

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 325
3301240

BETWEEN	HARRIET BURBIDGE Applicant
AND	VAST BILLBOARDS LIMITED First Respondent
AND	GRANT MORETON Second Respondent
AND	LOUISE MORETON Third Respondent

Member of Authority:	David G Beck
Representatives:	Emma Brankin, advocate for the Applicant Paul Brown, counsel for the Respondents
Investigation Meeting:	17 April 2025 in Christchurch
Submissions Received:	24 April 2025 from the Applicant 24 April 2025 from the Respondent
Date of Determination:	11 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Harriet Burbidge worked for Vast Billboards Limited (VB) as a sales account director from 23 May 2023 until the engagement ended in disputed circumstances on 11 September 2023.

[2] Ms Burbidge's representative raised a personal grievance with VB by letter of 25 September 2023, alleging an unjustified dismissal and an unjustified disadvantage pertaining to actions of VB prior to the dismissal including what Ms Burbidge says was an unjustified suspension. In the alternative, breach of good faith and breach of contract claims were advanced.

[3] VB's representative responded to the personal grievance letter on 10 October 2023 and reiterated the reasons for the termination of Ms Burbidge's employment.

[4] The parties subsequently attended mediation on 12 February 2024 but the matter remained unresolved.

[5] Ms Burbidge made an Authority application to resolve the employment relationship problem on 4 June 2024 that also without advancing reasons, sought to join Grant Moreton and Louise Moreton, directors of VB as persons involved to the proceedings citing s 142Y Employment Relations Act 2000 (the Act). I record no further advocacy was advanced to clarify this claim and the basis for it. As a result, I will not be making orders against the Moretons. There is no dispute that Ms Burbidge's employer was VB.

The Authority's investigation

[6] At the investigation meeting, Harriet Burbidge attended with her partner Lucas Fahey and sister-in-law, Christina Burbidge. Jonathan Howell, Sales Manager attended for VB. All provided written and oral evidence.

[7] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the employment relationship problem and make orders but I do not record all evidence. I have carefully considered the submissions and information received from both parties including an unauthorised recording and transcript of a disciplinary meeting. I will refer to them where appropriate and relevant.

Issues

[8] The Authority must decide:

- (a) Was Ms Burbidge unjustifiably dismissed following a sufficiently fair and properly conducted investigation?
- (b) Was Ms Burbidge unjustifiably disadvantaged by the actions or omissions of her employer prior to being dismissed?
- (c) If Vast Billboard Limited's actions in dismissing Ms Burbidge do not meet the standard of a fair and reasonable employer, what remedies should be awarded.
- (d) Should the Authority award penalties against Ms Burbidge for failing in breach of alleged good faith obligations to promptly disclose unauthorised audio recordings of key interchanges between herself and VB employees during the disciplinary process and thereafter and, did this reticence to disclose in a timely fashion obstruct the Authority investigation?
- (e) If Ms Burbidge is successful in all or any element of her personal grievance claims should the Authority reduce any compensatory remedies as a result of any contributory conduct?
- (f) An outline of how costs are to be determined.

What caused the employment relationship problem?

[9] Ms Burbidge commenced working for VB in Christchurch on 24 May 2023 after relocating from Auckland where she ran her own cleaning business. The position involved selling advertising space on digital billboards. The job advert called for someone with all-round skills in sales and account management. Ms Burbidge had a qualification in advertising and had worked in the hospitality industry but had no specific sales/account management experience. Ms Burbidge's role reported directly to Mr Howell.

[10] VB is a small family run business (up to ten employees) that commenced trading in late 2020. VB's core business is described by Mr Howell, who had been sales manager since March 2021, as "selling digital billboard space with locations nationwide". Mr Howell says Ms Burbidge's job involved securing new business by direct client contact to enable their

product to be presented and if a successful ‘pitch’ were achieved, Ms Burbidge would manage the ongoing account. Mr Howell says Ms Burbidge was developing in the job and VB had decided to persist with her employment beyond a 90-day trial period as they saw potential in her but some concerns existed about her sick leave usage.

[11] Ms Burbidge’s evidence was there was a level of frustrating informality on matters such as her commissions payments and at times she was paid late. Although the employment agreement Ms Burbidge signed provided ‘bare’ use of the company vehicle and its usage was informally discussed, in mid-June 2023 VB introduced a vehicle policy. Ms Burbidge recalled others refused to sign the policy but she did, saying she had no concerns. Ms Burbidge says she read the policy but says she knew a co-worker had been reassured by Mr Howell not to worry about the policy and she says it was ignored.

[12] Mr Howell says he had no input into the vehicle policy wording and confirmed aspects of it were informally ignored in particular the policy did not permit private use and maintained a fiction that vehicles be left at VB premises at the close of each business day. In addition, the policy stipulates mileage be recorded and this stricture was ignored by everyone.

[13] Ms Burbidge was on sick leave initially between 9 – 12 August after a diagnosis that required some rest to recover. On 13 August Ms Burbidge messaged Mr Howell explaining the nature of her diagnosis and requesting she temporarily work from home. This was declined with Mr Howell suggesting rest may be a better option.

