IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2016] NZEmpC 136
EMPC 73/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	XTREME DINING LIMITED TRADING AS THINK STEEL Plaintiff
AND	LEIGHTON DEWAR Defendant

Hearing:	26 and 27 July 2016 (heard at Christchurch)
Court:	Chief Judge G L Colgan Judge B A Corkill Judge K G Smith
Appearances:	T McGinn, counsel for the plaintiff A Lodge, counsel for the defendant
Judgment:	31 October 2016

JUDGMENT OF THE FULL COURT

Background

[1] What remedies, if any, should be awarded to an employee who was unjustifiably dismissed?

[2] That is the overarching question which arises from a non de novo challenge as to remedies brought by Xtreme Dining Limited (which trades as Think Steel), against a determination of the Employment Relations Authority (the Authority).[1]

[1] *Dewar v Xtreme Dining Ltd t/a Think Steel* [2016] NZERA Christchurch 19.

[3] It determined that Mr Leighton Dewar was unjustifiably dismissed after Think Steel concluded he was involved in an incident of theft of petrol by use of a company fuel card, and may have been involved in 27 other similar incidents.

[4] The event which triggered the dismissal occurred after Mr Dewar had driven his car at the request of a work colleague, to a Z Service Station at Belfast in Christchurch. The colleague, Mr Chris Feaver, and a friend who did not work for Think Steel, Mr Shane Jones, wanted cash so as to purchase beer. At the service station, Mr Feaver used Think Steel's fuel card to obtain approximately $60. While Mr Dewar knew Mr Feaver had used a fuel card for this purpose, he maintained he did not know it was one belonging to Think Steel.

[5] Mr Neil Gard, Managing Director of Think Steel was advised of the use of the company's fuel card soon after, by the card company involved. Mr Gard said that he then viewed relevant CCTV footage, and immediately commenced an investigation.

[6] In findings which are not challenged, the Authority concluded that the investigation was deficient in several respects. Mr Dewar had not been told prior to the investigation meeting which resulted in his dismissal that there was to be a consideration of allegations of serious misconduct; nor was he informed of this at the outset of that meeting. Mr Dewar had not admitted that he knew Mr Feaver had used Think Steel's fuel card without authorisation; he had explained that he understood the card belonged to someone else. The Authority held that the explanation was almost immediately discounted without it being checked with Mr Feaver, in circumstances where serious allegations were being considered.[2] The Authority also held that the investigation was not undertaken with an open mind and that there were elements of pre-determination by Think Steel's manager. The procedure adopted was fundamentally unfair and resulted in unfairness; further, good faith obligations had not been adhered to. The Authority determined that a fair and reasonable employer could not have decided at the time when the dismissal occurred there had been serious misconduct by Mr Dewar.[3]

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2 At [73].
3 At [86].

[7] The Authority also considered an alternate ground for dismissal on which the company had relied. It had been asserted that even accepting Mr Dewar's explanation, he must have known Mr Feaver was wrongfully using someone else's fuel card. The Authority held this allegation was not put to Mr Dewar before he was dismissed and arose as an alternative allegation at a later time. It could only be regarded as a matter of contributory conduct when assessing remedies.[4]

[8] Accordingly, the Authority concluded Mr Dewar's personal grievance that he was unjustifiably dismissed was established, and that he was entitled to a consideration of remedies.[5] There is no challenge to this conclusion.

[9] It will be necessary to consider the Authority's conclusions as to remedies in considerable detail as that part of its determination is the focus of the challenge. At this stage it suffices to say that Think Steel was ordered to pay Mr Dewar $2,709.08 gross for reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000 (the Act); further the sum of $12,000 should be paid as compensation under s 123(1)(c)(i) of the Act, subject to an assessment of contributory fault. Having regard to Mr Dewar's failure to act in the face of what he acknowledged was "dodgy" conduct, that sum was reduced to $10,000 under s 124 of the Act.

[10] Think Steel asserts that in fixing the lost wages award, the Authority erred by failing to consider adequately issues as to causation of Mr Dewar's alleged loss, and mitigation of that loss. It further argues that the correct application of s 124 of the Act would have resulted in a determination to refuse the award of remedies altogether.

[11] In a minute of 23 May 2016, Chief Judge Colgan concluded that the case raised two important issues, not only for the parties but more broadly. The extent of mitigating obligations on a dismissed employee would require consideration. The Court would also have to consider whether s 124 allows the Authority to apply what

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4 At [88].
5 At [90].

is colloquially described as a 100 per cent reduction. Accordingly it was directed that a full Court hear the case.

[12] There is a further matter relating to procedure to which it is necessary to make reference at this stage, concerning the nature of the challenge. The statement of claim stated that Think Steel's election related to that part of the Authority's determination which dealt with the remedies awarded and the quantum of those remedies; but it went on to state that a full hearing of those issues, a "hearing de novo", was sought.

[13] The effect of s 179(3)(b) of the Act is that a hearing de novo relates to a full hearing of the entire matter which was the subject of the challenged determination. It is not possible to seek a hearing de novo for a part-only of that determination, as was sought by Think Steel. Accordingly, in the initial timetabling minute, Chief Judge Colgan directed that the hearing would proceed by way of a non de novo challenge to remedies.

[14] Section 179(4) of the Act requires that a party who is not seeking a hearing de novo to specify:

a) Any error of law or fact alleged by that party; and

b) Any question of law or fact to be resolved; and

c) The ground on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the Court and the other parties of the issues involved; and

d) The relief sought.

[15] Think Steel's statement of claim did not meet those statutory requirements. After this was pointed out by the Court prior to the hearing, counsel for Think Steel, Mr McGinn, filed a memorandum which specified the errors of law and/or fact upon which the company intended to rely. These amplified the various respects in which it is claimed the Authority erred when considering remedies, both in fact and in law.

Later in this decision we will consider in detail the nine grounds of challenge which were thereby raised.

[16] Next, it is appropriate to refer to the relevant principles which apply to the hearing of a non de novo challenge since these differ from those relating to a de novo challenge:

a) A non de novo hearing is in the nature of an appeal. The challenger or plaintiff is required to show that the Authority's determination was wrong.[6]

b) Thus, the challenger has an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in its determination.[7]

c) Making such an election does not indicate the way in which the appeal is to be heard. There may be evidence or further evidence about the matters at issue in the non de novo challenge. The Court must make its own decision, as required by s 183 of the Act.[8]

d) Section 182(3) of the Act requires that where an election states that the person seeking the election is not seeking a hearing de novo, the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

[17] One of the difficulties which parties must consider when electing to proceed on the basis of a non de novo hearing is the scope and extent of the evidence which will be before the Court on such a challenge. No transcript is kept of the evidence received at an investigation meeting, since there is no requirement on the Authority to do so. The Act also stipulates that in its written determination the Authority need not set out a record of all or any of the evidence heard or received, or record or summarise any submissions made by the parties.[9] These features are consistent with

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6 *Counties Manukau District Health Board v Trembath* [2001] ERNZ 849 (EmpC) at [9]; *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] ERNZ 157 (EmpC) at [8].

7 *Robinson v Pacific Seals New Zealand Ltd* [2015] NZEmpC 84 at [24].

8 *Cliff v Air New Zealand Ltd* [2005] ERNZ 1 (EmpC), at [7].

9 Employment Relations Act 2000, s 174E(b).

the statutory intention that the Authority is required to dispose of problems and disputes promptly and without undue regard to technicalities. Consequently, when electing a non de novo challenge, careful attention should be given to the issue as to whether any additional information should be before the Court beyond that which is apparent from the determination under challenge.

[18] In the present case, the parties required the Court to consider not only the evidence referred to in the determination, but also briefs of evidence and documents which had been placed before the Authority, as well as the extensive oral evidence which was led.

[19] Although this approach resulted in a substantial quantity of evidence being placed before the Court, the statutory provisions require a focus on the conclusions reached in the Authority's determination, and whether there are errors of fact and/or law in any of the asserted respects. In this case, the challenge relates to remedies only; however, that includes an assessment of issues relating to contributory fault. Accordingly, the Court must obtain a detailed understanding of the factual context. For the purposes of this issue in particular, the Court must reach its own conclusions as to the sequence of events; only then can it determine whether there is an error of fact or law as to contributory fault. This is not a case where the additional evidence called in the Court comes into play only after an error of fact or law has been established.

Essential facts

[20] We now summarise the relevant factual circumstances, noting that it will be necessary to discuss particular aspects of those circumstances more fully later in this decision.

Background matters

[21] Think Steel manufactures fabricated steel parts for building and construction projects. Mr Dewar was employed by Think Steel as a Fabrication and Fitting Assistant on 11 August 2014. His role included fabricating steel components and

involved cutting and welding. He wished to obtain a qualification in this area of work, and was hoping that his job would lead to an apprenticeship.

[22] Mr Dewar was employed on the recommendation of Mr Lee Robins, who had a little earlier been employed as a Team Leader by the company. Mr Dewar and Mr Robins had worked together at a previous engineering firm. Following a further recommendation by Mr Robins, Think Steel also employed Mr Feaver. Mr Robins' team consisted of Mr Dewar, Mr Feaver and another employee.

[23] Mr Robins was provided with access to a Toyota truck which he was permitted to drive to and from work; and personal use of the vehicle was permitted with Mr Gard's permission. A company fuel card was issued for fuel purchases. The fuel card was linked to the registration of the truck, which was diesel-powered.

[24] In January 2015, Mr Gard's wife became concerned at the extent of the company's monthly fuel card account for December 2014. Some suspicious transactions were noted, particularly for the fuel card associated with the Toyota truck. A series of unleaded petrol purchases were associated with the card linked to this diesel vehicle. There were also purchases associated with another company card which was associated with an Isuzu crane truck; it was also diesel-powered.

[25] A list of current transactions subsequently provided by the fuel company for January 2015 confirmed that the suspicious activity was continuing.

Events of 1 February 2015

[26] On Sunday, 1 February 2015, Mr Dewar, Mr Feaver and Mr Jones travelled to the Waimakariri River. The day was hot. They went in Mr Dewar's vehicle. He drove and was primarily interested in swimming. The other two were mainly interested in drinking beer.

[27] Late in the afternoon when the group left the river, Mr Dewar stated that he would drop the other two back at a location where Mr Feaver's car was parked. At that point, Mr Dewar understood that Mr Feaver and Mr Jones wanted to obtain more beer.

[28] As they drove back, Mr Feaver said that he wanted to obtain money to buy beer, and that he had a fuel card which he would use for this purpose. He said that the fuel card belonged to an individual whom he named; that person was his partner's sister's partner, with whom he shared a home. Accordingly, as they approached the Z Petrol Station on Belfast Road, Christchurch, Mr Feaver asked Mr Dewar to pull over.

[29] Mr Dewar drove the vehicle into the service station, and parked on the forecourt to one side. From CCTV records which the Court has viewed, it is evident that someone present in Mr Dewar's vehicle as driver would have been in a position to observe what happened on the forecourt, but not what happened in the shop associated with the service station.

