authority must first consider whether Mr Amin's employment, or one or more conditions of his employment was affected to his disadvantage. If such disadvantage is established, the onus then turns to HCTL to justify its actions.

[44] Section 103A of the Act sets out the relevant test for justification, that being whether the employer's actions, and how the employer acted, were what a reasonable employer could have done in all of the circumstances at the time the dismissal or other action occurred.¹ In applying the test of justification, the Authority must consider the factors listed at s 103A(3) of the Act that, in a non-exhaustive manner, set out procedural considerations. The question of justification applies in two parts, to the process adopted by the employer and the substantive justification.

Was Mr Amin unjustifiably disadvantaged by the suspension from employment?

[45] Mr Amin claims that he was suspended from his employment on 27 June 2021, that it amounted to an unjustified action causing disadvantage, and that HCTL's actions also resulted in a breach of clause 9.10 of his IEA signed on 31 May 2021. There is no dispute that Mr Amin was in fact suspended from his employment, on pay, from 27 June 2021.

[46] The letter containing the notice of suspension was issued on 27 June 2021 and included the following text:

...

¹ Employment Relations Act 2000, s 103A(2).

You are requested to attend an investigation meeting at 11am at company office on Wednesday 30 June 2021.

The purpose of the meeting is investigate [sic] and discuss the following concerns with regard to your performance and to give you an opportunity to respond to these issues.

Clause 1.5(a) Breached, Entered into illegal negotiation to price fix.

1.5(a) Not do anything which prejudice [sic] the goodwill and reputation of the employer.

(d) Not enter into any commitment or incur any obligation on behalf of the employer in excess of such authority as may from time to time be delegated to him.

No decision on these issues has been made nor will be made until you have had an opportunity to explain the matter listed.

You are now on paid suspension leave until the matters above have been discussed....

[47] The suspension was ongoing, and Mr Amin remained suspended from 27 June 2021 until 19 August 2021 when he was dismissed from his employment. I am satisfied both that HCTL suspended Mr Amin from his employment, and that Mr Amin was disadvantaged as a result. As such, I must consider whether HCTL's actions were justified.

[48] In terms of procedural justification, it is of note that the letter of 27 June 2021 did not invite any response from Mr Amin as to the suspension issue, nor did the content of the letter merely amount to the expression of a preliminary view.

[49] Mr Amin's IEA contained a specific provision relating to suspension from employment. Clause 9.10 of the IEA appears under the heading of 'termination' and provides as follows:

9.10 Where the Employer has reason to believe the Employee has been guilty of serious misconduct as outlined in clause 9.6, the Employer may suspend the Employee with pay to permit a full investigation of the matter to be completed. To the extent that the notice suspending the Employee does not do so, a notice detailing the reasons for the suspension shall be served on the Employee within 24 hours after the decision has been made.

[50] Clause 9.6 of the IEA contains a non-exclusive list of conduct that may be considered serious misconduct.

[51] Clause 9.10 of the IEA does not itself place onerous obligations on HCTL in relation to the reasons for suspension. However, it required at least a basis for a belief

that Mr Amin was guilty of serious misconduct and the provision of notice detailing the reasons for the suspension. I find that HCTL breached clause 9.10 of the IEA in relation to both of those obligations.

[52] The letter of 27 June 2021 makes no reference to serious misconduct. Whilst an explicit reference might not necessarily be required, it is of significance that the letter refers to other aspects of the IEA, those being the employee's duties referred to at clause 1.5 of the IEA, without doing so. No reference was made to any of the grounds for alleged serious misconduct at clause 9.6 of the IEA. I find there is no evidence supporting a view that HCTL had reason to believe that serious misconduct had occurred. Whether Mr Amin's actions might have amounted to serious misconduct, in form or substance, was not considered at all.

[53] At the investigation meeting, Mr Sami stated that the reasons for the suspension related to Mr Amin's IEA. When taken to the letter of 27 June 2021 Mr Sami, who signed the letter in his role as Chairperson, was unable to explain why the letter did not refer to the IEA issues. In that context, the actual reasons for the suspension are entirely unclear and uncertain and I find that the suspension was absent substantive justification. No reasonably supportable justification was put forward as to why suspension was necessary in the circumstances.

[54] I also find that there were other matters taken into account by HCTL in relation to the suspension that were not included in the letter of 27 June 2021. That included those noted by Mr Sami relating to the IEA. The failure to notify Mr Amin of those reasons was not merely a minor procedural defect.

[55] The suspension also followed the issue the day prior relating to Mr Amin's availability on the weekends. The alleged conduct on 26 June 2021 was not put to Mr Amin as being the basis for the suspension. Mr Amin also said that he was unaware there was any concern with his availability to work on Saturday 26 June 2021 until hearing from one of the witnesses at the Authority's investigation meeting held in these proceedings.

[56] HCTL submits that the matters raised were serious, that there was an immediate crisis on 26 and 27 June 2021 which required immediate action, and that Mr Amin refused to engage with the other directors about the issues. HCTL further submits that additional allegations made on 1 July 2021, including as to the preparation of the IEA

and misrepresentation as to its term, met the threshold for ‘serious misconduct’ under the IEA.

[57] So far as any conclusion was reached by HCTL, I find there was no reasonable basis for it to conclude that Mr Amin was obligated to act in a manner other than he did on 26 June 2021. Relevant to that, I do not consider HCTL reasonably established that Mr Amin was obligated to work on that day, nor that he had done so on previous occasions, nor that his actions on 26 June 2021 were deliberately obstructive. For the sake of completeness, I do not consider suspension was open to HCTL based on those allegations such as they may have been considered.

[58] I do not consider the making of further allegations on 1 July 2021 to have in any way remedied the situation. The additional allegations made at that time related to the IEA and Mr Amin’s conduct relevant to the IEA being put in place. Whilst the letter of 1 July 2021 referred to paid suspension, it did so only in the context of reminding Mr Amin that he was suspended and was not to access the workplace. That approach in no way rectified the deficiencies made early by HCTL in terms of denying Mr Amin natural justice.