[14] However, on 14 August Mr Howell rang Ms Burbidge and relayed he had been speaking to the Moretons who were unsure about the impact of Ms Burbidge’s diagnosis. Ms Burbidge inquired if she may be losing her job and Mr Howell accepts that he communicated he was unsure of her ongoing employment. Ms Burbidge then became upset and ended the call to ring her partner to relay concerns. Shortly thereafter, Mr Howell, this time accompanied by another member of the Moreton family who worked for VB, reassured Ms Burbidge that her job was safe and he acknowledged he had been “blunt in the first call.” Ms Burbidge’s partner, without asking for permission, recorded the second call and an unchallenged transcript was later provided to the Authority during the investigation process. It shows Mr Howell took a more conciliatory approach offering support and a meeting.

[15] Ms Burbidge says she was very confused by the two calls and thereafter supplied another medical certificate for an absence between 14 – 21 August. VB paid Ms Burbidge during her absence on sick leave - a factor that later became contentious.

[16] Ms Burbidge returned to work on 21 August and says she met with Mr Howell and another accounts manager who suggested to aid her recovery she could work half days that week from home then the following week she could spend half days in the office building up to a full return in the office from 4 September. Ms Burbidge says she agreed to this 'return to work' plan. After the meeting, Ms Burbidge recalled discussing with the accounts manager (but not Mr Howell) a previously approved annual leave day for Friday 25 August to travel to Queenstown on a pre-arranged weekend trip with her partner.

[17] On 22 August, Louise Moreton emailed Ms Burbidge the envisaged return to work plan and also signalled that Ms Burbidge had no allocation of paid sick leave available and would have to pay back what had been advanced by VB. Ms Burbidge says Louise Moreton also offered her a personal loan and asked if Mr Burbidge could seek an "actual diagnosis" from VB's nominated doctor. In the event, Ms Burbidge did not attend the suggested appointment but did consult another practitioner recommended by Ms Moreton. In the email Louise Moreton also noted they had discussed Ms Burbidge being careful while driving the company car under the influence of strong painkillers as this may impact the vehicle insurance policy and Ms Burbidge had given an assurance this would not be the case. The email also had supportive opening comment and ended on a seemingly positive note with: "Please keep in touch and stay positive – We will get through this."

The Queenstown trip

[18] Ms Burbidge's decision to proceed with her Queenstown trip on 25 August while still on sick leave became contentious.

[19] The first issue was Mr Howell, although not contesting the leave had been approved well in advance, had assumed the trip would not proceed given Ms Burbidge was on sick leave (albeit while working half days from home). This assumption was reinforced by Ms Burbidge emailing Mr Howell the night of 24 August, to explain she was going to be unavailable by phone part of the next morning as she was attending her young son's school award ceremony.

No mention was made of the Queenstown trip. I find at least for the morning, Mr Howell reasonably assumed Ms Burbidge was working a half day, as agreed. However, I must provide a balance to a consideration of whether Mr Howell's perception was reasonably held as Ms Burbidge had pre-approved annual leave and was in any case the subject of a medical certificate.

[20] Regardless, Ms Burbidge after her Queenstown weekend trip, returned to work on Monday 28 August. The next day, Mr Howell emailed her asking: "Just checking did you work 9-1pm on Friday last week?", he acknowledged he knew of her son's award ceremony attendance, then asked: "Or did you head to Queenstown?". Mr Howell explained to the Authority that he had been alerted that the company fuel card had exceeded its monthly limit and says at the time he had not realised Ms Burbidge had travelled to Queenstown.

[21] The email exchanges that followed between Mr Howell and Ms Burbidge are accepted by Mr Howell as satisfying his concerns as her immediate manager. Ms Burbidge responded saying she had been working part of the day in contact with a couple of people "wasn't driving" during the Queenstown trip and "it was a last-minute decision to head down". Ms Burbidge's partner who accompanied her, explained he was taking the planned trip anyway as he is a musician and his band had some pre-arranged performances lined up.

[22] Mr Howell's acceptance of Ms Burbidge's explanation is reinforced by his email in response of 29 August that read:

That's okay heading to Queenstown and appreciate it was a last-minute thing but will have to notify Louise as it is technically a leave day. Working from home is okay at times when agreed upon, but that is when you are at home making calls and doing emails consistently over a given time period. I hope you can appreciate the same rules would apply for any of us.

[23] Ms Burbidge positively acknowledged the above email but Mr Howell says while the trip had been adequately explained to him, he recalled Grant Moreton was not happy. On 31 August, Mr Howell emailed Ms Burbidge again asking if she had taken the company car to Queenstown and "did you use the fuel card for the travel?"

[24] Ms Burbidge responded promptly with:

Yes, we drove the car however I put petrol in at Queenstown, I did not use the fuel card there.

When we talked about going to Queenstown over a month ago, when I put the leave in, I asked if it was okay to take the car, and we discussed it was fine to take it as long as I put fuel in there.

[25] I observe, as it later became an issue – Ms Burbidge did not at this point in time disclose she had used the company fuel card to top up the vehicle's tank before leaving Christchurch on the Friday and when returning on the Monday had filled the tank again using the company fuel card.