[30] Mr Dewar said that Mr Feaver did not go inside the shopping area to use a cash machine or make any purchases, but rather started approaching people on the forecourt who were placing fuel in their vehicles. Mr Dewar remained in the driver's seat of his vehicle. He said he was playing a game on his cell phone, and was not paying particular attention to Mr Feaver's activities. Mr Jones remained seated in the rear of the vehicle.

[31] Then Mr Feaver returned to the vehicle. Asked what he was doing, he said that he was approaching customers to see if they wanted a discount on petrol. He then resumed this activity.

[32] Mr Dewar said that from this explanation he assumed that what Mr Feaver meant was he would pay for a customer's petrol using the fuel card to which he had referred earlier. He said he thought this was "a bit weird"; when giving evidence he agreed these actions were "dodgy". He asked Mr Jones what he thought. Mr Jones said that if Mr Feaver possessed a fuel card and was allowed to use it, then there could be no objection. Mr Dewar rationalised the situation by accepting Mr Feaver's explanation that he was permitted to use the card, concluding that any issues over the use of the card would be between him and the cardholder.

[33] Then Mr Feaver approached a particular customer who was placing fuel in his vehicle. When he had completed this, the customer and Mr Feaver began walking towards the store. As he did so, Mr Feaver gave what appeared (to Mr Gard at least when reviewing the CCTV footage) to be a positive signal apparently directed to those in Mr Dewar's vehicle. There is no evidence that Mr Dewar saw this communication, if indeed that is what it was. We had difficulty discerning such a gesture, particularly with the importance Mr Gard attributed to it, from the footage as shown to us.

[34] From later footage, it is evident that within the service station shop Mr Feaver paid for the customer's fuel; then he and the customer withdrew cash from an ATM machine. There is no evidence that Mr Dewar observed what occurred in the shop.

[35] Mr Feaver returned to Mr Dewar's vehicle, stating that some $63 had been paid for the fuel, and that he now possessed $60 cash.

[36] After Mr Feaver returned to the vehicle, Mr Jones got out and approached the customer. Mr Dewar assumed this was to thank the customer.

[37] This incident occurred over some eight minutes. Mr Dewar said, in summary, that he had some awareness as to what was going on, but he was not taking any particular interest in these events as they did not concern him.

[38] Mr Dewar then drove to the location of Mr Feaver's vehicle, leaving him and Mr Jones there. He left them to see his girlfriend.

Think Steel's investigation

[39] Mr Gard then received a telephone call from the card company to advise that one of Think Steel's fuel cards associated with the Isuzu crane truck had been utilised to purchase petrol on Sunday, 1 February 2015. As a result, Mr Gard attended the Belfast Z Service Station and viewed the relevant CCTV footage. He was not permitted to copy it.

[40] After viewing the footage, Mr Gard concluded that Mr Feaver had entered into a transaction with an unknown customer by using a Think Steel fuel card, and in return had received cash from that person, probably at a discount as an incentive for the customer's participation. He thought that Mr Dewar was likely to be the driver of the vehicle. He noted that there had been several attempts by Mr Feaver to engage with a willing customer. He concluded from what he assumed was an update which he said Mr Feaver had provided to Mr Dewar and Mr Jones, and from the later hand gesture, they must have been well aware as to what was going on. He told the Court that upon observing the CCTV footage he was convinced Mr Dewar was involved in the transaction which Mr Feaver had undertaken.

[41] Late on Monday, 2 February 2015, Mr Gard told the company's Product Manager, Mr David Cross, about his suspicions, and that he wanted him to sit in on meetings which he would conduct with Mr Dewar and Mr Feaver the next day.

[42] On 3 February 2015, soon after he arrived at work, Mr Dewar was asked to meet with Mr Gard and Mr Cross. No notes were taken by any participant.

[43] It will be necessary to discuss what occurred at this meeting more fully shortly, but in summary there was a discussion about the use of company fuel cards. This was followed by a statement from Mr Gard that the issues being discussed could amount to serious misconduct and could involve the termination of employment. He referred to the applicable provisions of an individual employment agreement (the IEA). Reference was also made to the fact that two company fuel cards had been used over a period of three months to purchase unleaded petrol and possibly other products which had not been authorised by the company. Mr Dewar denied any knowledge of, or involvement in, these actions.

[44] Then Mr Gard referred to the transaction which had occurred two days earlier at the service station.

[45] To this point, Mr Gard considered Mr Dewar had reacted in a dismissive and uninterested fashion. For his part, Mr Dewar was unclear why he was being questioned. He simply denied he was involved in the matters to which Mr Gard

referred. Indeed, he said that it was not until Mr Gard mentioned the matters he had viewed on the CCTV footage relating to the Z Service Station, that he realised what he was talking about.

[46] At that point, Mr Dewar acknowledged he had driven his vehicle to the service station, and that Mr Feaver had told him he had a fuel card belonging to a person whom he described as Mr Feaver's brother-in-law. He said he did not know a Think Steel fuel card had been used; and he also said he had not received any money from the transaction.

[47] Mr Gard did not consider Mr Dewar's explanation to be credible. Mr Gard's account was that he then said "Do you think I have stupid tattooed on my forehead?" Mr Dewar's recollection was that Mr Gard said "Do I look like I have dumb c… written on my forehead?"

[48] Mr Gard also referred to the earlier transactions which he was concerned about. However, he said those transactions were not discussed directly as his focus was solely on what had occurred on 1 February 2015. But Mr Dewar said that Mr Gard asserted there were 27 transactions involving the unauthorised use of Think Steel fuel cards and that he considered Mr Dewar had been involved in these. We accept Mr Dewar's evidence, since it provides the more likely account.

[49] In his evidence, Mr Gard referred to Mr Dewar's description of events. He said that even a scenario that Mr Dewar knew Mr Feaver was misusing someone else's fuel card, and that this was somehow not a problem if he personally did not benefit by receiving cash, would not have changed his opinion that Mr Dewar had been dishonest.

[50] Mr Gard decided that he could not employ Mr Dewar any further given his involvement in the events which had occurred on 1 February 2015. He told Mr Dewar that he was dismissing him with immediate effect for theft and dishonesty.

[51] Mr Gard told Mr Dewar that he was to leave immediately and that he was not to speak to any team members in the workshop. Mr Cross was instructed to obtain

Mr Dewar's personal effects, and ensure he left the premises. At that point, Mr Gard had yet to meet with Mr Feaver.

[52] From a nearby vantage point, Mr Robins could see into Mr Gard's office and noticed that Mr Dewar was very distressed. Mr Robins attempted to enter the office. Mr Dewar told Mr Robins that his employment had been terminated. Mr Gard reacted by instructing Mr Robins to return to work. Mr Robins and Mr Dewar stated that at this point Mr Gard removed Mr Dewar aggressively from the office area. Mr Dewar says he was "shoved … out the door". Mr Gard said he put his hand on the back of Mr Dewar's shoulder to guide him into a car park area.

[53] Mr Gard then met with Mr Feaver; he admitted that he had used a Think Steel fuel card at the service station, and had stolen petrol from Think Steel. His employment was terminated. Mr Feaver was not asked whether or not Mr Dewar had been aware that Think Steel card had been used at the service station. As we understand it, Mr Feaver has not challenged the decision to dismiss him.

Events following the termination

[54] Mr Dewar then laid a complaint of assault with the police regarding Mr Gard's action in pushing him. Subsequently the police stated that the complaint was unlikely to be investigated having regard to resource issues.

[55] Late on 3 February 2015, Mr Dewar emailed Mr Gard stating that he was very upset about the events of that day. He confirmed that he had never stolen anything from Mr Gard or from Think Steel. He strongly disagreed with the allegations which had been made.

[56] Mr Gard responded the next day by letter, providing a brief outline of the matters that had been discussed with Mr Dewar, including Mr Dewar's acknowledgment that he had been present in his vehicle when Mr Feaver used the fuel card, although he had said he understood the fuel card belonged to Mr Feaver's brother, and that he did not receive any money as a result of the transactions undertaken by Mr Feaver. Mr Gard also recorded that there were 27 other transactions, all of which he claimed followed the same pattern. He drew attention

to the serious misconduct clause of the IEA, and that theft and dishonesty had occurred. He said that Mr Dewar had "been involved in at least one and potentially 27 [incidents] of stealing petrol owned by Think Steel".

[57] Although Mr Dewar had driven Mr Feaver to his vehicle after they had both been dismissed on 3 February 2015, Mr Dewar had no further contact with him except by text messaging. On 5 March 2015, Mr Feaver sent Mr Dewar a text claiming that he had told Mr Gard that Mr Dewar had no involvement in his actions.

[58] Following the termination, Mr Dewar concluded that he was unable to support himself or pay rent. He lived for a time with Mr Robins and his wife, who offered him practical support.

[59] In the few days following his dismissal, Mr Dewar was unable to obtain work. Since a hoped-for apprenticeship had not eventuated at Think Steel, he decided to enrol in a course at the Christchurch Polytechnic Institute of Technology (CPIT) so as to obtain a pre-trade qualification. The course ran from 18 February 2015 to 1 July 2015. He received no earnings in this period, although he did receive a student loan.

[60] On 20 June 2015, he was able to obtain work with E4 Engineering Limited. This was initially part-time until his course concluded. Then it became a full-time job. That employment was terminated at the end of a 90-day trial period, due to insufficient work being available for him; this occurred on 13 September 2015. He was able to obtain work elsewhere subsequently.

Authority's determination as to remedies

[61] Before considering each ground of challenge, it is necessary to record in more detail the conclusions reached by the Authority on remedies which it considered were appropriate in light of the conclusion that Mr Dewar had been unjustifiably dismissed.

[62] The first remedy which was addressed related to lost wages. The Authority made reference to the decisions which Mr Dewar made initially to undertake a

course at CPIT, and then work for various employers. It dealt with a submission made for Think Steel that there was no evidence of any mitigating steps being undertaken by Mr Dewar before he decided to study, at a time when the Christchurch rebuild was at its peak and Mr Dewar had relevant work experience. It had also been submitted that the chain of causation between the loss of the job and lost wages was broken by the decision not to actively apply for other jobs but to retrain.[10]

[63] In response it had been submitted that Mr Dewar had been promised an apprenticeship at Think Steel; with no performance issues there was no basis on which to conclude that he would not have received an apprenticeship if he had not been dismissed.