[59] HCTL submits that any procedural defects relating to the suspension were minor and did not result in any prejudice of unfairness to Mr Amin. HCTL also submits that there is no immutable rule requiring consultation with an employee prior to suspension and, referring to the decision of the Employment Court in *Tawhiwhirangi v Attorney General*² that consideration of whether a suspension was procedurally fair will depend on the unique circumstances of each case.

[60] In some circumstances, such as where there is an imminent risk to health and safety, suspension without providing an employee an opportunity to be heard may be justifiable. It is also the case that suspension “must be looked at in a sensible, flexible, and a reasonable way to ascertain what are the requirements of fairness on the particular occasion and the particular surrounding circumstances”.³ Looking at the suspension on that basis, I conclude that there was no urgent need for the suspension, HCTL did not provide substantive reasons as to why it considered Mr Amin needed to be excluded

² *Tawhiwhirangi v Attorney-General in respect of the Chief Executive, Department of Justice* [1993] 2 ERNZ 546.

³ *Tawhiwhirangi v Attorney-General in respect of the Chief Executive, Department of Justice* [1993] 2 ERNZ 546 at 558.

from the workplace, nor did it provide Mr Amin an opportunity to comment prior to taking the action that it did.

[61] Some directors may have had concerns about historic actions as to the price fixing matters, but not even the most rudimentary of enquiries had been made as to Mr Amin's role in those issues. The information available to HCTL, whilst the allegations were yet to be fully investigated, did not form a reasonable basis on which to suspend Mr Amin.

[62] Counsel for Mr Amin submitted that substantive justification requires more than the mere making of allegations. I agree. Whilst the letter of 27 June 2021 contained allegations, it did not address the need for Mr Amin to be excluded from the workplace at all. To that end, the decision to suspend was also non-compliant with the terms of the IEA and Mr Amin's conditions of employment were affected to his disadvantage.

[63] No reasonable explanation was provided, either at the time or during the Authority's investigation, which may have justified the need for Mr Amin to be excluded from the workplace on the basis of the allegations contained in the letter of 27 June 2021. The price fixing matters were subject to an ongoing processes being dealt with, albeit in an arguably somewhat chaotic way, by the Board. There was no suggestion that there was a relevant ongoing risk relating to Mr Amin's ongoing presence in the workplace.

[64] I conclude that the suspension was procedurally unjustified in that HCTL did not provide Mr Amin notice of all the relevant allegations prompting the proposed suspension, HCTL did not provide Mr Amin an explanation as to why it considered it necessary to exclude him from the workplace, and that HCTL did not afford Mr Amin an opportunity to comment prior to the suspension and in doing so denied Mr Amin natural justice.

[65] The action taken against Mr Amin was also unjustified having regard to the considerations at s 103A(3) of the Act. This included HCTL having not raised its concerns prior to action being taken, and a failure by HCTL to provide Mr Amin a reasonable opportunity to respond before the action was taken. Additionally, I find that

good faith required HCTL to provide relevant information to Mr Amin and an opportunity to respond prior to any decision being made⁴ and that it did not do so.

[66] The procedural defects were substantial and not minor. This is not a case of the employer's process being the subject of 'minute and pedantic scrutiny', but rather one where the employer failed in a substantial way to afford the employee natural justice before taking action to exclude them from the workplace.

[67] The decision to suspend Mr Amin was both procedurally and substantively unjustified. I conclude that the action taken by HCTL, and the way in which it acted, were not actions open to a fair and reasonable employer at the time the action occurred.

[68] Mr Amin was unjustifiably disadvantaged by HCTL's actions in suspending him from his employment.

Mr Amin's other unjustified disadvantage claims

[69] In submissions, counsel for Mr Amin dealt with the second and third of the alleged unjustified disadvantage claims in the context of the unjustified dismissal claim. I consider that approach appropriate and that the issues identified are relevant to, and best dealt with in the context of the unjustified dismissal claim. However, for the sake of clarity, I record my findings as to the two distinct claims below.

[70] Mr Amin, in effect, submits there was no reasonable basis for the initiation of an investigation into his conduct, including in that the allegations related to conduct during an earlier period of employment. Mr Amin also claims the process was initiated for an improper purpose.

[71] HCTL submits that the suspension letter of 27 June 2021 raised specific concerns and that the fact they had not been raised previously was unsurprising. The reasons given for this included that the other former directors that had been involved at the time of the price fixing issues had all resigned and that the allegations were raised at the first opportunity by the newly constituted Board.

⁴ *Sefo v Sealord Shellfish Ltd* (2008) NZELR 407 (EmpC), at [37].

[72] HCTL further submits that it would be wholly unreasonable to suggest that an employing entity could not implement and undertake an investigation into those matters and that doing so cannot be seen as having caused disadvantage.

[73] Whilst I have found that the suspension of Mr Amin occurred in the context of insufficient enquiries having been made, I am satisfied that there were reasonable grounds on which HCTL were able to initiate an investigation into Mr Amin's conduct relating to the price fixing matters. I am not satisfied that Mr Amin has established a personal grievance for unjustified disadvantage in relation to the instigation of the investigation by HCTL itself.

[74] Mr Amin held a position of responsibility, albeit that the discharge of his responsibilities as manager were subject to instructions from the Board. In that capacity he took steps to progress decisions taken by the Board to progress the minimum fare arrangements. Those steps were taken absent any objection from him and they were imprudent. Whilst I find the Board ultimately decided or approved the progression of that matter, I consider HCTL were justified in considering and investigating Mr Amin's actions in relation to the matter.

[75] I do not accept that HCTL were effectively barred from investigating Mr Amin's role in the Commerce Commission matters simply because there had been a break in the employment relationship. I consider it relevant that a new Board had been put in place, that former Board members present during the relevant period had resigned or not been re-elected, and that Mr Amin had a level of involvement sufficient to warrant the making of enquiries and the commencement of an investigation. However, that is not to say that what unfolded was procedurally justified.