[26] Mr Howell then emailed Ms Burbidge back objectively accepting her response over the timing of the trip while mentioning his view that he thought her recent health issues may have prevented her from going. He then suggested Ms Burbidge should address the two fuel card purchases (\$50.27 on 25 August and \$123.57 on the 28th). Mr Howell then indicated: “going forward there needs to be clear communication between all parties and I work on a ‘no surprises’ basis”. He suggested leave requests and personal car usage requests be made in writing.

[27] By a prompt email response, Ms Burbidge acknowledged the suggested way forward of formalising requests, noted she had apologised for not calling Mr Howell on the Friday in question to say she was off to Queenstown and, she signalled: “I will pay the fuel bill”. Ms Burbidge then traversed some concerns she had such as being paid commission late but then explained she appreciated VB's support for her health issue but wanted to “pay it all back”. Ms Burbidge then asked for an outline of all she had been paid by VB so she could set up a payment plan.

[28] Mr Howell's emailed response of 1 September at around 8:30am, was to suggest it had “been a roller coaster ride for everyone since mid-May”; he had never suggested she may be losing her job; it warranted a discussion with the wider management team before they had reassured her and, crucially:

As far as your pay goes it is a matter for yourself and Louise as to how best sort and I will leave with Louise to discuss with you.

It has been not only been (sic) a stressful period for yourself but also the team at Vast and that also needs to be acknowledged.

[29] Objectively, I find Ms Burbidge was entitled to view matters at this point in time, as being resolved or at least on a path to resolution. I do note it was Ms Burbidge's evidence that she did not promptly address the repayment of the fuel used during the trip and she says this was because the following events took place in a relatively short timeframe. I also note on questioning Ms Burbidge on the fuel usage, she seemed genuinely confused as she had paid for some fuel when in Queenstown without using the fuel card.

[30] Ms Burbidge however, accepted in evidence to the Authority that she should not have topped up the fuel on the company card before leaving for Queenstown and upon her return she should have paid to fill the tank using her own money.

[31] Likewise, Mr Howell conceded that being a small family company and operating informally, he had not communicated the vehicle policy well and when it was introduced, it was not fully adhered to by others (some even refusing to sign the policy). Mr Howell says there was an informal understanding through discussion, that personal vehicle use (despite the policy) had reasonable boundaries including pertinently, no travel South further than Tekapo. On the use of the fuel card, the loose instruction had been - travel to your destination but fill up using your own funds once the fuel runs out.

[32] Objectively, it had not occurred to Ms Burbidge that this discussion implied 'replacing' used fuel at the end of a trip was expected. During the investigation meeting I put to Ms Burbidge that an analogy would be if she hired a car and returned it, the contract usually states you return the car with a full tank of petrol or pay to have it topped up. Ms Burbidge acknowledged the analogy.

Louise Moreton's intervention

[33] By email of 12:40pm on Friday 1 September headed "HB amounts owed to Vast", also openly copied to Grant Moreton and the company lawyer but not Mr Howell, Mr Moreton signalled (in summary) a view that Ms Burbidge:

- Had no entitlement to any paid sick leave but had been paid "7 full days and 8 half days".

- Had taken an annual leave day (25 August) also without entitlement and in contacting Mr Howell on the day, had implied she was working and not travelling given her health issues.
- Had been too demanding of the VB accounts person to resolve pay issues.
- Had not been asked to reimburse medical bills VB had paid for but the offer to do so was accepted (totalling \$371.00) – “And your comment about being anxious in your position is due to your own actions, this is not something you can blame on Vast”.
- Would need to repay petrol costs for the Queenstown trip (\$173.84).
- Would have to repay 12 days advanced sick leave and in this context why was she “demanding” her commission be paid as it only amounted to \$325.50 (implying it would be offset).

[34] Ms Moreton then opined that despite the support VB had provided around Ms Burbidge’s health issues “it appears you are well enough to go on holiday, in the company car using the company petrol” and that Ms Moreton was “flabbergasted” at the situation. The letter concluded: “You will be receiving a letter from Jonathan about a meeting we will have on my return addressing your breaches of employment contract”.

[35] I observe the tone of the aforementioned email was terse and it would appear from the content that the main issue was hinged around Ms Moreton’s belief that Ms Burbidge was abusing her trust and VB’s benevolence.

[36] On 4 September by email, Mr Howell provided a letter requesting Ms Burbidge attend a disciplinary meeting on 6 September. The letter was attributed to Mr Howell but his evidence was he had no part in its drafting and it was prepared by Louise and Grant Moreton with legal advice. No specific decision maker was identified but Mr Howell confirmed that the Moreton’s drove the process and were the decision makers. The letter indicated VB had engaged Paul Brown an employment lawyer and Ms Burbidge was welcome to get her own advice and representation. The letter did not explicitly state who would be attending the disciplinary meeting only vaguely referring to once “we have met” and considered what Ms Burbidge had to say they would be issuing a preliminary decision that Mr Howell would discuss in some detail with Ms Moreton.