[64] The Authority said it could not be confident that if Mr Dewar had not been dismissed his hope of being offered an apprenticeship by Think Steel would have eventuated. The Authority was not prepared to include in the assessment of lost wages the period during which he studied. It was observed that whilst this was no doubt a sensible decision, Think Steel should not be liable for the decision to undertake study in the circumstances.[11]

[65] The Authority accordingly concluded that Mr Dewar was entitled to reimbursement of lost wages from the date of termination to the date of commencement of the CPIT course (3 to 18 February 2015) and then for any shortfall of wages following the end of the course for the months of July and August 2015. In summary, the approach which was adopted was to assess lost wages for a period of three months, but to exclude the period of the CPIT course. On this basis, the Authority determined Mr Dewar was entitled to reimbursement of $2,709.08 gross, subject to any findings as to contribution.[12]

[66] Turning to compensation, the Authority noted a submission made on behalf of Think Steel that there was sparse and contradictory evidence about the claim for non-economic loss. The Authority in rejecting that submission reviewed the evidence given by Mr Dewar as to the significant consequences of dismissal,

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10 *Dewar v Xtreme Dining Ltd t/a Think Steel*, above n 1, at [95] – [96].
11 At [99].
12 At [100] and [101].

including what he had described as an "emotional breakdown".[13] It recorded Mr Robins' evidence to the effect that Mr Dewar was very distressed when he was pushed by Mr Gard. Mr Robins had observed a major change in Mr Dewar's behaviour after the dismissal in that he had no motivation and was depressed. Although the Authority was urged to conclude that this evidence was exaggerated, it was accepted as corroboration of Mr Dewar's own account.[14]

[67] The Authority concluded that the inappropriate process adopted by Think Steel had been unfair and impacted on Mr Dewar's self-confidence and feelings of injustice. Mr Dewar's evidence that he had been pushed aggressively by Mr Gard when leaving the premises was accepted. This was because the Authority was satisfied that Mr Gard had been angry. A further relevant factor related to the inexplicable delay whilst Mr Dewar's personal belongings were retrieved when he was not permitted to enter the premises. The Authority considered this would have been distressing. Subject to any findings about contribution Mr Dewar was entitled to an award of compensation of $12,000.[15]

[68] Finally, the Authority dealt with the issue of contribution under s 124 of the Act. The Authority recorded that it was not until this point that it needed to reach a conclusion about whether Mr Dewar did what it was alleged he had done and whether he was involved in the theft of petrol on one and potentially 27 other occasions from Think Steel; or as had been submitted for the company, that he was party to other dishonest activity that would have justified dismissal if a fair process had been followed.[16]

[69] The Authority reviewed the events of 1 February 2015, and determined that it was not satisfied on the balance of probabilities that Mr Dewar knew Mr Feaver was in unauthorised possession of a Think Steel fuel card, and that he was stealing from the company. It found it more likely that Mr Feaver had not disclosed he possessed a Think Steel fuel card. In reaching this conclusion, the Authority placed reliance on a text message sent by Mr Feaver confirming Mr Dewar had no involvement in his

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13 At [102].
14 At [104] and [105].
15 At [106] and [107].
16 At [109].

actions. It was also noted that Mr Feaver was clearly untruthful when it suited him. The Authority found that there was a strong likelihood Mr Feaver did not want Mr Dewar, with whom he had a friendship outside of work, to know that he was dishonest and was in unauthorised possession of a fuel card from Think Steel, so that he had made up a story about the fuel card belonging to another person. A relevant matter of context was that Mr Feaver was quite a few years older than Mr Dewar.[17]

[70] The Authority concluded that had Mr Feaver been asked by Mr Gard about Mr Dewar's explanation, there was a strong likelihood he would have told him that he had made up the story he gave to Mr Dewar, to the effect that the fuel card belonged to someone else. The Authority also noted that Mr Feaver had not been questioned on this aspect of the matter before Mr Dewar had been dismissed.[18]

[71] Next, the Authority dealt with the submission that had been made that Mr Dewar was party to some criminal activity, whether it involved Think Steel or not, and that dismissal was inevitable. The Authority accepted that Mr Dewar believed Mr Feaver had permission to use the fuel card, and that he wrongly understood cash would be obtained from it directly. It was noted that Mr Dewar had accepted that Mr Feaver's conduct on the forecourt had looked dodgy. In spite of this he had not, for example, encouraged Mr Feaver to desist from approaching customers. That contributed to the view formed by Mr Gard that all those in the car were involved in the conduct, and there was accordingly a degree of blameworthiness that contributed to the situation as a result.[19]

[72] On the basis of these findings, the Authority noted it had already taken into account the fact that an offer of apprenticeship was unlikely, so that no further reduction to the proposed award for lost wages was appropriate.

[73] Turning to the question of whether the award for non-economic loss should be reduced, the Authority recorded that dismissal was not inevitable if Mr Dewar had not been involved in Mr Feaver's dishonest actions. This was because a variety of options could have been considered and it was not clear what would have happened

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17 At [114] and [115].
18 At [116].
19 At [123].

if further investigations had been undertaken. In those circumstances, the extent of the reduction of the award of compensation would be from $12,000 to $10,000. Relevant factors in the assessment were that the process had been so deficient that it would in all likelihood have led to incorrect conclusions about Mr Dewar's conduct, and it had caused him considerable harm.[20]

The challenge

[74] We now turn to the various grounds of the challenge. This requires a consideration of each individual remedy awarded by the Authority, followed by a consideration of its findings as to contributory fault.

Compensation for non-economic loss

[75] On this topic, the Authority reviewed the evidence which Mr Dewar himself gave, to the effect that the dismissal had impacted on him significantly. He had said that he had a good job with Think Steel, that he did not know what he was going to do following termination, and that he was in shock. It was then that he realised what he had been accused of, and that he had suffered what he described as an emotional breakdown. A reference had been made in the letter which recorded the termination of his employment of 3 February 2015 to the fact that all information would be passed on to the police for investigation. Mr Dewar had been stressed about this threat. The Authority recorded that he had also said he felt upset about the lack of fairness of the process, and that his self-confidence had been damaged severely.

[76] This evidence was corroborated by Mr Robins, who observed Mr Dewar had been very distressed immediately after his employment was terminated, and in the circumstances which followed termination where Mr Gard was seen to push Mr Dewar in quite an aggressive manner from the premises. Mr Robins had told the Authority he observed a major change in Mr Dewar's behaviour after dismissal, in that he was not motivated and was depressed. Since Mr Dewar had no income and nowhere to live, he invited him to stay with him and his wife; they helped him with

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[20] At [127].

food and daily living expenses until he found a job. This evidence was accepted as reliable.

[77] The Authority found that the process adopted by Think Steel was clearly unfair and impacted on Mr Dewar's self-confidence and feelings of injustice. Although Mr Gard had vigorously denied that he pushed Mr Dewar out of the premises after he was dismissed, the Authority found that Mr Dewar's evidence on this topic was credible. It was concluded that it was likely in the circumstances that Mr Gard was angry at the time, so that there was some force in his actions that amounted to being more than a guiding motion. Mr Dewar also faced inexplicable delay whilst his personal belongings were retrieved, while he waited outside being forbidden to enter the premises; the Authority found this would have been distressing.

[78] Subject to findings as to contribution, the Authority concluded Mr Dewar was entitled to an award of $12,000.

[79] There is no challenge to these findings. In any event, we regard these conclusions as having been well open to the Authority.

[80] Ms Lodge, counsel for the defendant, submitted that an award at the higher end of the scale was justified. She referred to recent dicta of the Employment Court to the effect that hurt and humiliation awards have not kept pace with inflation.[21] She said that Mr Dewar should not be bound by the amount which he had originally claimed in his statement of problem, of $12,000.

[81] No cross-challenge on this topic was brought by Mr Dewar. Accordingly, there is no jurisdictional basis for the Court to reconsider this award. It is, however, subject to the issue of contributory fault with which we deal subsequently.

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[21] *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, (2015) 10 NZELC 79-051 at [87].

Lost wages

The facts

[82] The main issues raised by the challenge on this topic relate to causation and mitigation; and once established, contribution.

[83] As already mentioned, Mr Dewar was upset following his dismissal. He sought the assistance of Mr Robins and his wife. Mrs Robins assisted him with the rewriting of his CV. Mr Dewar also met her on several occasions at a building site at which she was working where she, and a quantity surveyor who was also working at the site, spoke to him about career and training options.

[84] She also spoke to two sub-contractors with whom she was having dealings at the time; this led to Mr Dewar discussing with them whether he could obtain employment which would advance his fabrication and fitting skills. Such work was not available. He also tried to obtain work with a former employer, but there was no vacancy.

[85] Mr Dewar said that the only jobs which were available in the area in which he wished to work, involved requirements for skilled welders and fabricators who had many years' experience in the trade; he did not possess such experience. Whilst he could have obtained a labourer's job where no skill was required, he reached the conclusion that to advance his career he needed to obtain a relevant qualification by undertaking an apprenticeship. He had hoped to do this by accepting an apprenticeship at Think Steel. Mr Gard had told him he would consider this, although there had been no firm agreement to that effect.

[86] In lieu of an apprenticeship arrangement, Mr Dewar decided to enrol for a course at CPIT so as to obtain a pre-trade qualification. Such a course was about to commence shortly after the dismissal on 18 February 2015. He enrolled for the course a few days earlier on 13 February 2015.

[87] He was engaged on the course full-time until 1 July 2015. As already mentioned, towards the end of the course, he was able to obtain work on a part-time basis until his course concluded. Then he worked full-time until the end of a 90-day

trial period, when his employment was terminated as the firm had insufficient work for him to undertake. He was out of work for one week, before obtaining employment with another engineering company.

[88] The Authority awarded Mr Dewar reimbursement of lost wages for 11 days from 3 to 18 February 2015; and from the conclusion of the CPIT course for some two months, finding that thereafter the earnings Mr Dewar received were in excess of what he would have received at Think Steel.[22] As already mentioned, that amounted to $2,709.08 gross, subject to any findings as to contribution.

Mitigation of loss

[89] Think Steel asserts that the Authority erred by failing to apply a correct onus as to the proof of loss of income following the dismissal. Mr McGinn submitted that no formal applications for employment were made, and that "no door knocking was attempted". All that happened, he said, was that Mr Dewar received some career advice from a friend and from two employers in the industry in the week following his dismissal, and then abandoned any attempt to find work. It was argued that Mr Dewar should not be reimbursed for lost wages in these circumstances.

[90] Mr McGinn cited *Allen v Transpacific Industries Group Ltd*, stating that its dicta supported his submission.[23]

[91] In that judgment, Chief Judge Colgan emphasised that unions and others representing dismissed employees intending to take personal grievances should keep complete records of their attempts to mitigate losses. Then he said:[24]

> [D]ismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

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22 *Dewar v Xtreme Dining Ltd t/a Think Steel*, above n 1, at [100].
23 *Allen v Transpacific Industries Group Ltd* [2009] 6 NZELR 530 (EmpC).
24 At [78].

[92] The effect of Mr McGinn's submission was that the Authority erred by failing to determine Mr Dewar had not provided adequate evidence as to the steps he took following termination to find another job.

[93] The starting point for consideration of the relevant principles as to mitigation of loss must begin with reference to the position at common law. This was conveniently summarised by the Court of Appeal in *Walop No 3 Ltd v Para Franchising Ltd*, where Anderson P observed:[25]

> … In an action for damages for breach of contract the innocent party is under no obligation to prove that all reasonable steps to mitigate were taken by it. Rather, the onus is on the defaulting party to satisfy the Court that damages should be reduced because a plaintiff has failed to take reasonable steps to mitigate loss consequent on a defendant's wrong and should not be permitted damages in respect of any part of the loss due to the plaintiff's neglect to take such steps.