[76] I do not consider the instigation of the investigation or 'employment process' by HCTL itself to have disadvantaged Mr Amin in his employment such as it establishes a separate personal grievance of unjustified disadvantage. Whilst I have found that the suspension of Mr Amin from his employment amounted to an unjustified disadvantage, I do not consider the commencement of the investigation was necessarily entirely baseless.

[77] I consider the findings made by HCTL and communicated to Mr Amin on 12 August 2021, being that Mr Amin breached his duty of good faith and committed serious misconduct, amounted to an unjustified disadvantage. Without clearly

dismissing Mr Amin at that time, Mr Amin was unjustifiably disadvantaged by those findings and HCTL's actions in informing him that it considered the employment relationship to be unsustainable.

[78] HCTL's actions were procedurally and substantively unjustified. Further reasons for my findings, such as I consider they are necessary, in discussion as to the unjustified dismissal claim.

Was Mr Amin unjustifiably dismissed from his employment?

Mr Amin was dismissed from his employment

[79] The letter of 12 August 2021 HCTL claimed that Mr Amin had breached his duty of good faith and that that constituted serious misconduct. The letter did not explicitly confirm the termination of Mr Amin's employment and instead recorded that HCTL's view was that it believed the relationship of trust and confidence had ended, and that "[o]ur client's decision is that the relationship is simply unsustainable". The letter also contained a conditional offer that HCTL would pay Mr Amin what he would have been entitled to "...for the period it understood Mr Amin was to be employed, that being until 30 September 2021".

[80] On 19 August 2021, following a request from counsel for Mr Amin for clarification on 16 August 2021, counsel for HCTL confirmed the dismissal in the following terms:

Our client instructs that having considered your correspondence it is if the view the relationship of trust and confidence has broken down and the employment relationship is irreparable. Accordingly, Mr Amin's employment at Hutt & City Taxis Ltd is terminated effective immediately.

[81] Mr Amin was dismissed from his employment.

The test of justification and overview of submissions

[82] As Mr Amin was dismissed from his employment, the onus turns to HCTL to provide justification for its actions. The Authority must consider, on an objective basis, whether HCTL's actions, and how HCTL acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.⁵

⁵ Employment Relations Act 2000, s 103A.

[83] The test of justification is set out at s 103A of the Act and the Authority must have regard to the factors at s 103A(3) of the Act. Justification requires the consideration of both substantive and procedural fairness.

[84] Mr Amin submits that the dismissal was both procedurally and substantively unjustified. He also submits that the allegations raised were baseless, that HCTL's investigation suffered from significant flaws, and that there was no proper basis for HCTL's finding that Mr Amin had breached his good faith obligations constituting serious misconduct.

[85] Mr Amin also submits HCTL's findings as to his conduct relating to the IEA were unjustifiable and that there was no basis for HCTL's finding that it had lost trust and confidence in him having regard to the Commerce Commission allegations. Mr Amin submits that HCTL's decision to dismiss was impacted by bias and that there was no basis upon which his employment could be considered anything other than permanent in nature.

[86] HCTL submits that Mr Amin was dismissed from his employment for deliberately misleading HCTL as to the term of his IEA and it being approved by HCTL's solicitor. It submits that those misrepresentations induced HCTL into offering him employment, and that the actions of Mr Amin was destructive of good faith and the necessary trust and confidence in the employment relationship.

Procedural justification

[87] In considering whether there was a procedural justification for the dismissal, I must consider the factors at s 103A of the Act. Those factors include whether the employer sufficiently investigated the allegations; whether the employer raised the concerns with the employee prior to dismissing them; whether the employer gave the employee a reasonable opportunity to respond before dismissing them; and whether the employer genuinely considered the employee's explanation. The Authority may also consider any other factors I consider appropriate.⁶

[88] I consider the investigation and process followed by HCTL was insufficient such as might allow a fair and reasonable employer to have drawn the conclusions that HCTL did. The allegation relating to the origin of the IEA document was a prominent

⁶ Employment Relations Act 2000, s 103A(4).

part of the investigation and dismissal. Mr Sami made enquiries of the company solicitor, including asking whether any he had prepared any "...template employment agreements for the company" on 25 June 2021.

[89] Mr Sami's evidence in the Authority was that "...[Mr Amin] had told us that the employment agreement had been prepared by the company's lawyer, [company solicitor]". In cross examination, Mr Sami confirmed that Mr Amin was not advised that an investigation was being initiated into the issue at the time. Mr Sami's statement in the Authority went on to say:

We asked Mr May to confirm that he had prepared the agreement and he said that he hadn't. We subsequently found that the agreement had been removed from the company's computer. It was obvious that Ronnie had written the agreement himself and instead of providing for a maximum four-month term it had provided a minimum four-month term. We had been misled by him.

[90] Mr Sami's statements are indicative of a conclusion being drawn that Mr Amin's conduct was misleading from a very early stage. That was a significant issue because Mr Amin had not at that time been advised of the investigation into those matters. I find a predetermination of those matters is also evident from the statements made by Mr Richardson to Mr Amin at the meeting on 30 June 2021 referred to elsewhere in this determination.

[91] Mr Sami made broad assertions in his statement as to his understanding that Mr Amin's employment should be until the next AGM, and that Mr Amin had told 'us' that the IEA had been prepared by the company's solicitor. The precise origin of those assertions remains unclear even now. However, what is apparent is that there was not reasonable attempt to ascertain or record what Mr Amin had allegedly said about those matters at the time the allegations were initially raised.

[92] That situation persisted. The allegations, at least in very general form, were included in Mr Richardson's letter of 1 July 2021. Email statements of sorts were obtained from Sahab Singh and Ms Gemmell on 6 July 2021. Neither of those statements included any mention of the alleged issue as to the IEA being a "template", nor do they address the words said to have been used by Mr Amin at the meeting on 31 May 2021.

[93] At the meeting on 15 July 2021 Mr Amin made clear that he had amended the relevant document. On 20 July 2021, HCTL provided the statements of Mr Bhangu and Sahab Singh in a letter including further detail of the allegations.