[37] The invite to the disciplinary meeting described “The Allegations” as:

- 1) Your alleged serious misconduct (E.A 5.1 a) in regards to using the company fuel card for what was a personal trip to Queenstown.
- 2) Your alleged breach of clause v) of the Vast company vehicle policy that you did not personally drive the company car to Queenstown and it was your partner Lukas that drove at times on the trip.
Our concern is that your behaviour amounts to serious misconduct justifying termination of employment because your behaviour may amount to a fundamental breach of trust and confidence.

[38] The next heading: “Background to the Allegations”, explained that VB viewed it as “unauthorised misuse of the company fuel card to use for a personal trip” and that no prior written consent had been obtained to enable Ms Burbidge’s partner to drive the company vehicle. It was then suggested that VB would not have been aware of the leave taken for the trip in dispute until they noticed the fuel card limit had been exceeded and they estimated the trip had put “some 952 kilometres on the company vehicle”. The letter went on to say there were other unspecified “work performance” concerns that would be discussed once the above matters were resolved.

[39] The letter then proposed to suspend Ms Burbidge until the disciplinary meeting and sought her prompt feedback on the proposed suspension.

[40] Attached to the letter, was the VB’s company vehicle policy (under Ms Burbidge’s acknowledging signature that she had “read and understood this policy”) that in part states:

No other person is to drive a Company Vehicle without the Employer’s prior written consent.

The disciplinary meeting

[41] Before considering whether a fair investigation and process was adopted at the disciplinary meeting and beyond, I do pause to acknowledge that VB had presented genuine concerns about the company fuel card use and latterly the issue of Ms Burbidge’s partner driving the company vehicle without permission. The problem as discussed below, is did VB fairly consider Ms Burbidge’s explanation for her conduct and had VB clearly set out their expectations and been consistent in administering their own vehicle policy. A further problem is on the use of the fuel card, the above cited communication between Ms Burbidge and Mr

Howell (and arguably confirmed by Ms Moreton saying she would need to pay it) evidenced that the fuel card usage had already been put as a concern and resolved by Ms Burbidge's offer to repay the fuel and Mr Howell had accepted her use of the car and not raised an issue about prior permission for her partner to drive.

[42] The disciplinary meeting proceeded on the morning of Friday 8 September and was attended by Ms Burbidge and her sister-in-law as a support person; Louise Moreton and Jonathan Howell and Paul Brown, counsel attended for VB. Without permission, Ms Burbidge recorded the meeting and an uncontested transcript and original recording was later provided to the Authority and VB.

[43] VB did not produce notes of the 8 September meeting (taken by Mr Brown). The Authority accepted the recording and transcript in evidence. While Mr Brown did not successfully challenge the admittance of the recording, I do have significant concern that Ms Burbidge's advocates did not promptly disclose to VB or Mr Brown, the existence of the recording and initially advanced a personal grievance without disclosure and maintained this position in the application to the Authority of 2 June 2024.

[44] It was not until 8 February 2025 after written evidence had been provided by both parties, that the recordings and transcripts were disclosed to VB and the Authority. This non-disclosure does not sit well with Ms Burbidge's advancing arguments that VB did not act in good faith. The Authority while taking a pragmatic and more expansive approach to the admittance of evidence, does not condone such 'tactical' manoeuvring by any party.

[45] I, however, decline to award a penalty for non-disclosure but only on the basis that the duty of good faith does not survive the employment relationship¹ and s 134A of the Act's threshold has not been breached for the seeking of a penalty against Ms Burbidge as the recordings were disclosed before the investigation meeting and therefore could not be viewed as obstructing or delaying the Authority investigation.²

¹ *Balfour v The Chief Executive, Department of Corrections* [2007] ERNZ 808 at [31] and Employment Relations Act 2000, s 4(1) defines the obligation as between: "Parties to an employment relationship".

² Employment Relations Act 2000, s 134A(1).

[46] I have also taken account of the overall circumstances of the recording, it's context and the existing power imbalance evident when one party is unrepresented during a disciplinary meeting. I further consider that it is not an unreasonable obligation on an employer, to take notes at a disciplinary meeting in order to as a minimum, accurately record questions put and explanations given and to likewise disclose those notes to the worker during the disciplinary process. The lack of note taking suggests a fair and open minded approach was not evident.

[47] At the commencement of the meeting (quotes reproduced from the transcript) Mr Howell initially narrowed issues down to the fuel card usage and Ms Burbidge allowing her partner to drive the company vehicle. Mr Howell then puts an open question about the fuel card usage and Ms Burbidge responded it had been discussed with Mr Howell but she felt there had been miscommunication: "Otherwise I would not have used it". Ms Burbidge then explains her understanding of what she recalled Mr Howell saying about fuel car usage i.e. fill it up before you go and then put gas in when you get to Queenstown. Mr Howell then states there was no doubt that Ms Burbidge was "allowed to take the car to Queenstown. That's not in question". Louise Moreton then intervened and stated to Mr Howell that she did not think he would have said "fill it up on the company fuel card", to which he replied "No, no I didn't say that". Ms Burbidge reiterated she had filled the car in Queenstown as discussed.

[48] Ms Burbidge then conceded her partner had also driven the car "in one stint". Without asking any further questions as to why this was the case, Mr Howell then asked Ms Burbidge: "What would you like to see happen here today Harriet?". To which Ms Burbidge responded she did not know and reiterated her belief that it was known by co-workers she had planned a day off to go to Queenstown.