[94] This view has long been the position at common law as explained at the highest level. In *Banco de Portugal v Waterlow and Sons Ltd,* a judgment of the House of Lords, Lord McMillan stated:[26]

> …Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been to and meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken. …

[95] In *Wilding v British Telecommunications PLC,* a judgment of the United Kingdom Court of Appeal, it was concluded by Potter LJ that the various common law authorities were apt to establish the following principles:[27]

> …

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25 *Walop No 3 Ltd v Para Franchising Ltd* CA20/03, 23 February 2004 at [7].
26 *Banco de Portugal v Waterlow and Sons Ltd* [1932] AC 452 (HL) at 506.
27 *Wilding v British Telecommunications PLC* [2002] EWCA Civ 349, [2002] ICR 1079 at [37].

(i) It was the duty of [the claimant] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from … his former employer;

(ii) The onus was on [his former employer] as the wrongdoer to show that [the claimant] had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment;

(iii) The test of unreasonableness is an objective one based on the totality of the evidence;

(iv) In applying that test the circumstances in which the offer was made and refused, the attitude of [the former employer], the way in which [the claimant] had been treated and all the surrounding circumstances should be taken into account; and

(v) The court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of [the claimant].

[96] In the same judgment, Sedley LJ drew attention to the difference between a test of acting reasonably on the one hand and not acting unreasonably on the other. He said:[28]

> … It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.

[97] Turning to this jurisdiction, s 123(1)(b) of the Act allows for the possibility of mitigation being considered when it provides:

> **123 Remedies**
>
> (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
>
> …
>
> (b) *the reimbursement* to the employee *of a sum equal to the whole or any part of the wages or other money lost* by the employee as a result of the grievance:
>
> …
>
> (Emphasis added)

[28] At [55].

[98] Parliamentary intent is clear. A sum in respect of lost wages may be provided up to the full amount which has been lost. This is consistent with the principle of loss mitigation where a complete sum may be ameliorated if the plaintiff has not acted appropriately.

[99] But the real issue raised in the present case relates to the respective obligations of the parties.

[100] It has long been the position in this jurisdiction that the common law tests as to onus are applicable to claims for statutory remedies.[29] Given that onus, it is incumbent on the employer as the defaulting party to raise the issue, usually in the relevant pleading. Having raised the issue, the employer continues to carry the ultimate onus, or as it has sometimes been described, the "legal burden".[30]

[101] But there is an "evidential burden" on the employee to provide relevant information. This is what the Court referred to in *Transpacific*. It is necessary for the employee to provide this information, if called on, because it is information of which he or she has knowledge. This obligation is a manifestation of the famous statement made by Lord Mansfield in 1774 in *Blatch v Archer* that "it is certainly a maxim that all evidence is to be weighed according to the proof of which it was in the power of one side to have produced, and in the power of the other to have contradicted."[31]

[102] That does not preclude the employer from leading its own evidence on the topic, for instance as to employment options which were reasonably available but not pursued; or to challenge the accuracy or adequacy of the evidence given by the employee.

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29 *Burch v Willoughby Consultants Ltd* (1990) 3 NZELC 97, 582 (HC); *Pascoe v Covic Motors Ltd* [1994] 2 ERNZ 152 (EmpC) and *Schollum v Andrew* EmpC Auckland AEC45/96, 12 August 1996 at 6.

30 *Accident Compensation Corporation v Ambros* [2007] NZCA, [2008] 1 NZLR 340 (CA) at [55].

31 *Blatch v Archer* (1774) 1 Cowp 63 at 65; *Ambros*, above n 30, at [59]; *The Healy Holmbert Trading Partnership v Grant* [2012] NZCA 451, [2012] 3 NZLR 614 at [41].

[103] But when considering all the evidence, this issue of fact[32] must be assessed on the basis that the employee is the victim of a wrong.[33] The Authority or Court cannot be too stringent in its expectations of a dismissed employee. Further, what has to be proved – by the employer – is that the employee acted unreasonably; the employee does not have to show that what he did was reasonable.

[104] In summary, where the employer puts mitigation in issue, the employee must provide relevant information as to the steps he took to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

Did Mr Dewar act unreasonably?

[105] In considering the period of some two weeks following Mr Dewar's dismissal, it is necessary to take into account the significant impact which the termination circumstances had on him. We accept the evidence from him and from Mrs Robins that he was very distressed. He was regarded as a reliable employee, who aspired to obtain a trade, and believed that Think Steel could provide opportunities for him to obtain relevant qualifications. A significant fact was that he had been dismissed for dishonesty. Obtaining alternative employment in these circumstances would inevitably have been difficult. The alternative of study so as to advance his qualifications was entirely reasonable. Mr Dewar did explore the possibility of obtaining work, but the only employment available would not have involved the skills he held. We do not find that Mr Dewar acted unreasonably in the decisions he took; the Authority did not err in its conclusion on this point.

Causation

[106] Mr McGinn also submitted that there was a break in the chain of causation as to loss, in two respects.

[107] The first relates to the Authority's decision to award lost wages after the "intervening event" of the course of study which Mr Dewar undertook. Again, the

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32 *Walop No 3 Ltd v Para Franchising Ltd*, above n 25 at [8].
33 *Banco de Portugal v Waterloo and Sons Ltd*, above n 26, at 506.

observations in *Wilding*, cited earlier, are apposite.[34] A standard which is too demanding is not to be applied, because the employee is the victim of a wrong. The state of mind of the employee may be taken into account.[35] It is also appropriate to consider the claimant's standing, experience and personal history.[36]

[108] The starting point for this conclusion is s 128(2) of the Act which provides that the employer may be liable to pay to the employee the lesser of a sum equal to lost remuneration or three months' ordinary time remuneration.

[109] However, s 128(3) of the Act provides that the Authority has a discretion if the employee has suffered a loss of remuneration as a result of the personal grievance which is the sum greater than that to which an order under s 128(2) may relate. That is, the discretion under s 128(3) arises where there is lost remuneration, or a sum equal to three months' ordinary time remuneration.

[110] We are satisfied that the Authority had jurisdiction to consider making an award of lost remuneration under s 128(3) of the Act, providing that loss could be said to have arisen as a result of the personal grievance. The decision to attend a study course was made at short notice as a result of the unexpected dismissal and in the face of a discussion with Mr Gard that an apprenticeship could be available. But the study period was time limited. As a result of the dismissal it was appropriate to consider the issue of the diminished wages which were earned in the two-month period after the period of study. That loss arose from the dismissal.

[111] The Authority awarded wages for the period between 3 and 18 February 2015; and in respect of the shortfall for July and August 2015, when Mr Dewar worked for E4 Engineering.

[112] Although Mr McGinn may have been correct in asserting that the chain of causation was broken when the trial period at E4 Engineering came to an end, that

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34 *Wilding v British Telecommunications PLC*, above n 27 at [55].
35 At [37].
36 *Edwards v Society of Graphical and Allied Trades* [1971] Ch 354 at 363.

termination occurred on 13 September 2015, which was outside the period of the Authority's assessment.

[113] Ms Lodge invited the Court to award lost wages for some three years. As there was no cross-challenge as to the quantum of this award, there is no basis for considering this possibility.

[114] It is not established that the Authority's assessment was wrong in fact or law. Subject to contributory fault considerations, the Authority's assessment for lost wages will therefore stand.

Contributory fault

[115] Think Steel raised five grounds of challenge in respect of the contributory fault findings made by the Authority. Three of those related to factual issues, and two related to the relevant legal findings. We deal first with the factual, then the legal challenges.

Did Mr Dewar know a Think Steel fuel card was used?

[116] Mr McGinn submitted that the Authority erred in fact by finding that Mr Dewar did not know that a Think Steel fuel card was used by Mr Feaver to obtain cash. In particular, it was submitted the Authority overlooked or failed to take into account that:

a) The weight of evidence pointed to a close relationship between the defendant and Mr Feaver prior to the dismissal, so that he must have known what in fact was occurring.

b) CCTV evidence pointed to the same conclusion.

c) Mr Dewar's behaviour at the investigation meeting conducted by Mr Gard confirmed that he was implicated.

d) The Authority placed too much reliance on evidence that was inherently unsafe and which related to events which occurred after Mr Dewar and Mr Feaver were dismissed.

Close relationship?

[117] When dealing with issues as to justification, the Authority recorded Mr Gard's evidence which was to the effect that he had concluded Mr Dewar had engaged in theft, and was dishonest, because he and Mr Feaver were "thick as thieves". Mr McGinn submitted that the Authority did not take this finding into account in its s 124 analysis. This was important, Mr McGinn submitted, for three reasons:

a) If Mr Dewar and Mr Feaver were close friends it is more likely that Mr Dewar was a knowing party to the wrongful use of the fuel card.

b) If they were such friends, then the evidence given by Mr Dewar to the Authority and again to the Court that they were "associates" rather than "friends" was a deliberate downplaying. This pointed to the likelihood that Mr Dewar had not been truthful in his explanation to Mr Gard at the meeting on 3 February 2015; nor to the Authority and the Court. It raised a doubt as to his credibility.

c) Mr McGinn also pointed to a series of text messages, between Mr Dewar and Mr Feaver which he said belied the suggestion that they were merely associates. This evidence, he submitted, showed that they were in fact friends.

[118] This issue requires some understanding of the extent to which Mr Dewar socialised not only with Mr Feaver but also Mr Robins.

[119] As mentioned earlier, Mr Robins and Mr Dewar had worked for an engineering company before they commenced working together at Think Steel. At the previous workplace, Mr Dewar was assigned to Mr Robins as an "apprentice". He said he found Mr Dewar's manner, work ethic and thirst to learn pleasing. He warmed to him quickly, and became supportive of him. They became close friends.

[120] Mr Robins often socialised at the Elmwood, a local bar and bistro, after work. So too did Mr Dewar. Subsequently, a staff member of the Elmwood formed a personal relationship with Mr Feaver. He too began to attend the Elmwood on a regular basis.

[121] After Mr Robins and Mr Dewar, and then Mr Feaver, became employees of Think Steel, they continued to socialise at the Elmwood. This association developed. They all attended other social events. The text messages before the Court shows this happened with some degree of frequency in January 2015.

[122] In summary, by early February 2015, the position as between Mr Dewar on the one hand and Mr Feaver on the other was that they were co-workers; but they socialised regularly. Furthermore, on the weekend in question, Mr Feaver – along with Mr Jones – stayed at Mr Dewar's flat.

[123] In addressing this issue, it is necessary to acknowledge that individuals might hold different views as to where the line of friendship might be drawn; and obviously there are degrees of friendship. Mr Dewar was clearly closer to Mr Robins than he was to Mr Feaver. But Mr Gard had a different perception. As already noted, he thought Mr Dewar and Mr Feaver were thick as thieves, but it is apparent that he did not have a detailed understanding of their non-work circumstances. So, for example, he drew no real distinction between the nature of Mr Dewar's association with Mr Feaver on the one hand, and the nature of his association with Mr Robins on the other. He simply regarded them all as being close friends.

[124] That said, the Court is satisfied that Mr Dewar did attempt to distance himself from Mr Feaver both at the investigation meeting, and when giving his evidence, in a somewhat self-serving way. From Mr Dewar's standpoint, Mr Feaver's actions caused him a lot of trouble. It is perhaps unsurprising that when the fuel card issue was investigated, he claimed Mr Feaver was not a friend. But the reality is that there had been a friendship between the two, although it arose from a frequency of association rather than from a close personal empathy. However, these circumstances do not in and of themselves lead to a conclusion that he was therefore aware of and party to Mr Feaver's misuse of his employer's fuel card.