[94] What was critical in this case were the words actually said to have been used by Mr Amin when meeting with Mr Bhangu and Sahab Singh on 31 May 2021. That is particularly so given that he was, at least in effect, accused of very serious allegations relating to misleading Sahab Singh and Mr Bhangu. In order to fairly establish whether or not Mr Amin deliberately misled them, I consider a genuine attempt to ascertain what was actually said by him on 31 May 2021 was required. I find that that did not occur.

[95] Instead, statements were obtained from Mr Bhangu and Sahab Singh on 27 July 2021, approximately two months after the meeting on 30 July 2021 and a month after the relevant allegations were first raised with Mr Amin. So far as the statements address what occurred on 31 May 2021, they provide little in terms of evidence as to what Mr Amin actually said. The following extracts from Sahab Singh's statement detail the extent of what Mr Amin was said to have said:

11. At the meeting Rahid refused to engage in the discussion or share his knowledge and said that unless the Company extended his role as manage (sic) of the company until the Annual General Meeting in September 2021, he would not speak with the Company's lawyer or provide us with any information to assist in making our decision.
...
13. Rahid said that the company's lawyer, [company solicitor] had drafted a standard employment agreement for managers and that he would simply use the approved template and insert his name.
14. He advised us that the terms of the agreement were the exact same as his then current contract except for two provisions, one that he be provided a specified time to pray, and two, that it be a fixed term for a maximum of four months.
15. He assured us the agreement was approved by the company's lawyer and that the terms were as he explained.

[96] This can be compared with Mr Bhangu's statement provided on the same day:

11. At the meeting Rahid refused to engage in the discussion or share his knowledge of the charges and said that unless the Company entered into a new contract with him as manager of the company until the Annual General Meeting in September 2021, he would not speak with the Company's lawyer or provide us with any information to assist in making our decision.
...

13. Rahid said that the company's lawyer, [company solicitor] had drafted a standard employment agreement for managers and that he would simply use the approved template and insert his name.
14. He advised us that the terms of the agreement were the exact same as his then current contract except for two provisions, one that he be provided a specified time to pray, and two, that it be a fixed term for a maximum of four months.
15. He assured us the agreement was approved by the company's lawyer and that the terms were as he explained.

[97] Setting aside the disturbingly similar construction of the relevant paragraphs, it is significant in my view that the statements do not directly provide a recollection of the words said to have been used by Mr Amin, but rather include conclusions or a summary of the conversation. Whilst some degree of repetition may invariably creep into statements, the similarities are more than just that and I find they are indicative of serious procedural failings.

[98] When considering the two statements, which were taken into account by HCTL when advising Mr Amin of its preliminary findings prior to Mr Amin being provided the statements, it is clear that HCTL did not appropriately or fairly assess the evidence and consider Mr Amin's responses. Any rudimentary but objective review of the statements would have led to the conclusion that, at best, further enquiries would need to be made as to the commonalities. At worst, the statements could be viewed as having been produced to support a decision that had already been made to dismiss Mr Amin from his employment.

[99] There was no critical analysis of the statements and there is no record of any interviews having been conducted with Sahab Singh and Mr Bhangu. The conclusionary statements they made were taken on face value absent any critical assessment.

[100] It is also the case that the statements were taken some three days prior to HCTL making preliminary findings. That was approximately two weeks after the second investigation meeting Mr Amin attended, which he submits was adjourned and never completed. I conclude that those statements were obtained in order to support a decision to dismiss Mr Amin as opposed to being obtained in the course of a fair and impartial investigation. The statements do not reflect a mere recounting of the relevant events and observations, for example, a recounting of the words used or the way in which the IEA was drafted, such as might have allowed an impartial assessment of conflicting

accounts. Mr Singh and Mr Bhangu were not asked to respond to Mr Amin's version of events and had no opportunity to respond to what he says occurred.

[101] I accept Mr Amin's submission to the effect that any reasonable enquiry by HCTL would have disclosed that Mr Amin had not represented to Sahab Singh and Mr Bhangu that HCTL's solicitor had approved the finalised IEA. Mr Bhangu, for example, confirmed in questioning from me that he had no such impression. Mr Bhangu also stated in cross-examination that prior to providing his written statement he was told by others that Mr Amin had fraudulently changed the IEA.

[102] So far as HCTL's investigation is concerned, there is no evidence of any formal interview with either Sahab Singh or Mr Bhangu. Mr Bhangu, at least, said at the investigation meeting that he was not advised as to what Mr Amin had said about the IEA and the events of 31 May 2021, nor does it appear that there was any real assessment of his evidence.

[103] The letter of 12 August 2021 containing HCTL's investigation findings included the following statement:

...
Your client's position regarding the use of [HCTL's solicitors] employment contract is at odds with the statement of [HCTL's solicitor] himself in which he denies providing a standard form template for general use....

[104] I find that conclusion was strained not one that was open to a fair and reasonable employer. The conclusion followed a letter from counsel for Mr Amin on 4 August 2021 pointing out that Mr Amin had not made a statement to the two directors which could have led them to believe that HCTL's solicitor had prepared or approved the IEA. Whilst the letter of 4 August 2021 referred to the use of a template HCTL simply sought to take that statement as evidence of impropriety rather than making further enquiries of Mr Amin.

[105] Instead of approaching the matter in a balanced and impartial way, the investigation proceeded to make adverse findings against Mr Amin without his response being genuinely considered or further enquiries being made. It would have been a relatively simple matter for further enquiries to be made testing Mr Amin's view that the contract had previously been used in the nature of a template and why he understood that to be the case.

[106] I also find that HCTL's approach to investigating its concerns involved a significant aspect of prejudgment and that it reached conclusions prior to considering Mr Amin's responses to the allegations. The transcript provided of the meeting held on 30 June 2021 evidence that in my view. This included conclusory statements made by Mr Richardson that Mr Amin had committed serious misconduct, that had breached two clauses of this IEA, and that Mr Amin was not "...behaving in a manner expected of a reasonable employee".⁷ Those statements were premised on correspondence from the Commerce Commission without any apparent investigation by HCTL as to the level, if any, of Mr Amin's involvement.