[49] Louise Moreton then expressed concerns at length, expressing her belief that Ms Burbidge had misled VB about her trip taken when on sick leave and outlined the assistance and support given by her. Ms Burbidge tried to acknowledge the support but was met by an angry response from Louise Moreton that "I'm not listening" – "I'd like you to respond to my statement". Ms Burbidge repeated her gratitude but Louise Moreton then expressed what may well have been her key concern, as: "Okay, So what about going on holiday in my car when your supposed to be very unwell". Ms Burbidge tried to explain this was only a weekend away

and not a holiday but Louise Moreton then became fixated on the communication on 25 August suggesting Ms Burbidge had not communicated what she was doing to Mr Howell and her.

[50] There is then an exchange about what the main issue was and Mr Brown intervenes and says: “So the biggest issue is the fuel. Like bit of Argy Bargy about arranging the timeline, yeah? Whatever”. To which Louise Moreton says the arrangement of the trip was the breach of trust.

[51] At this point in the meeting Mr Brown returned to the fuel card usage as being his client’s big issue and he suggest to Ms Burbidge two options:

- 1) Do we accept it as an error of judgment and don’t do it again; or
- 2) It could be framed as poor judgment in not recognising on a commonsense basis that using the fuel card in the way she did was an error and a breach of trust and confidence and Mr Howell or Louis Moreton should have been pre-warned.

[52] Without waiting for Ms Burbidge’s response, Mr Brown then stated as this had not happened (impliedly no permission sought) the stark choice was either a written warning or the sack for the erosion of trust and confidence and he explains why he thought it’s a sackable offence. Mr Brown then said to Ms Burbidge:

What do you want to do? Let me rephrase that. Do you two just want to have a little walk up the road and back with me before we carry on this meeting, so that we can just have you know what we call it like, if you was a lawyer, we’d have a the lawyer and I would have a without prejudice chat, but you are not, and you don’t need to be, right? But you and I, we can just go for a walk up and down the footpath.

[53] Mr Howell and Louise Moreton then immediately signalled they would leave the room and they did so. Mr Brown asked if Ms Burbidge was ok with this process and she responded in the affirmative. Mr Brown then said: “Five to ten minutes” and he would get back to Louise Moreton and Mr Howell.

[54] Mr Brown then without explaining what ‘without prejudice’ entailed beyond a short walk, explained in colourful terms, that his client was of a view they could dismiss Ms Burbidge. Mr Brown then explained the option of resigning as an option he would advance if

he wanted to sack someone accompanied by a certificate of service. Mr Brown then attempted to press Ms Burbidge to decide the matter 'there and then'. When Ms Burbidge questioned the process saying she thought a preliminary decision would be ran past her first, Mr Brown reiterated he thought his client may dismiss her.

[55] There is then an exchange about how Ms Burbidge thought she had resolved matters with Mr Howell but Louise Moreton was being unreasonable and Mr Brown went through the fuel card usage in some detail. At one point after listening to Ms Burbidge's explanation he says, "it's sad, really because it was just miscommunication". After some further interchanges, Mr Brown returned to pressuring Ms Burbidge to look at resigning, going as far to suggest that his client may pursue an "overpayment" of around \$3,000 (suggesting it would be offset against final holiday pay). Mr Brown then tried another tack giving Ms Burbidge legal advice around her final pay and deductions and then suggesting an approach he could make to his client if Ms Burbidge would just agree to resign.

[56] The first part of meeting lasted over 40 minutes and concluded with Ms Burbidge remaining undecided on the suggestion she resign. Mr Brown then took a break to talk to his client and left Ms Burbidge time to consider her position. The second part of the meeting resumed when Mr Brown returned and it took around 15 minutes. Ms Burbidge opened indicating she was unsure of what to do as she had no money to engage a lawyer. Mr Brown then suggested if she were to resign VB would not pursue 'overpayments' (described as "their sucking in the overpayment because you were sick") but would pay any holiday pay owed and commissions.

[57] In response Ms Burbidge said she would like to get advice and intimated she would like to see any offer in writing with a breakdown of pay owing. Mr Brown affirmed that was okay but his client would be issuing a preliminary decision as they wanted a response "today". Mr Brown did open the issue of returning to the disciplinary meeting but when Ms Burbidge said: "They can make their decision. I'm happy to leave everything here" – Mr Brown agreed there was no need to continue with the "formal part of the meeting" and Ms Burbidge could leave and expect an email that he would help draft. Mr Brown then suggested Ms Burbidge seek advice from the local community law centre.

The preliminary decision

[58] On the afternoon of the same day (8 September) over Mr Howell's name, VB issued a: "Provisional Outcome of the Discipline meeting" by email. The letter in summary indicated VB:

- Had accepted Ms Burbidge's annual leave day of 25 August had been in their calendar for over a month but they had been surprised she did not apprise Mr Howell of her intention to travel that weekend given her health issues. VB concluded this was not serious misconduct.
- Had concluded the use of the company fuel card and allowing her partner to drive the company vehicle, (described as a serious breach of the vehicle policy) amounted to serious misconduct (a conclusion Louise Moreton had been consulted on) and Ms Burbidge's explanation that Mr Howell had authorised the manner in which the fuel card was used, was rejected.
- Had come to the preliminary conclusion that Ms Burbidge's actions amounted to a "fundamental breach of trust and confidence" warranting a penalty of summary dismissal.