[125] In fact, the Authority concluded that Mr Dewar held a friendship with Mr Feaver outside of work, up to the date of the incident. It was this factor that led the Authority to conclude that Mr Feaver did not want Mr Dewar to know that he was not authorised to use the fuel card, so that he made up a story about it belonging to another person.[37] It will be necessary to refer later to conclusions reached by the Authority about the reliability of evidence sourced from Mr Feaver, but at this stage the Court is not persuaded that the Authority erred by not finding Mr Dewar was aware of the illicit use of the fuel card simply because there was a friendship between the two.

Inference to be drawn from CCTV footage

[126] Mr McGinn next submitted that whilst the CCTV footage of the service station incident did not provide information about statements made by Mr Feaver to Mr Dewar, it nonetheless "clearly illustrates that [Mr Dewar] had full knowledge of and participated in a scam to exploit someone's fuel card and thereby [became] [a] party to a dishonesty offence".

[127] In discussion with the Court, Mr McGinn submitted that the assertion Mr Dewar was a party to an offence arose from the fact that he transported Mr Feaver to the service station knowing what would happen next, and that from the CCTV footage it is evident that he stood by and did nothing.

[128] This submission reflected Mr Gard's belief as to what had occurred, once he viewed the CCTV footage. So, in video image stills which were produced to the Court taken from the relevant footage, he added commentary in which he expressed his opinion as to what Mr Feaver had actually said to Mr Dewar about what they were doing and why. For example, in relation to an image which shows only Mr Feaver standing beside the passenger door of Mr Dewar's vehicle, Mr Gard was certain that Mr Feaver had returned "to discuss progress" with Mr Dewar. Two minutes later when Mr Gard said that Mr Feaver gave an affirmative gesture after engaging with a customer who then followed him into the shop, Mr Gard said this was a "thumbs-up" which he gave when looking straight at Mr Dewar, concluding

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[37] *Dewar v Xtreme Dining Ltd t/a Think Steel*, above n 1, at [115].

that thereby Mr Dewar was fully on notice as to what was occurring. These factors endorsed his belief that Mr Dewar knew Mr Feaver was using a Think Steel fuel card.

[129] Against this must be assessed Mr Dewar's own evidence. Reference has already been made to his account that he believed the fuel card involved belonged to another person. He also said he was not particularly focused on what was occurring since he was playing a game on his cell phone. There is some support for this evidence from the CCTV images.

[130] In our view, the CCTV footage does not provide an adequate basis from which to draw a conclusion as to the extent of Mr Dewar's knowledge. There is no evidence that Mr Feaver ever showed Mr Dewar the card he was using. The issue as to the extent of his knowledge must turn on other evidence, particularly the account which he himself gave since no other participant in these events was interviewed by Mr Gard, or called to give evidence. Mr Dewar was unshaken on the issue as to whether he knew in advance or at all that a Think Steel fuel card was used.

[131] Given the seriousness of the allegations of illegal conduct, the Court is far from satisfied that this assertion, in reliance of the CCTV footage, is established. The Authority did not err in this respect.

Mr Dewar's responses at investigation meeting

[132] Next, Mr McGinn submitted that an adverse inference should be drawn as to Mr Dewar's credibility, having regard to the way his explanation about the ownership of the fuel card unfolded at the Think Steel investigation meeting.

[133] Mr Gard's evidence was that at the commencement of the meeting, he told Mr Dewar that he believed the latter had used company fuel cards to put fuel in company vehicles when at work. He said Mr Dewar agreed that there were fuel cards but did not know what they looked like. He concluded from this answer that Mr Dewar was "playing dumb". Then he told Mr Dewar he wanted to ask some questions about the use of such cards for non-work vehicles, to which Mr Dewar responded that he did not know anything about such an issue. He seemed to

Mr Gard to be disinterested and quite relaxed or even bored. After referring to the serious misconduct clause and examples of theft and dishonesty so as to explain the context, he said that Mr Dewar repeated his assertion that he did not know anything about fuel cards, not even what they looked like. Then, Mr Gard referred to the fact that a fuel card for the company's Isuzu crane truck was missing. Two fuel cards had been used over a period of three months to buy unleaded petrol and possibly other products. Mr Dewar denied any knowledge of or involvement in these matters.

[134] Mr Gard said that it was at that point he referred to the transaction at the service station stating that he had seen relevant CCTV footage. He said that only after explaining that he had seen Mr Dewar's vehicle in the CCTV footage did Mr Dewar confirm he was the driver of the vehicle, and that he understood Mr Feaver had used a fuel card belonging to his "brother-in-law"; he emphasised that he had not received any of the cash.

[135] Turning to Mr Dewar's evidence as to the course of the meeting, he said he was initially asked to pull up his sleeves, because Mr Gard wanted to know whether he had any tattoos on his arms. He rolled up his sleeves and said he did not. He was then asked if he knew anything about the use of company fuel cards for non-work vehicles, to which he responded by saying that he did not know anything about such use. He denied telling Mr Gard that he did not know what a fuel card was; he repeated that what he had stated was that he did not know anything about the unauthorised use of company fuel cards.

[136] Mr Dewar stated that reference was then made to the serious misconduct clause. This was followed by Mr Gard telling him that two company fuel cards had been used over a period of three months to purchase petrol for non-work related vehicles. Again, Mr Dewar said he did not know anything about this.

[137] Mr Dewar said that it was when Mr Gard explained there had been a recent incident at the service station in Belfast that he realised what Mr Gard was talking about. Consequently, he told Mr Gard what had happened on that occasion. He explained that he had driven Mr Feaver there, but he told him he had a fuel card belonging to a person who was described as Mr Feaver's brother-in-law. He also

confirmed he had not received any money from the transaction. But he felt he was not given a proper opportunity to respond to the questions raised; in particular he was not told about the detail as to what could be seen on CCTV.

[138] Mr Cross recalled only some aspects of the meeting. In particular, that Mr Dewar was initially "bored and distracted and not that interested in answering [Mr Gard's] questions", and that he was being "a bit of an idiot in saying he didn't know what a fuel card was".

[139] There are some differences of recall, which is unsurprising given the passage of time and the absence of any contemporaneous notes. Mr Gard's subsequent letter to Mr Dewar does not provide a full account, and indeed is in error on one matter as he now accepts – he incorrectly described what he had been told as to the relationship of the person who Mr Feaver said had provided him with a fuel card. He referred to that person as being Mr Feaver's brother, rather than brother-in-law. Significantly, the letter does not refer to Mr Dewar stating that he did not know what a fuel card was. That issue apparently assumed more significance later.

[140] Mr Gard was understandably annoyed, and perhaps even angered by the circumstances he was investigating which involved multiple instances of wrongful use of fuel cards. As a result, he did not act in a procedurally correct way, as determined by the Authority and not challenged in the Court; and as his description of the CCTV footage illustrates, he was inclined to draw adverse inferences in a speculative fashion. In some respects his evidence is unreliable.

[141] It is surprising that Mr Dewar did not immediately provide information regarding the incident on 1 February 2015, which had occurred only two days prior to the interview; and more particularly that he gave improbable answers as to his awareness of the use of fuel cards. However, we consider that this was in all probability a defence mechanism, since Mr Dewar had not been put on proper notice as to the matters which Mr Gard needed to question him about. Once Mr Gard's concerns became apparent to Mr Dewar, he ceased dissembling.

[142] We are not satisfied that these circumstances should lead to the very serious conclusion that Mr Dewar knew all along Mr Feaver was using a Think Steel fuel card. The Authority did not err by not reaching such a conclusion.

Authority relied on inherently unsafe evidence

[143] With regard to this ground of challenge, Mr McGinn submitted that the Authority placed undue weight on a text sent by Mr Feaver to Mr Dewar several weeks after the dismissal. In it, Mr Feaver contended that he had told Mr Gard that Mr Dewar had no involvement in his actions. In essence Mr McGinn submitted that this was objectionable hearsay so that the content of the text should not have been admitted; or if admitted, no weight should have been placed on it.

[144] The relevant findings were expressed by the Authority in these terms:

> [114] I am not satisfied on the balance of probabilities that Mr Dewar knew that [Mr Feaver] was in unauthorised possession of a Think Steel fuel card and was stealing petrol from the company. I find it more likely [Mr Feaver] did not disclose that he had a Think Steel fuel card to Mr Dewar and Mr Dewar did not therefore have that knowledge. I have relied in reaching that conclusion on the text message from [Mr Feaver] that Mr Dewar had no involvement in his actions and *the fact that [Mr Feaver] was clearly untruthful when it suited him*. I have also placed some reliance on text messages which were also referred to as part of the evidence that supported Mr Dewar and Mr Robins' [belief] that [Mr Feaver] had stolen items from them. I have also placed reliance on the fact that only [Mr Feaver] was implicated in any other instance of stealing petrol when Mr Gard looked into the other 27 transactions.
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> [115] I find that there is a strong likelihood that [Mr Feaver] did not want Mr Dewar with whom he had a friendship outside of work to know that he was dishonest and was in unauthorised possession of a fuel card from Think Steel so he made up a story about the fuel card belonging to another person. [Mr Feaver] was quite a few years older than Mr Dewar.
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> (Emphasis added)

[145] We deal first with the question of whether the text from Mr Feaver should have been admitted. The text was annexed to a brief in reply which Mr Dewar prepared for the Authority's investigation meeting. That evidence was apparently given in response to evidence in Mr Gard's brief of evidence. Mr Gard had said, in effect, that Mr Feaver did not tell him he had told Mr Dewar at the time of the incident that the fuel card he was using belonged to his brother-in-law. The text was

produced in support of Mr Dewar's evidence that he had been led to believe that Mr Feaver had told Mr Gard he was not involved in Mr Feaver's actions.

[146] The text was produced in answer to an assertion made by Mr Gard. It corroborated Mr Dewar's understanding as to what he had been told by Mr Feaver in a text. It was a relevant and admissible document.[38] It was not necessarily, however, reliable evidence as to whether Mr Gard had *in fact* been told by Mr Feaver that Mr Dewar was not involved in his actions.

[147] It was this distinction which the Authority recognised in the above passage. It found that Mr Feaver was clearly untruthful when it suited him. It was the Authority's point that Mr Feaver was untruthful in stating he had informed Mr Gard of the actual facts, but he had chosen to tell Mr Dewar that he had done so. This was because he had not wanted Mr Dewar to know he was acting dishonestly by using a Think Steel fuel card for personal purposes.

[148] The communication contained in the text sent by Mr Feaver is clear. There is no reason to doubt that Mr Dewar received the text, and that it was from Mr Feaver. It constituted reliable evidence. But it was not evidence that Mr Feaver had indeed informed Mr Gard that Mr Dewar had no involvement in his actions. Nor did the Authority conclude that he had done so.

[149] The Court agrees with the conclusion reached by the Authority.

Authority erred in fact and law by failing to make a negative credibility assessment of Mr Dewar

[150] In a further ground of challenge, Mr McGinn asserted that having regard to what he described as "determined attempts to understate what was a close relationship with Mr Feaver", the Authority should have made a credibility assessment, rejecting Mr Dewar's evidence where it conflicted with that of Mr Gard.