[107] The investigation conducted was, at best, haphazard. In effect, no interviews were conducted with the relevant witnesses, their recollection of events was not tested in any meaningful way, and conclusions were drawn prior to affording Mr Amin an opportunity to respond. Further, not investigation report was produced.

[108] At the investigation meeting, various members of the Board explained that they were involved in the decision making relating to Mr Amin's dismissal. When questioned, those members of the Board gave significantly different answers to questioning as to the reasons for Mr Amin's dismissal. That is unsurprising given the inadequacy of the process followed.

[109] Additionally, I find that conclusions had by that time already been reached as to Mr Amin's conduct relating to the IEA. In particular it is apparent that HCTL had already concluded that Mr Amin's conduct had been improper in relation to statements said to have been made regarding the origin and/or author of the IEA, a matter that was not raised in the suspension letter of 27 June 2021. At that stage no allegation in relation to the IEA had been put to Mr Amin. Despite that, the issue was raised at the meeting after an adjournment of the meeting was requested on the basis that Mr Amin had not been afforded the opportunity to have a representative present.

[110] More concerningly, comments were then made by HCTL's representative to the effect that the IEA had been blatantly altered. The statements made by HCTL's representative impliedly reveal that it had concluded, without any notice to Mr Amin, that he had represented to the directors that HCTL's solicitor had drafted the IEA. Those

⁷ Transcript of meeting on 30 June 2021 at pg. 7.

statements were made on 30 June 2021, well before any formal investigation had taken place, and a month before Mr Bhangu and Sahab Singh provided written statements.⁸

[111] I also find that HCTL's actions in proceeding with the meeting on 30 June 2021, albeit that it was eventually adjourned, was inappropriate in the circumstances given Mr Amin had not been advised that he could have a support person present. Continuing with the meeting in those circumstances was not an option open to a fair and reasonable employer.

[112] Despite the above, I do not consider that the entire process was baseless. I accept that there were legitimate concerns based on the different understandings of what had been agreed in relation to the term of Mr Amin's role. However, those concerns were not raised and investigated in a fair and balanced manner. The approach taken by HCTL to the investigation was seriously defective and the approach taken was not one that was open to a fair and reasonable employer in the circumstances.

[113] I consider there were significant deficiencies in terms of HCTL's process, the extent of which rendered the findings made erroneous and otherwise unsupportable. I conclude that the dismissal, from a procedural perspective, was seriously deficient and that the dismissal was procedurally unjustified.

Substantive justification

[114] HCTL submits that pre-employment misrepresentation can justify dismissal, typically where qualifications or experience have been misrepresented or where criminal convictions have not been disclosed. HCTL also referred to Mr Amin's legal representative having involvement in process on behalf of Mr Amin, including attendance at the investigation meeting on 15 July 2021.

[115] HCTL also submitted that it was subjected to undue influence and that HCTL were induced into entering into the IEA on the basis of misrepresentations made by Mr Amin. That submission is consistent with the reasons given for the dismissal such as they might be ascertained from the letter of 30 July 2021. In that letter contained a range of factual allegations and stated the following preliminary view:

⁸ Noting Sahab Singh had however previously provided a brief statement of events by email.

Our client has formed the preliminary view that Mr Amin has breached his duty of good faith to our client in withholding information critical to the employer, misleading the directors as to the terms of the agreement and misleading the directors in saying that [HCTL's solicitor] provided and approved the contract.

It is also our client's view that in his capacity as director, Mr Amin, has induced the employer to enter into this agreement by exerting improper pressure.

Our client has formed the view that this is sufficiently serious as to warrant disciplinary action and may constitute serious misconduct.

[116] I am not satisfied that HCTL had a reasonable basis for concluding that Mr Amin misled Mr Bhangu and Sahab Singh as to the nature of the employment agreement by saying that HCTL's solicitor had provided and approved the IEA.

[117] Any comments by Mr Amin were more limited in nature and to the effect that the agreement had initially been sourced from HCTL's solicitor and had been used on previous occasions as a template. At best, I consider there to have been a misunderstanding between Mr Amin and the directors about his statements. I do not consider there was at the time a reasonable basis to conclude that Mr Amin actively sought to mislead it. Such as that formed a basis for the dismissal, the dismissal was substantively unjustified.

[118] I accept that Mr Amin viewed the contract as a template and that it had been used previously on that basis. I find that an employer acting fairly and reasonably could not have concluded that Mr Amin deliberately misrepresented the nature of the document as being specifically prepared by HCTL's lawyers.

[119] I also do not accept there was a reasonable basis on which HCTL could have concluded that Mr Amin withheld information critical to the employer, nor that he leveraged that information to induce the directors into entering the IEA.

[120] An email was sent by Edward Cox of Gibson Sheet, the lawyers acting for HCTL in relation to the price fixing issue, on Friday 28 May 2021 at 5.54pm, to Mr Braid. That email advised that Mr Cox needed to communicate with the Commerce Commission's lawyer on Monday as to whether it would defend the proceedings or otherwise as to issues relating to potential liability and the quantum of penalties and asked if a response could be provided by Monday 31 May 2022. Mr Braid forwarded Mr Cox's email to the other members of the Board at 6.04pm on 28 May 2021, with the

comment “Please read and understand the seriousness of the decision we have to make on Monday”.

[121] Mr Braid resigned as Chairperson and Director on 30 May 2021. On 31 May at 1.07pm Joseph Howell, Director of the accounting firm acting for HCTL, sent an email to Mr Cox raising a number of issues relating to the potential implications of the proposed range of penalties contained in Mr Cox’s email of 28 May 2021. Significantly, Mr Howell advised in that email that he had just been on the phone with Mr Amin, and the other directors, and had discussed the proposed penalty ranges with them, including reference to information provided directly from Mr Amin as to the proposed penalty amounts. That email, and the communications from Mr Amin relating to it, are inconsistent with the conclusion reached by HCTL that Mr Amin was refusing to provide information or to deal with the Commerce Commission matters.