[59] The letter concluded by asking for a response by 5 pm Monday, 11 September and also referred to the option of alternatives discussed during the "without prejudice" discussion with Mr Brown.

Personal grievance signalled

[60] On the morning of 11 September, Ms Burbidge's advocate in an email to Mr Howell, indicated Ms Burbidge was "considering raising a personal grievance" that was specified as "for unjustified disadvantage, breach of contract, breach of good faith and unsafe workplace". Further, it suggested the list of her concerns was not complete. Ms Burbidge's advocate then identified problems with: The suspension; withholding of commission due; the method adopted to signal dismissal was an inevitability during the disciplinary meeting (essentially 'resign or you will be dismissed'); and the inappropriateness of a purported without prejudice discussion. The email suggested that Ms Burbidge now had no choice but to resign as she had lost all trust and confidence in her employer.

[61] The email concluded with an invitation to negotiate a way forward and suggested the preliminary decision to dismiss be deferred.

[62] In a response letter later of 11 September, Mr Brown noted: “At the end of the disciplinary process there was a discussion about various options” being dismissal for serious misconduct given the misuse of the fuel card and allowing her partner to drive the vehicle was “undeniable”. Mr Brown said Ms Burbidge had asked and was granted the weekend to consider her options.

[63] The letter concluded that VB had decided to end Ms Burbidge’s employment summarily “for a fundamental breach of trust and confidence”, effective 5pm that day.

[64] In a letter of 25 September 2023, Ms Burbidge’s advocate identified a series of personal grievances; predominantly arguing Ms Burbidge had been unjustifiably dismissed. The most significant contention raised was VB had in the circumstances, pre-determined the outcome before completing a disciplinary process.

Context

[65] Ms Burbidge’s role was the subject of an individual employment agreement. The agreement relevantly has a schedule, detailing:

Item 4: Remuneration	\$65,000.00 per annum salary from start date.
	Kiwi saver of 3% paid on salary.
	Commissions – 10% of revenue nett of landlord rental.
	Motor vehicle provided with fuel card for company use.
	Mobile phone usage account paid.
	Company laptop provided.

[66] As can be seen the terms by which Ms Burbidge was engaged including representations made, was that the motor vehicle was part of the remuneration package and private use was implicit. During employment, Ms Burbidge did have private use of the vehicle and the only reasonably disputed matter was over the fuel card use and her partner driving the vehicle. While the brief terms above are explicit that the fuel card is only “for company use”

the vehicle policy is less focussed. It only refers to VB authorising the use of the fuel card to purchase petrol and oil and that it should only be used for the company vehicle. There is no explicit restriction on private use or guidance on private use other than generally prohibiting private use. There was, however, a provision in the policy explicitly stating prior written consent was required if another person drove the vehicle (implying this meant someone not employed by VB).

[67] In giving evidence, Mr Howell conceded that guidance he provided around the company vehicle and fuel card use was informally communicated. Although expressing a view he thought he had made fuel card usage clear he accepted it could have been misinterpreted and that Ms Burbidge seemed genuinely confused in thinking her paying for fuel once she arrived in Queenstown, was sufficient. Mr Howell however, maintained that Ms Moreton's concern which he shared, was that the return trip to and from Queenstown was beyond reasonable use.

Assessment

[68] Before analysing the dismissal in terms of s 103A and good faith requirements of the Act, I find the problem for VB is the lack of clarity on the use of the fuel card and the fact that as part of the remuneration package Ms Burbidge had an entitlement to private use of the company vehicle. In such a circumstance, it was only reasonable for VB to conclude that Ms Burbidge had not been authorised to incur fuel costs during her Queenstown trip and this could have been easily resolved by asking her to reimburse the company. The factual background demonstrates that Mr Howell who was Ms Burbidge's direct manager and her conduit around instructions on the use of the fuel card, took this approach and Ms Burbidge accepted she should reimburse the fuel costs.

[69] I find it was not fair or reasonable that VB then viewed the use of the fuel card as a matter of potential serious misconduct. If I am wrong in that conclusion, I note Ms Burbidge's explanation at the 8 September disciplinary meeting was objectively reasonable in that she said she thought how she had used the fuel card was consistent with a discussion had with Mr Howell and she acknowledged this might have been misinterpreted otherwise she should not have used the fuel card.

[70] This leaves the issue of Ms Burbidge allowing her partner to drive the company vehicle without permission. In this context Ms Burbidge did not try to conceal the fact her partner drove the vehicle and although she neglected to seek prior permission, it was apparent that she only allowed him to drive due to a physical restriction she had that VB was well aware of. I observe the discussion on this latter issue was very brief during the 8 September disciplinary meeting with the transcript showing that once Ms Burbidge confirmed (what she had already admitted) that her partner drove the car at some point in the drive, no further elaboration was sought and Mr Howell and Louise Moreton switched focus to the fact of the Queenstown trip. I also note that a purported concern of VB was their insurance cover but VB did not point to any specific provision in the copy of the insurance policy provided that restricted cover for other drivers.