[151] On this point, Mr McGinn referred to the fact that Mr Dewar had a propensity to depart from his prepared evidence when he considered this to be in his interests.

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[38] Employment Relations Act 2000, s 189.

An example was that in the brief of evidence which he provided to the Authority's investigation meeting he said the serious misconduct clause of the IEA had been read out to him. The Authority, however, had noted that in his oral evidence he could not recall that passage being read out. Then, he repeated his primary assertion in the brief of evidence which he read to the Court.

[152] In this context, Mr McGinn also alluded to Mr Dewar's reluctance to give realistic answers regarding fuel cards at the commencement of the employer's investigation meeting.

[153] We have already touched on some of these points finding that in some respects Mr Dewar's evidence was not particularly reliable because of his defensive answers. But, as we have found, some of Mr Gard's evidence was also unreliable.

[154] This was a case where conclusions as to the reliability of the respective witnesses turned not only on an assessment of their various statements, but also the context within which those statements occurred, having regard to the procedural inadequacies which occurred.

[155] The Court is not satisfied that this was a situation requiring an outright rejection of Mr Dewar's evidence where it conflicted with Mr Gard's. It required a careful analysis of all the evidence. That is what happened. It is not established that the Authority erred in this respect.

Conclusion as to factual assessments

[156] The Court is not satisfied that any of the factual challenges brought by Think Steel are established. The Authority reached conclusions which were open to it.

[157] Indeed, in its own assessment, the Court is satisfied that Mr Dewar was unaware a Think Steel fuel card was used by Mr Feaver. Whilst there are some aspects of Mr Dewar's account which were underplayed by him, such as the extent of his friendship with Mr Feaver, those difficulties in his evidence could not lead to a conclusion that Mr Dewar has been untruthful at all times on the issue of whether he knew a fuel card was used which belonged to his employer. There is no reliable

evidence challenging his account. Nor is there any evidence that he ever saw the fuel card at any time during the incident.

Authority erred by failing to consider the probability of Mr Dewar being dismissed had Think Steel followed a fair procedure

[158] The next aspect of Think Steel's challenge requires analysis of a counter-factual possibility. That is, had Mr Gard conducted a fair procedure, in which Mr Dewar had observed that Mr Feaver's conduct was "weird" or "dodgy" by using a fuel card belonging to someone else, would it have been appropriate to conclude that Mr Dewar's actions were destructive of trust and confidence because he was "party to theft from another company"? Could the dismissal have been justified in those circumstances, so that no remedies should have been awarded?

[159] The Authority's consideration of this topic proceeded as follows:

a) First, it was concluded that Mr Dewar knew that Mr Feaver's conduct did not look right or normal, because quite simply it was not. He did not intervene, for example by encouraging Mr Feaver to desist from approaching customers. To that extent, Mr Dewar's conduct contributed to the view formed by Mr Gard that all those in the car were involved in the conduct, and there was thus a degree of blameworthiness that contributed to this situation as a result.

b) The Authority then determined that as it had already taken into account when awarding lost wages that an offer of an apprenticeship was unlikely, no "further reduction" would be made to that particular award.

c) Finally, the Authority concluded that it was not clear what would have happened if further investigations had been undertaken. It considered compensation should be reduced from $12,000 to $10,000. It held there would be no further reduction, because the process was so deficient that the likelihood was incorrect conclusions would have been reached; in addition, considerable harm had been caused to Mr Dewar.

[160] In short, a counter-factual scenario was considered. Although the Authority held that it was unclear what would have happened had there been a fair procedure because the process was so deficient, a partial and modest reduction was made because what Mr Dewar observed did not look right.

[161] We understand Mr McGinn's submission to be that the Authority did not go far enough; he asserts that there should have been a conclusion that Mr Dewar would have been dismissed having regard to his account of the circumstances.

[162] In her submissions, Ms Lodge emphasised that had a fair process been followed, the employer would have had the following information on which to make a decision:

a) It would have been established that Mr Dewar was present in the vehicle (as driver) at the time of Mr Feaver's actions.

b) Mr Gard would have been in receipt of an explanation that Mr Dewar:

- had not seen the fuel card used by Mr Feaver;
- did not know it belonged to Think Steel; and
- believed Mr Feaver was authorised to use the fuel card which belonged to someone other than Think Steel.

[163] It was Ms Lodge's submission that at worst, Mr Gard would have been left with the possibility that Mr Dewar knew Mr Feaver was using a fuel card belonging to another company to obtain cash, but that he genuinely thought Mr Feaver had permission to do so.

[164] This issue requires a consideration of what duties Mr Dewar had as an employee during the non-work incident which occurred on the forecourt. The Authority commented that Mr Dewar had waited in the vehicle "without intervention" and that he was "essentially passive" and "did not for example

encourage [Mr Feaver] to desist from approaching customers", even though he thought Mr Feaver's conduct was questionable.[39]

[165] For the reasons we discussed earlier, we are not satisfied that these circumstances should lead to a conclusion that Mr Dewar was "party to Mr Feaver's offence of dishonesty", as Mr McGinn urges. There is no evidence that Mr Dewar transported Mr Feaver to the service station knowing an offence would occur and that he then stood by and did nothing. It would not have been appropriate to conclude either that there was intentional assistance or encouragement of an offence under s 66(1) of the Crimes Act 1961, or that Mr Dewar had formed a common intention with Mr Feaver to commit a crime under s 66(2) of that Act.

[166] Nor are we satisfied that there was any relevant duty in the IEA which required Mr Dewar, on the basis of his understanding of the situation, to take any steps such as attempting to persuade Mr Feaver not to undertake the course of action he was adopting. The situation as he believed it to be did not fall within the description of serious misconduct in the IEA, which stated that termination could arise where there were actions which seriously damaged Think Steel's reputation. He was not required to discourage Mr Feaver from using the card belonging to Think Steel, since he did not know this was the case.

[167] We have also considered whether, in the light of Mr Dewar's understanding of the situation, he had a statutory obligation under s 4(1A) of the Act to disclose what had occurred to Think Steel, as an aspect of the duty of good faith.

[168] Whilst such a duty may in some circumstances where non-work offending has occurred require disclosure,[40] we do not consider that the duty of good faith applied to the present circumstances. That is because it is not established that Mr Dewar knew Mr Feaver was using a fuel card which belonged to Think Steel.

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39 Dewar v Xtreme Dining Ltd t/a Think Steel, above n 1, at [120].

40 As held by the Court of Appeal in *ASG v Hayne* [2016] NZCA 203, [2016] 3 NZLR 289 at [31]; noting, however, that leave to appeal this decision to the Supreme Court has now been granted: *ASG v Hayne* [2016] NZSC 108.

[169] In the absence of any such duty arising from the employment relationship, the Court is not satisfied that the circumstances observed by Mr Dewar required him as an employee of Think Steel to act. The Authority did not err when considering the counter factual scenario.

Section 124 of the Act: reduction for contribution

[170] It is next necessary to consider several legal issues relating to the meaning and application of s 124 of the Act, which provides:

> **124 Remedy reduced if contributing behaviour by employee**
>
> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,–
>
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
>
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[171] We intend to address the issues relating to this section as follows:

a) General observations as to the application and effect of the section.

b) Whether the section can be used to completely extinguish remedies that would otherwise be awarded.

c) Observations as to quantum of reduction under the section.

General observations as to the section

[172] In *Harris v The Warehouse Ltd*, the elements of this section were analysed by Chief Judge Colgan.[41] The Court considered that the logical sequence to the application of the section begins with the word "must"; in every case where there is a personal grievance, the Authority or the Court must in deciding both "the nature and extent of the remedies to be provided" consider the factors described in subs (a) and (b).[42]

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41 *Harris v The Warehouse Ltd* [2014] NZEmpC 188, [2014] ERNZ 480.

42 At [174].

[173] The reference to "the nature" of the remedies to be provided is to the provisions of s 123 of the Act. The most common remedies are those of reinstatement,[43] reimbursement of wages or other money lost as a result of the grievance[44] and distress compensation.[45] Other remedies are applied less commonly, and will need to be considered where they are relevant.[46] The reference to "extent" of remedies is to the amount or duration of each or any of them.[47]

[174] Coming on to subs (a) it is necessary to consider the provenance of the personal grievance – that is the particular form of statutory grievance which the Authority or Court is satisfied has been established.[48]

[175] The subsection then requires consideration of "the situation that gave rise to" that personal grievance. It is well established that there must be more than simple cause and effect.[49] The cases emphasise that the employee's actions must be culpable or blameworthy or wrongful actions which have, when assessed in a commonsense way, contributed to the situation that gave rise to the personal grievance. So where the grievance is that the employee has been unjustifiably dismissed, the question will be whether the employee acted in a culpable or blameworthy way thus creating the situation that gave rise to that dismissal.[50]

[176] The subsection also requires the Authority or Court to consider "the extent to which there was a relevant contribution". That invokes the important requirement of proportionality, which is dependent on the circumstances. The analysis must reflect the fact that on occasion an employee may have been at fault but the circumstances did not justify his or her dismissal or disadvantage; and in other circumstances there is no element of contributory conduct, in which case neither the nature nor the extent of the remedies to be provided will need to be reduced.

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43 Employment Relations Act 2000, s 123(1)(a).
44 Section 123(1)(b).
45 Section 123(1)(c)(i).
46 Section 123(1)(c)(ii), (ca) and (d).
47 *Harris v The Warehouse Ltd*, above n 41, at [176].
48 At [177].
49 *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC) at 337 – 339; *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31 (EmpC), at 52 – 53.
50 *Harris v The Warehouse Ltd*, above n 41, at [178].

[177] Turning next to subs (b), the Authority or the Court is able to exercise a broad discretion. If the contributory actions of the employee "so require" there may be a reduction of the remedies that would otherwise have been awarded.

[178] The provisions of the statute require first that the Authority or Court fix the remedies that would otherwise have been awarded, before undertaking the analysis which s 124 of the Act requires.

[179] An analytical approach which has often been found useful was described in *Paykel Ltd v Ahlfeld.*[51] Although that decision related to the correct approach to be adopted under s 40(2) of the Employment Contracts Act 1991, its terms are, for present purposes, closely similar. The three steps endorsed by the Court in that case are:

a) First, there must be a determination as to whether the employee has a personal grievance.

b) Secondly, the (now) Authority or Court must consider the extent, if any, to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. It is the "actions" of the employee which are to be considered if they contributed not to the actual personal grievance itself, but to the situation which gave rise to the claim that the employee has a personal grievance. In carrying out this step, there should be a consideration of causation in determining the extent to which the employee's actions contributed to the situation giving rise to the personal grievance.

c) The third step is to be carried out if there is a causal connection between the actions and the situation that gave rise to the dismissal. If "those actions so require" the decision-maker must reduce the remedies that would otherwise have been awarded. The use of the word "must" demonstrates that the step is mandatory. The actions that require a reduction in remedies are actions which may loosely be categorised as being "culpable" or "blameworthy".

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[51] *Paykel Ltd v Ahlfeld*, above n 49.