[122] In terms of the alleged urgency of the situation, I also consider it relevant that Mr Sahab Singh confirmed on 2 June 2021 that he wanted Mr Amin to resume his “duties as a Manager from now onwards”.⁹ I don’t take that email as an acceptance that the role was a permanent one, and instead consider it simply goes to the resumption of Mr Amin’s performance of the role. However, I consider the email evidences an ongoing desire to have Mr Amin perform the role beyond the immediate pressures of 31 May 2021.

[123] There was eventually a variation to the IEA as to the rate of pay and as to the removal of payment of the Chairperson salary on 18 June 2021. That document contained no reference to a fixed term.¹⁰ Mr Amin also communicated with the shareholders by email on 2 June 2021 confirming his appointment.¹¹ That communication contained no reference to the appointment being made on a limited or fixed term basis.

[124] In submissions, HCTL referred to three factors as evidencing that Mr Amin deliberately misled the other directors as to the content of the IEA and the solicitor’s approval. Firstly, that Mr Amin created the IEA himself on HCTL’s work computer. Secondly, that the document was saved to a private password-protected folder and not

⁹ Document 78, pg. 503.

¹⁰ Document 84, pg. 514.

¹¹ Document 79, pg. 504.

to HCTL's SharePoint system as Mr Amin had claimed. Thirdly, that Mr Amin dealt with the two other directors in an opportunistic situation.

[125] I find that the fact the document was created or amended by Mr Amin on HCTL's computer is not of significance. It was clear in my view that Mr Amin, Mr Singh and Mr Bhangu were all in the room when that occurred. I do not consider there was sufficient evidence on which HCTL could have reasonably concluded that Mr Amin had sought to deliberately conceal or withhold the IEA. Such a finding would be inconsistent with Mr Amin's sending of the document to HCTL's solicitor and accountant, and the fact that both Mr Bhangu and Sahab Singh not only signed the IEA but initialled each page of the document.

[126] I am unable to find that HCTL could have, acting fairly and reasonably, concluded that Mr Amin was deceptive in relation to the term of the IEA. If Mr Amin had simply approached the matter on the basis that the role would be permanent, including on the asserted basis that his approach was consistent with the position as advertised on Trade Me, then there would have been no need for any reference to four months. Mr Amin had made clear previously that he was not prepared to continue in the Managers role on a month-to-month basis.

[127] I accept that the Board, or at least certain members of the Board, were intent on hiring an independent manager. That progressed at least to the point of a short list of candidates being selected by 24 March 2021.¹² There can be little dispute about that. However, that is not what eventuated, and I do not consider the motivations of the previously constituted Board of any significant relevance.

[128] I find that Mr Amin, despite his evidence to the contrary, approached the IEA on the basis that the role would be for a minimum of 4 months, and for a longer period subject to future approval of the Board. I accept that Mr Bhangu and Sahab Singh may have taken the discussions as meaning that the IEA would be for a four-month fixed term. Whilst that may have been their understanding, I do not consider there to have been sufficient evidence upon which HCTL could reasonably have concluded that Mr Amin's actions were deliberately misleading as to the term.

¹² See, for example, the correspondence of 24 March 2021 at pg. 696.

[129] HCTL submits that obligations of good faith apply, by virtue of s 4 of the Act and as a matter of the common law relating to contracts, and that a deliberate misstatement about an essential term had the effect of undermining the trust and confidence in the employment relationship. I have found that HCTL did not have a sufficient basis on which to conclude Mr Amin misrepresented the term of the IEA.

[130] HCTL also submits that the bargaining for the IEA was unfair for the purposes of s 68 of the Act and that Mr Amin's actions were inconsistent with his fiduciary duties and that he failed to disclose a conflict of interest. HCTL has not lodged a statement of problem addressing either of those matters and appears to be submitting that they are factors providing a substantive justification for the dismissal. Those allegations were not raised during the investigation and disciplinary processes, nor is it apparent that they were put to Mr Amin as the reasons for the dismissal.

[131] Mr Amin was obligated, in his role as director, to act in good faith when exercising powers or performing duties.¹³ HCTL also submits that the actions of the Board in appointing Mr Amin to the managers role on 31 May 2021 were invalid on the basis that the Board were only able to operate at the time for the purposes of increasing the number of directors or for calling a general meeting.¹⁴ That was not a matter raised by HCTL prior to making final submissions.

[132] I am not satisfied that the actions of the Board were invalid, including given clause 88.1 of the document leaves open the possibility that the number of directors required may have been altered by ordinary resolution. In any event, that issue has not been raised by HCTL other than in the context of their submissions. In my view, it is also not the role of the Authority to declare the actions of the Board invalid. That is not to say Mr Amin's actions, if relevant, cannot otherwise be taken into account.

[133] HCTL's submissions also included reference to Mr Amin's interests being conflicted and his interest in the director appointment not having been entered "on an interests register properly approved by the Board". That is also not an allegation that was raised with Mr Amin in the course of HCTL's investigation or disciplinary processes and only arose in the course of submissions. Any failure to disclose a conflict

¹³ Constitution of Hutt & City Taxis Limited, document 5, at pg. 52, clause 74.1; Companies Act 1993, s 131.

¹⁴ That submission being made on the basis of clauses 84 and 88 of the Constitution of Hutt & City Taxis.

of interest cannot now in my view be said to justify the dismissal or any of the disadvantage grievances raised.

[134] Given the significant flaws in the investigatory and disciplinary processes, I have found that a fair and reasonable employer could not have relied upon the findings made as establishing that serious misconduct had occurred, nor that there had been an irreparable loss of trust and confidence. As such, the dismissal was also substantively unjustified.

[135] I conclude that the dismissal was both procedurally and substantively unjustified.

Is Mr Amin entitled remedies?

Is reinstatement practicable and reasonable?

[136] Mr Amin claims that reinstatement is practicable and reasonable and that HCTL cannot rely on its concerns as to trust and confidence given it is predicated on an erroneous finding that Mr Amin committed serious misconduct.