[71] The latter issue is encapsulated by Louise Moreton's expressed anger that Ms Burbidge went on "holiday in my car" while she was unwell. In deconstructing this premise, I observe Ms Burbidge was already accommodating her employer by working part-time while on sick leave and on Friday 25 August she had pre-approved annual leave. While there was a bit of confusion over whether Ms Burbidge would take the trip to Queenstown (that Mr Howell knew was a prospect), it is objectively, not a reasonable expectation in the circumstances, that she should spend a weekend away or any of the employer business what a worker does when they take a leave day. Ms Burbidge returned to work the following Monday so this is not a situation where the employer considers the sick leave was not genuine (given Ms Burbidge had by this time fully shared medical information with VB and agreed on a gradual return to work plan).

[72] Returning to Ms Burbidge's partner driving the car, I do not objectively find this breach of the policy warranted a finding of serious misconduct. I accept it was a concern but it could have easily been resolved by counselling and an overall revisiting of the vehicle policy and communication to all employees of VB that the policy was to be strictly adhered to.

[73] I find VB has not substantively made out that they acted in a fair and reasonable manner in concluding in all the circumstances, that Ms Burbidge's actions were serious misconduct warranting her dismissal.

Procedural fairness

[74] If my conclusion above is not accurate I find that in enacting the decision to dismiss Ms Burbidge, VB did not approach the disciplinary process with an open mind and their instructions to secure Ms Burbidge's resignation during the early stage of the disciplinary process demonstrated that the matter was unreasonably pre-determined. This renders the dismissal at the onset, as potentially unjustified on procedural grounds. However, I discuss other factors I must consider below.

[75] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[76] Section 103A of the Act details elements that the Authority must objectively measure an employer's actions against before concluding whether the employer in context, acted in a fair and reasonable manner; these can be summarised as:

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

(f) were there defects in process that albeit minor, caused the employee to be “treated unfairly”.³

Applying factors identified by the Act

Resources

[77] My finding is that although they are a small family-run business, VB had the resources and deployed them, in engaging an experienced employment lawyer throughout the process. Lack of resources is not an issue.

Sufficiency of the investigation

[78] The first issue is, given that VB categorised the initial allegations a potential serious misconduct, one would have expected a careful and documented investigation to proceed and whilst I do not expect it to be “akin to a judicial inquiry”,⁴ I do have to consider if it was sufficiently fair given the serious level of the allegations. I find that overall, this was not the case and that the standard of the investigation fell short of procedural fairness and the defects were not minor and my reasons for this finding are discussed below.

Pre-determination

[79] As above I have found that prematurely communicating the outcome of a disciplinary process by trying to extract a resignation is evidence that an open-minded approach was not taken.

Issues in the investigation process

[80] It emerged in the investigation meeting that Mr Howell was not the decision-maker at any point during the disciplinary process. It is apparent Louise Moreton was the decision maker and in undertaking this function she failed to make appropriate inquiries on how Mr Howell administered VB’s vehicle policy (including usage by other employees) or if she did, I had no evidence proffered that this occurred.

³ Employment Relations Act 2000, s 103A (5)(b).

⁴ *A Limited v H* [2016] NZCA 419; [2017] @ NZLR 295 at [25].

[81] I also find in analysing the transcript and recording of the disciplinary meeting, that Louise Moreton did not take an objective approach to her inquiries or framing of the issues. Central to this was the belief that Ms Burbidge had offended her benevolence that included the patently unreasonable approach of seeking to recover paid leave from Ms Burbidge that had already being granted (albeit on a discretionary and objectively generous basis). It is apparent that Louise Moreton eschewed a conventional approach which would have been to allow Ms Burbidge to anticipate sick leave entitlement in advance, in favour of a ‘grace and favour’ approach that she later felt was legitimate to reverse.

[82] I have reasoned that in all the circumstances, dismissal was not substantively a decision open to a fair and reasonable employer. I find that a fair and reasonable employer could have approached this more fairly and paused to consider wider factors before making the decision to seek Ms Burbidge’s resignation then to dismiss her.

[83] Overall, Ms Burbidge was entitled to be treated fairly in terms of s 103A and the good faith obligation set out in the Act. I find that the defects in process were not minor as envisaged in s 103A(5) of the Act⁵ and they did result in Ms Burbidge being treated unfairly. VB had access to an experienced lawyer and was heavily reliant upon Mr Brown’s advice and approach that at times was borderline exploitative of a vulnerable and unrepresented worker in attempting to secure her resignation but I cannot absolve VB from a poorly conceived approach to the issues and badly conducted process.

Finding on the summary dismissal

[84] I find in the overall circumstances, that the summary dismissal of Ms Burbidge was unjustified on substantive and procedural grounds.