Complete extinction?

[180] An issue on which counsel presented detailed submissions relates to whether the Authority or Court can, having fixed remedies, then eliminate them in their entirety where the conduct of the employee is sufficiently egregious as to justify such a conclusion.

[181] Mr McGinn submitted in summary that the section should be construed as allowing for such a possibility, principally for the reasons set out by Judge Inglis in *Knapp v Locktite Aluminium Specialties Ltd*.[52] In that judgment, the Court concluded that having regard to text and context, and the obligation to deal with issues under s 124 consistent with the statutory exhortation to act "as in equity and conscience it thinks fit", it is possible to find that 100 per cent reduction is appropriate, depending upon circumstances. Judge Inglis said that such a result was likely to be rare.[53]

[182] Ms Lodge emphasised that standard dictionary definitions of "reduce" do not extend to outright extinguishment, as opposed to "diminishing, lessening or making smaller."[54] She submitted that the fundamental difficulty with the concept of 100 per cent reduction is that an employee who has established a breach of statutory rights is then left wholly without any remedy. Another way of expressing this is to say that it is the employee who is completely responsible for his or her unjustified dismissal and not, in any respect, the employer.

[183] This issue requires, initially, a focus on the text used in s 124(b) of the Act where the decision-maker "may reduce the remedies that would otherwise have been awarded". It is necessary, of course, to consider not only text, but also purpose which is to be determined by having regard to the immediate and general legislative context.[55] Accordingly, we first consider the legislative history, together with the key cases which have considered the relevant provisions.

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52 *Knapp v Locktite Aluminium Specialties Ltd* [2015] NZEmpC 71.

53 At [25] – [34].

54 Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary* (11th ed revised, Oxford University Press, Oxford, 2006) at 1206 – "make or become smaller or less in amount, degree, or size".

55 *Commerce Commission v Fonterra Corp Group Ltd* [2007] NZSC 36, 3 NZLR 767 at [22].

[184] Our brief analysis of the history begins with s 229(3)(b) of the Labour Relations Act 1987 (the LR Act). It provided:[56]

> (3) Where–
>
> …
>
> (b) The grievance committee or the Labour Court is satisfied that the situation that gave rise to the personal grievance resulted in part from fault on the part of the worker in whose favour the order is to be made,–
>
> The grievance committee or the Labour Court shall reduce, to such extent as the grievance committee or the Labour Court thinks just and equitable, the sum that would otherwise be ordered to be paid to the worker by way of reimbursement.

[185] The sub-section related only to the remedy of reimbursement of lost remuneration, but not to other remedies such as compensation.[57]

[186] However, whilst there was no statutory authority to reduce compensation on account of contributory fault, it had long been the practice of the Labour Court and, before it, the Arbitration Court to take the worker's conduct into account in the assessment of compensation. So, where the grievant was the author of his own misfortune, that factor was taken into account.[58]

[187] Finally, the section in the LR Act referred expressly to the obligation on the decision-maker to act in a way which it thought "just and equitable".

[188] The Employment Contracts Act 1991 (the EC Act) introduced two similar provisions in respect of contributory conduct. Section 40(2) provided:

> Where the Tribunal or the Court determines that an employee has a personal grievance by reason of being unjustifiably dismissed, the Tribunal or Court shall, in deciding both the nature and extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and shall, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

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[56] Under s 209 of the Labour Relations Act 1987 "personal grievances are not limited to unjustifiable dismissals but extend to other unjustifiable detrimental actions such as sexual harassment, duress and discrimination".

[57] See s 227.

[58] *Finsec v Australian Mutual Provident Society* [1992] 1 ERNZ 280 (EmpC) at 291 per Chief Judge Goddard.

[189] Then s 41(3) of the EC Act provided:

> Where–
>
> (a) The Tribunal or the Court is obliged to make an order under subsection (1) of this section; and
>
> (b) The Tribunal or the Court is satisfied that the situation that gave rise to the personal grievance resulted in part from fault on the part of the employee in whose favour the order is to be made,–
>
> The Tribunal or the Court shall reduce, to such an extent as it thinks just and equitable, the sum that would otherwise be ordered to be paid to the employee by way of reimbursement.

[190] The following observations are made as to these provisions:

a) Section 41(3) of the EC Act was identical in all material respects to s 229(3) of the LR Act.

b) Section 40(2) of the EC Act was new. It arose from a decision to omit cl 17(3) of the Employment Contracts Bill, which would have prevented dismissals from being held to be unjustifiable where the sole ground of complaint was breach of procedural fairness. Due to submissions made as to this clause it was removed from the Bill, but it was replaced by the provision which became s 41(3).[59]

c) Section 41(3) of the EC Act referred expressly to a "just and equitable" principle, whilst s 40(2) did not. However, in practice the absence of that phrase was not considered significant, since the principle was regarded as being implicit.[60]

d) The Court of Appeal considered these provisions in *Ark Aviation Ltd v Newton.*[61] It found that ss 40(2) and 41(3) of the EC Act essentially carried the same meaning, notwithstanding the difference in language.[62] Then it stated:[63]

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59 Right Hon WF Birch, Second Reading of Employment Contracts Bill (23 April1991) 514 NZPD 1438 - 1439. See also Bronwyn Boon "Procedural Fairness and the Unjustified Dismissal Decision" (1992) 17 NZJIR 301.

60 *Davis Trading Company Ltd v Lewis* [1993] 2 ERNZ 272 (EmpC) at 287.

61 *Ark Aviation Ltd v Newton* [2001] ERNZ 133, [2002] 2 NZLR 145 (CA).

62 At [40].

63 At [41].

> The purpose of the direction to assess the nature and extent of remedies, including sums which in general must be awarded to reimburse lost wages according to what is thought just and equitable, is to enable the Tribunal and the Employment Court to do justice to the overall situation that is proved at the hearing of the grievance. That is ultimately done when determining remedies. The statutory provisions should be interpreted to give them full effect, consistent with this statutory purpose.

[191] Section 124 of the current Act replaced these provisions. The decision to combine two sections of the former statute into one was intentional. The explanatory note to the Employment Relations Bill 2000 stated:[64]

> The existing sections 40(2) and 41(3) of the Employment Contracts Act 1991 are replaced by a general provision relating to contributing behaviour in personal grievance cases. It is to be noted that s 124 provides for reduction in remedies in relation to all types of grievance, contrary to the previous more limited position.

[192] The Court of Appeal considered this provision in some detail in *Salt v Fell.*[65] The case concerned the manner in which subsequently discovered conduct following a dismissal should be taken into account. At issue was the mechanism by which such conduct should impact upon remedies. The majority favoured the view that such conduct was relevant to whether remedies should be granted at all under the discretionary provisions of s 123. Chambers and Robertson JJ stated:[66]

> Subsequently discovered misconduct of a truly significant nature can be taken into account when determining remedies *under s 123 itself*. That section, as this Court said of its predecessor, confers '"remedies in broad discretionary terms"': (See *Ark Aviation Ltd v Newton* … at [35]). The Employment Court was required to exercise this '"broad discretionary"' power as '"equity and good conscience"' dictated: see s 189(1). Powers are to be exercised '"for the purpose of supporting successful employment relationships and promoting good faith behaviour."'

[193] The majority also referred to an article by (then) Associate Professor Gordon Anderson.[67] Of this, they said:[68]

> In that article, the professor expressed the view that "s 124 is concerned with conduct contributing to the facts giving rise to the grievance which excludes

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64 Employment Relations Bill 2000 (8 – 1) (explanatory note) at 21.
65 *Salt v Fell* [2008] NZCA 128, [2008] ERNZ 155, [2008] 3 NZLR 193.
66 At [83].
67 Gordon Anderson "Reimbursement and Compensation for Unjustified Dismissal (2006) 12 NZBLQ 230 at 242 – 243.
68 *Salt v Fell*, above n 65, at [79].

> later discovered misconduct" … We agree with that part of the Professor's analysis. It is clear s 124 is intended to operate like a "contributory negligence" provision: if the employee, by his or her own behaviour *is partly* the cause of the employer's hasty or ill-judged action (here, in dismissing the employee), then the employee should have the remedies to which he or she would otherwise have been entitled reduced.
>
> (Emphasis added)

[194] The majority concluded that it was wrong to reduce the employee's entitlements under s 124, because to do so would have involved conduct which did not affect the employer's decision to dismiss, as the employer was not aware of that conduct.[69] The conduct which was discovered post dismissal, however, was "highly relevant" to what remedies should be provided.[70]

[195] By contrast, Hammond J in his minority judgment concluded that it was correct to consider conduct discovered after dismissal under s 124. This conclusion was reached notwithstanding the fact that a reduction would be based upon information which the employer did not know about at the date of dismissal. In the course of his analysis, Hammond J stated:[71]

> Section 124 created a single provision addressing the reduction of remedies for contributory conduct, replacing the similarly worded ss 40(2) and 41(3) of the Employment Contracts Act. While those provisions had '"reflected the past practice of the Court"', more recent cases suggested that '"the Court is showing an increasing willingness to reduce remedies in appropriate cases including making nil awards"'…

[196] The significance of this decision for present purposes is that s 124 was not construed by the majority so broadly as to permit the consideration of conduct which was not linked to the dismissal. Section 123, described subsequently as a "gateway" provision in respect of remedies,[72] required the exercise of a discretion in accordance with the equity and good conscience provision.[73] It was held in effect that s 123 is the primary provision when considering remedies, and that s 124 may have a more limited role.

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69 At [80].
70 At [82].
71 At [48].
72 *Knapp v Locktite Aluminium Specialties Ltd*, above n 52, at [24].
73 *Salt v Fell*, above n 65, at 83 and 93; and Employment Relations Act 2000, s 189.

[197] We consider that the findings made by the majority members of the Court of Appeal are relevant when considering other issues relating to s 124, such as whether it permits an outright exclusion of remedies where there is misconduct of a truly significant nature which occurs prior to the termination of employment. In such a case, it may well be preferable to consider entitlement to remedies under s 123; and that s 124 should be construed in that context.

[198] Turning to s 124, the correct meaning to be assigned to the phrase "reduce the remedies that would otherwise have been awarded accordingly", has attracted differing opinions. In *Kendal v A Mark Publishing New Zealand Ltd*, Judge Palmer considered that s 40(2) of the EC Act, which also used the phrase, would include a reduction of remedies to the point of extinction in an appropriate case. Such a construction was in accordance with the dictionary definition, he said, and was not a contradiction in terms.[74]

[199] Chief Judge Goddard, however, put the matter differently. In *Tupu v Romano's Pizzas (Wellington) Ltd*[75] he held that contributory conduct was available to reduce remedies, but not to extinguish them.[76]

[200] As Ms Lodge has submitted, the plain and ordinary meaning of the word is to "… make or become small or less".[77]

[201] However, context may lead to a different conclusion. That point is demonstrated by considering a comparatively recent decision of the UK Employment Appeals Tribunal, *Lemonious v Church Commissioners*.[78] There the Tribunal was required to consider section 122(2) of the United Kingdom Employment Rights Act 1996, which provides:

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74 *Kendal v A Mark Publishing New Zealand Ltd* (EmpC) Christchurch CEC19/97, 18 July 1997 at 55 – 56.