[137] HCTL submit that reinstatement should be declined. It submits that any trust and confidence that may have been held was destroyed when Mr Amin misrepresented the terms of the IEA and refused to co-operate with the other directors until the IEA was signed. It also points to what it says was HCTL's intention that Mr Amin's appointment be short term only.

[138] HCTL submitted that many of the factors present in the case of *NZQA v Hickey*¹⁵, where the Employment Court quashed the Authority's order for interim reinstatement, were also present in this case. I do not accept that submission. I do not consider in the present case that there was a complete breakdown in the employment relationship, nor that there are other significant impediments to a successful return to work as referred to in HCTL's submissions.¹⁶

[139] HCTL also referred to the appointment of a permanent manager, Mr Kalbushan Joshi. I consider HCTL's submission, to the effect that the appointment of Mr Kalbushan means that there is no role for Mr Amin, incorrect. If reinstated, then there

¹⁵ *New Zealand Qualifications Authority v Hickey* [2022] NZEmpC 76.

¹⁶ Submissions for HCTL dated 16 August 2022, at [107].

would be. In an appropriate case the impact of a reinstatement would be that the employee return to their role. However, I do consider it appropriate to take into account the potential impacts on Mr Kalbushan in this case.

[140] I also consider it appropriate to take into account the background to Mr Amin's appointment as manager and potential impacts of Mr Amin returning. Ultimately, I do not consider that Mr Amin's evidence as to the term of his employment was forthright. I consider that Mr Amin, contrary to what he told the Authority, entered into the IEA on the basis that his employment would be for a period of four months, in effect, until the AGM. Whilst I do not consider that issue significant in terms of Mr Amin's claims, nor to the issue of contribution given my findings as to the significant procedural failings by HCTL, I do consider relevant to the question of reinstatement.

[141] In addition, whilst I have noted that I do not accept the position put by HCTL that Mr Amin's conduct involved a deliberate misstatement as to the term of the IEA, I do consider Mr Amin's conduct relevant to the issue of reinstatement. I don't consider there is a sufficient basis to find that Mr Amin deliberately misled the two directors. Rather, I find that Mr Amin, at the time, thought that the IEA would be for a period of four months and would be subject to approval of the Board if it were to continue.

[142] Mr Amin, in questioning from me at the investigation meeting, denied that the IEA was entered into on the basis that it would be subject to review after four months. Mr Amin's explanation as to the reference to four months in the IEA was that he wanted stability and that the reference was not included to denote the IEA as being fixed term.

[143] I accept that Mr Amin, when entering the IEA, was seeking increased stability. That is consistent with his evidence that he had declined the role being offered on a month-to-month basis. However, I do not accept Mr Amin's evidence that he, at the time of entering into the IEA, thought that the role would be permanent. Whilst Mr Amin pointed to the role as having been advertised on a permanent basis, he did not apply for the role on that basis, and I am not persuaded that the IEA was entered into having regard to the advertisement.

[144] Ms Gemmell's evidence was that Mr Amin told her that he had hoped to stay in the role until the AGM, but that a mistake had been made in the contract and he was the permanent manager. Mr Amin, at the investigation meeting, denied having said that to her. I prefer the evidence of Ms Gemmell and consider it is consistent with what was

recorded in the IEA. I do not consider that Mr Amin sought to deliberately mislead the two directors, but rather that he later sought to claim that his employment was intended to be permanent when it was not.

[145] I consider there would be a reasonable basis for HCTL's concern as to a loss of trust and confidence, albeit on a basis not pursued in terms of the investigation and findings it made. Further, taking a broad approach to the issue of reinstatement, I do not consider reinstatement reasonable in circumstances where I have found that Mr Amin did not in fact intend for the employment to be ongoing, at least absent approval of the Board at the AGM.

[146] I accept Mr Amin's submissions in relation to the alleged fixed term and non-compliance with s 66 of the Act. I also accept that that non-compliance meant that HCTL were not entitled to rely on the purported expiry date to end the employment relationship. However, I nonetheless consider the issue one relevant to reinstatement and I decline to order reinstatement in the particular circumstances of this case which I find included an intention that the term of the employment would be conditional upon further approval of the Board after a period of four months.

[147] I find that reinstatement is not reasonable in the circumstances. I decline to order that Mr Amin be reinstated.

Is Mr Amin entitled to compensation for lost wages?

[148] Mr Amin provided detailed evidence as to his attempts to find alternative work after his dismissal from HCTL. This included applying, unsuccessfully, for at least 27 different roles.

[149] Mr Amin says that he eventually found alternative employment as a bus operator, commencing on 21 December 2021. That alternative work was at a reduced rate of pay. The difference, as calculated by counsel for Mr Amin, being \$12.80 per hour or \$512 per week, when compared with his employment at HCTL. I accept Mr Amin's evidence as to the issue of lost wages.

[150] I am satisfied that Mr Amin made reasonable and genuine attempts to gain alternative employment in order to try and mitigate his losses.

[151] Submissions on behalf of Mr Amin were made seeking compensation for lost wages until the date of any reinstatement ordered, or alternatively until the date of the Authority's determination. Counsel for Mr Amin provided calculations based on Mr Amin's previous and current earnings as follows:

- (a) Three months lost wages would total \$20,696 gross.
- (b) Four months lost wages would total \$27,973.71 gross.
- (c) Loss resulting from the difference in wages from 21 December 2021, until such time as reinstatement or determination, would total \$512 per week.

[152] On the basis above, Mr Amin submits that the Authority should exercise its discretion, pursuant to s 128(3) of the Act, to order payment of compensation for lost wages in a sum greater than 3 months.

[153] The Authority's discretion is to be exercised in a principled and not arbitrary manner. Whilst I accept Mr Amin took appropriate steps to mitigate his loss, I do not consider making any additional discretionary order appropriate having regard to all of the circumstances, including Mr Amin's relatively short period of employment with HCTL.

[154] I conclude that an appropriate award of compensation is a total of three months wages, inclusive of a discretionary order in terms of s 128(3) of the Act. I would order HCTL to make payment to Mr Amin of \$20,696 under s 123(1)(b) of the Act, subject to any reduction on account of contribution.