[85] While this twin finding may appear harsh to VB who obviously considered the decision to dismiss was substantially justified but perhaps concede it was procedurally defective but overall justified, it is well established having been identified by the Court of Appeal thirty five years ago in *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc*

⁵ The Authority or the court must not determine a dismissal or an action to be unjustifiable under this act solely because of defects in the process followed by the employer if the defects were – (a) minor; and (b) did not result in the employee being treated unfairly.

IUOW a judgment delivered by Woodhouse P, holding that a dismissal could be found to be a lawful exercise of an employer's right but "unjustifiable" by virtue of the way in which the matter was handled.⁶

The unjustified disadvantage claim

[86] Ms Burbidge was suspended without a real opportunity to discuss the need for a suspension but in the circumstances given it was on pay and for a very short duration, I decline to find it was an unjustified action and no compensation is appropriate.

Conclusion

[87] Having made a finding of unjustified dismissal on substantive and procedural grounds I consider that Ms Burbidge is entitled to consideration of remedies sought and I discuss them below.

Remedies

Lost wages

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

[89] Here I find Ms Burbidge's lost remuneration was attributed to the personal grievance. Ms Burbidge gave evidence that she did not secure alternative employment until 10 June 2024 but did not give extensive evidence on efforts to secure alternative employment or her availability for such but she did assert, in not addressing her request, that VB refused to waive a six-month restraint provision preventing her engaging in the same industry in competition with VB. I record this was an ambiguous issue, as Ms Burbidge's advocate did not seek to clarify whether VB would enforce the restraint and VB did not place Ms Burbidge on notice of their intention to enforce it either. In the circumstances I do not consider Ms Burbidge has

⁶ *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IOUW* (1985) ERNZ Sel Cas 142; [1982] ACJ 663 (CA).

established that her concern about the restraint was a valid impediment to her seeking alternative employment. I have however, taken account of the impact of the summary dismissal and fact that Ms Burbidge would be constrained by communicating the circumstances of such to prospective employers while seeking immediate alternative employment in a city she was unfamiliar with.

[90] Given the above and reflecting the overall circumstances of the dismissal, I consider overall justice is served by awarding Ms Burbidge 13 weeks lost wages calculated at \$1,354.12 per week.

Commission payments allegedly owed

[91] While claiming unpaid commission Ms Burbidge did not specify an amount owed other than to suggest she thought it had been offset against her advanced sick leave and that the final pay has a commission amount paid of \$352 that Ms Burbidge cannot understand the basis of how it has been calculated. Due to the lack of a specific claim the Authority cannot award a remedy.

Compensation for hurt and Humiliation

[92] Ms Burbidge her partner and sister-in-law gave compelling evidence of the distressing impact of the summary dismissal on Ms Burbidge's confidence and wellbeing and the uncertainty it created at a difficult time to find immediate alternative employment and the upset it caused.

[93] I am convinced that at the time, Ms Burbidge suffered humiliation and shame, loss of dignity and injury to feelings by how the dismissal was effected and this was placed against a context where she had relocated and was trying to improve her earnings prospects in an unfamiliar career. Taking account all the circumstances and awards made by the Authority and Court in similar situations, I consider Ms Burbidge's evidence warrants a reasonably significant level of compensation that I fix at \$18,000 under s 123(1)(c)(i) of the Act.

Contribution

[94] Section 124 of the Act states that I must consider the extent to what, if any, Ms Burbidge's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*⁷.

[95] I find that Ms Burbidge engaged in blameworthy conduct by failing to fully appreciate that in using the company fuel card for personal use it was not reasonable to travel a significant distance without paying for all the fuel utilised from her own resources. Further, but to a lesser extent, it was reasonable to expect Ms Burbidge to turn her mind to how unwise it was to allow her partner to drive the company car.

[96] Overall, I find Ms Burbidge did contribute to the situation giving rise to the personal grievance but I have balanced this up with my finding that VB's approach was procedurally deficient. Ms Burbidge cannot be blamed for the significant deficiencies in process that robbed her of a real opportunity to have her situation fairly considered.

[97] On balance, despite the identified deficiencies in VB's approach, Ms Burbidge's unwise actions did contribute to her dismissal. I find a 10% reduction in Ms Burbidge's remedy of compensation for distress is warranted.

[98] I also consider that any remedy should be reduced further by the outstanding fuel bill still owed in the amount of \$173.84.

Penalties

[99] Ms Burbidge has sought penalties for VB's alleged a breach of good faith and breach of contract but in exercising discretion the Authority has under s 160 of the Act, I decline such on the basis that the compensatory orders made below appropriately address Ms Burbidge's employment relationship problem.

⁷ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Orders

[100] I have found that:

- (a) Harriet Burbidge was unjustifiably dismissed.
- (b) In the circumstances Vast Billboards Limited is ordered to pay Harriet Burbidge the sums below 28 days after the date of this determination being issued:
 - (i) \$17,603.56 gross lost wages pursuant to s 123(1)(b) of the Act; and
 - (ii) \$16,026.16 without deductions, compensation pursuant to s 123(1)(c)(i) of the Act.

Costs

[101] Costs are reserved.

[102] The parties are encouraged to resolve any issue of costs between themselves.

[103] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Harriet Burbidge may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Vast Billboards Limited will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[104] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁸

David G Beck
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1