75 *Tupu v Romano's Pizzas (Wellington) Ltd* [1995] 2 ERNZ 266 (EmpC).

76 At 271. See also *Eastern Extension Australia and China Telegraph Company Ltd v Commonwealth* [1908] HCA 59, (1908) 6 CLR 6474 at 678 where O'Connor J said when construing a contract taking the word in its ordinary meaning "reduce" does not mean "abolish".

77 *Concise Oxford English Dictionary*, above n 54.

78 *Lemonious v Church Commissioners* [2013] UKEAT 0253-12-2703, [2013] All ER (D) 199 (Jun).

> Where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable *to reduce or further reduce* the amount of the basic award *to any extent* the Tribunal shall reduce or further reduce that amount accordingly.
>
> (Emphasis added)

[202] A submission was made that the word "reduce" was used, but not the words "… or extinguish"; counsel submitted that a reduction in the ordinary sense of the word "always" leaves something of the original, and thereby the statute excluded the possibility of a nil award.

[203] The Tribunal held such a submission focused impermissibly on one word in the section and not on the phrase in which it appeared – as italicised above. It held that the words "to any extent" were important, and that it would be contrary to those words to hold that an award could be reduced only to some extent. Thus, the word "reduce" when construed in context did permit a 100 per cent reduction.

[204] The language in the UK statute differs from that of s 124 of the New Zealand Act. It does not contain the additional language which appears in the UK provision. On the face of it, s 124 contemplates reduction only.

[205] There are several other factors which persuade us that this conclusion is in accordance with Parliament's intent.

[206] The first relates to the problem which arises if s 124 is construed as permitting a 100 per cent reduction. In *Wilmshurst v McGuire (t/a California Sun & Beauty Studio*),[79] Chief Judge Goddard referred to the obvious inconsistency which is created by first establishing remedies, and then removing them in their entirety. He said:[80]

> … The Tribunal was right to think that, in most cases, the legislation requires it to make an award and then a deduction from it for conduct that calls for deduction. Where that deduction is as high as 100 per cent, the making of an award in the first place, only to confiscate it a moment later, although a entirely proper cause, can be misunderstood and can expose the Tribunal to

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79 *Wilmshurst v McGuire (t/a California Sun & Beauty Studio*) [1999] 2 ERNZ 128 (EmpC), at 132.

80 At 132.

> avoidable uninformed criticism. It is open to the Tribunal, in cases in which it thinks that the employee should recover nothing, to say so as part of the process of assessing compensation. A nil award is the equivalent of nominal or token damages at common law and would convey the Tribunal's view that the case should never have been brought…. If the employee has behaved in a way that is strongly causative of the situation that gave rise to the personal grievance, and that behaviour was reprehensible in a way that is relevant to the employment relationship and was known to the employer before dismissing the employee, so that it can be said that but for the employees bad behaviour the employer probably would not have considered dismissing the employee, then the Tribunal may be justified in awarding no compensation for injury to the employees feelings or reputation or for humiliation.

[207] We respectfully agree with this dicta. It is one thing for the decision maker to conclude that a personal grievance is established but that disgraceful conduct on the part of an employee means it is not just or equitable to award remedies – under s 123; it is quite another for the decision maker to undertake a process of fixing remedies, and then determine that those remedies should not be awarded at all. Such an artificial process cannot have been intended.

[208] Next, we refer to the statement in *Salt*, to the effect that s 124 is intended to operate like a contributory negligence provision. There the Court explained that this meant that if the employee, by his or her own behaviour, "was partly" the cause of the personal grievance, then the employer is entitled to have the remedies reduced.

[209] We respectfully agree that the analogy with contributory negligence principles is in some respects helpful. Section 3 of the Contributory Negligence Act 1947 (CN Act) provides for the "apportionment" of liability in case of contributory negligence; it goes on to refer to circumstances where a person suffers damage "as the result partly of his own fault and partly of the fault of any other person". In those circumstances, the Court may reduce recoverable damages as it thinks just and equitable. As has been held in the United Kingdom, to hold that the claimant is 100 per cent responsible is not to hold that he shared the responsibility for the damage.[81]

[210] Under the EC Act, there was an express acknowledgment of this approach in s 41(3), when it stated that the situation giving rise to the personal grievance had to result "*in part* from fault on the part of the employee in whose favour the order is to

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[81] *Pitts v Hunt* [1991] 1 QB 24 at 48 per Beldam LJ.

be made…". As we noted earlier the Court of Appeal in *Ark Aviation* considered that the two sections carried the same meaning, even though the parallel section, s 40(2), did not use these words.[82]

[211] Although the reference to fault "in part" has not been repeated in s 124 there is no evidence that Parliament intended that s 124 would operate differently in this respect.

[212] The only difference alluded to in the explanatory note which we cited earlier was that reduction of remedies would now apply to all types of grievances.[83] We consider that since the section is similar to a contributory negligence provision in its effect, it is appropriate to conclude that Parliament must have intended that there would be a reduction of previously established remedies, only where there is employee fault "in part". We respectfully agree with the statement of the majority in *Salt* to this effect.[84]

[213] Finally, we deal with a submission which was made regarding the introduction in 2010 of s 103A(5) of the Act. In *Harris v The Warehouse Ltd*, Chief Judge Colgan stated:[85]

> … Section 124 has been applied by the Authority and the Court in cases where an unjustified dismissal or disadvantage arises because of a so-called procedural defect but in circumstances where the merits or substance of the employee's conduct would otherwise make dismissal justified. Section 103A(5) now deals with such cases expressly. Process defects that are both minor and do not result in the employee being treated unfairly cannot (the sub-section is mandatory) alone cause a dismissal or an action to be unjustified. The application of subs (5) now deals with cases in which the Authority or the Court might previously have used s 124 to reduce to nothing any remedies that would otherwise be provided to do justice to the sort of situation caused by s 103A(5).

[214] Mr McGinn argued that the amendments which were introduced in 2010 related only to the question of justification, and only in relation to grievances under s 103(1)(a) and (b). He correctly stated that the section has no application to the

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82 *Ark Aviation*, above n 61, at [40].
83 See para [194].
84 *Salt v Fell*, above n 65 at [79].
85 *Harris v The Warehouse Ltd*, above n 41.

eight other types of grievances that may be raised under s 103, all of which activate the remedies provision, s 123, and the contribution provision, s 124.

[215] We also accept Mr McGinn's submission that the introduction of s 103A(5) was to codify previous judge-made law concerning justification, as noted by the full Court in *Angus v Ports of Auckland Ltd.*[86] Parliament did not intend when enacting s 103A(5) to modify the effect of s 124 of the Act.

[216] We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience". The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

Exercise of discretion under s 124

[217] We now make some brief remarks as to the extent of reduction which may be justified, as a matter of practice. It will suffice to mention three cases only.

[218] The first is *Paykel Ltd v Morton*,[87] where Judge Colgan (as he then was) held:

> The Tribunal should carefully consider the exercise of its powers under s 40(2). Not every imperfection or peripheral fault on the part of an employee should attract a deduction. A reduction of 25 per cent is one of particular significance.

[219] Then in *Donaldson & Youngman t/a Law Courts Hotel v Dickson*,[88] Chief Judge Goddard raised similar concerns. He said:[89]

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[86] *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466 at [56]. See also *Fox v Hereworth School Trust Board* [2015] NZEmpC 206 at [265].

[87] *Paykel Ltd v Morton* [1994] 1 ERNZ 875 (EmpC).

[88] *Donaldson & Youngman (t/a Law Courts Hotel*) *v Dickson* [1994] 1 ERNZ 920 (EmpC).

[89] At 929.

> I was told from the Bar that it is, while not common, yet not uncommon, for the Tribunal to find that an employee's contribution has been in the order of 50 percent or even greater. Such cases should be very rare. I do not mean to say that it is not possible for a situation to arise in which an applicant can be said to have contributed to the extent of as much as 75 percent to the situation that gave rise to the personal grievance, but in most cases of that degree of contribution, the difference between 75 percent and 100 percent which would disentitle the applicant from any recovery at all, is imperceptible to the naked eye, even to a trained and experienced one. A moment's thought will show that attributing 40 percent of the blame for his or her dismissal to an employee is already a strong criticism indeed.

[220] He went on to agree with the finding in *Paykel* that a 25 per cent reduction is one of particular significance.

[221] In *Telecom v Nutter*, the Court of Appeal touched briefly on the question of contributory fault.[90] The Court expressed the view that a finding of contributory fault of 50 per cent is a significant one.[91]

[222] We respectfully adopt, and emphasise, this conclusion.

The s 124 assessment in this case

[223] As already mentioned, the Authority determined that the lost wages award should not be reduced for contributory fault, since there had already been consideration of the fact that an offer of an apprenticeship was unlikely. Then, with regard to the compensatory award, the Authority found that it could not conclude dismissal would have been inevitable if a fair process had been followed; and that the process was so deficient that there were incorrect conclusions reached about Mr Dewar's conduct, which caused him considerable harm.[92]

[224] The reduction was some 16.7 per cent.

[225] The one adverse finding which the Authority made was that Mr Dewar had witnessed dodgy behaviour but he had not done anything to discourage it.

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90 *Telecom v Nutter* [2004] 1 ERNZ 315 (CA).
91 At [98].
92 Dewar v Xtreme Dining Ltd t/a Think Steel, above n 1, at [126] – [127].

[226] This conclusion has already been analysed, and we have found that there was no relevant duty on Mr Dewar to encourage Mr Feaver to desist, or to report what had occurred to Think Steel. However, what we have described as dissembling by Mr Dewar at the commencement of the Think Steel investigation is relevant to the s 124 assessment. Mr Dewar gave implausible answers to Mr Gard as to his understanding of the use of company fuel cards which contributed partly to the unsatisfactory questioning process. Some reduction must be made for this conduct.

[227] In those circumstances, we reduce the compensation award of $12,000 to $10,000.

[228] Given our findings as to the circumstances, the possibility of a nil award of remedies does not arise.

Conclusion

[229] Because of the requirement of s 183(2) the Authority's determination is automatically set aside, and we make the following decisions:

a) Leighton Dewar was dismissed unjustifiably by Xtreme Dining Ltd trading as Think Steel.

b) Mr Dewar is entitled to compensation for lost remuneration in the sum of $2,709.08 under s 123(1)(b) of the Act.

c) The defendant is to pay the plaintiff compensation under s 123(1)(c)(i) of the Act in the sum of $10,000.

Costs

[230] Mr Dewar is entitled to costs. We note that, at the relevant telephone directions conference, counsel were agreed and the presiding Judge noted that the case then impressed as one warranting a 2B award of costs under the Court's pilot scale costs guideline. We encourage the parties to adopt this estimate when attempting to agree on costs. If, however, there are factors that mean that this

prediction is now no longer accurate, then any submissions made to us on costs should address such a change.

[231] If counsel are unable to reach agreement on this topic, Mr Dewar may file and serve an appropriate application within 21 days; Think Steel may respond within 21 days thereafter.

B A Corkill
for the full Court

Judgment signed at 1.45 pm on 31 October 2016