Is Mr Amin entitled to compensation for humiliation, loss of dignity and injury to feelings?

[155] I approach the issue of compensation on a global basis having regard to the substance and timing of the personal grievances established.

[156] Mr Amin gave evidence as to the impact of the termination and other actions of HCTL. Mr Amin says that he has suffered emotionally and that he has lost the respect of his peers as a result of HCTL's actions. Mr Amin also says that he was caused embarrassment, including from being required to address rumours that were circulated about him.

[157] Mr Amin says that he has had trouble sleeping, has suffered from stress and anxiety, and that he has been prescribed medication for those conditions. Mr Amin says that the stress caused resulted in his seeking medical attention.

[158] The impacts on Mr Amin of HCTL's actions are supported by evidence from Mr Amin's partner, Sarjini Devi. Her evidence is that she observed Mr Amin being stressed and worried which was evident from him continuing to talk about the issues and his losing sleep. She says the situation became so bad that she felt the need to call the doctor and arrange an appointment for him. She also says that the family more broadly has suffered as a result of his spending less time with their son as a result of the impact on Mr Amin.

[159] Mr Amin's brother, Khalid Amin, also gave evidence as to his observations relating to the impact on Mr Amin. He says that he could see that Mr Amin was stressed following the dismissal and that Mr Amin did not appear his usually confident and assured self.

[160] I am satisfied that Mr Amin has been impacted significantly by HCTL's actions relating to its investigation, the suspension of Mr Amin from his employment, and from the dismissal. The allegations made relating to Mr Amin's conduct were in effect broadcast to a wide audience of his peers. There was nothing discrete or careful as to the manner in which HCTL's investigation proceeded.

[161] I am satisfied that Mr Amin suffered damage in relation to both the actions relating to the unjustified disadvantage and dismissal claims. In the case of the suspension in particular, I find that Mr Amin suffered humiliation in circumstances where no reasonable steps had been taken to properly establish the allegations made. That led to significant speculation amongst Mr Amin's peers. Whilst that is the case, I consider it appropriate that a global approach be taken to the issue of compensation.

[162] I accept Mr Amin's evidence as to the impact HCTL's actions have had, and additionally that of the supporting witnesses. Whilst there is some medical evidence in relation to the impact on Mr Amin, I do not consider the evidence provided supports a finding that compensation at the higher end is warranted. However, I am satisfied that Mr Amin has been impacted significantly and that he is entitled to be compensated for that.

[163] I would order, subject to any reduction on account of contribution, HCTL to make payment to Mr Amin of \$28,500 under s 123(1)(c)(i) of the Act.

Should any compensation be reduced on account of contribution?

[164] Section 124 of the Act requires that I consider the extent to which Mr Amin's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.¹⁷

[165] If there is no causal link between Mr Amin's conduct and the situation giving rise to the grievance, then no reduction can appropriately be made. I find there was not a sufficient link between Mr Amin's actions relating to the IEA and the situation that gave rise to the grievance.

[166] Such that Mr Amin may have been involved in the price fixing matters, noting the statement of problem lodged by HCTL (matter 3152401) asserted that he promoted and implemented the price fixing conduct, his involvement was at the direction of the Board. Mr Amin may well have considered progressing the matter a good idea, but so did many others, including some members of the Board.

[167] Mr Amin's conduct cannot be said to have had a sufficient causal link with the situation giving rise to the grievance in circumstances where the actions of HCTL were so fundamentally absent procedural justification. Further, I have found that the suspension was procedurally unjustified. It cannot be said that the alleged conduct contributed at all to the situation giving rise to the grievance on that basis. Mr Amin's conduct, even if accepted as alleged by HCTL, cannot be said to have contributed the unfair procedure in relation to any of the grievances.

[168] Given the significant procedural failings in relation to each of the established personal grievances, I do not consider Mr Amin's actions to have led in any way to the situation. Additionally, whilst HCTL may have held serious concerns as to Mr Amin, those concerns were not tested through any remotely robust or fair process.

[169] I decline to reduce the remedies I have concluded that Mr Amin is entitled to.

¹⁷ Employment Relations Act 2000, s 124.

Should an order be made for pre-litigation costs?

[170] Mr Amin submits that an order should be made requiring HCTL to make payment to Mr Amin for the costs associated with pre-litigation, and in particular the costs associated with what is submitted to have been a “baseless process”¹⁸ conducted by HCTL.

[171] Counsel for Mr Amin pointed to the timing of the relevant events, including the process having been initially undertaken based on what were said to be performance concerns relating to Mr Amin’s previous employment and the price fixing allegations. It is submitted that the employment investigation was initiated by Mr Sami soon after he started as Director and Chairperson and that the actions were those of someone acting with the dominant purpose of securing Mr Amin’s departure.

[172] I am not satisfied that it is appropriate to make an order on the basis of special damages in this case. I do not consider the HCTL’s investigation and processes to have been entirely baseless, nor otherwise akin to the type of circumstances that warranted the order of special damages in *Stormont*. I also do not consider that HCTL’s actions were simply designed to secure Mr Amin’s departure.

[173] I have found that there were significant procedural failings by HCTL in relation to both the suspension and dismissal. Additionally, the suspension and dismissal were such that they could not be justified on substantive grounds. However, I am unable to find that the actions were baseless, and instead consider the actions of HCTL arose out of genuine concerns.

Summary of orders

[174] Hutt and City Taxis Limited is ordered, within 28 days of the date of this determination, to make payment to Mr Rahid Amin of:

- (a) \$28,500 as compensation for hurt and humiliation under s 123(1)(c)(i) of the Act; and
- (b) \$20,696 as compensation for lost wages under s 123(1)(b) of the Act.

¹⁸ *Stormont v Peddle Thorp Aitken* [2017] NZEmpC 71; *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, (2015) NZELR 157 at [114].

Costs

[175] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

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

[177] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁹

Rowan Anderson
Member of the Employment Relations Authority

¹⁹ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.