IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 29
ARC 66/12

IN THE MATTER OF	proceedings removed with special leave from the Employment Relations Authority
BETWEEN	PETER DAVID HALL Plaintiff
AND	DIONEX PTY LTD Defendant

Hearing: 10-13 February 2014 and 17-20 November 2014

Appearances: T Drake, counsel for plaintiff
D Erickson and M King, counsel for defendant

Judgment: 13 March 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Hall was employed by Dionex Pty Ltd (DPL), a supplier of scientific instruments and equipment, from 2004. From 2008 he held the position of Sales and Services Manager for New Zealand. He was dismissed for serious misconduct in December 2011. His dismissal arose against the backdrop of DPL's acquisition and a subsequent and ongoing process of integration into Thermo Fisher New Zealand Limited (TFNZL). Mr Hall's dismissal came a short time after his former (DPL) manager had been dismissed and another senior ex-DPL manager had exited on apparently agreed terms. All three had been involved in what TFNZL considered to be inappropriate conduct, including in relation to company expenditure and behaviour while on business trips to Thailand.

[2] Mr Hall claims that he was unjustifiably disadvantaged and dismissed. A fundamental component of his claim is that Ms Cameron, a TFNZL employee, who

undertook the disciplinary process and made the decision to dismiss, had no legal authority to do so. This raises issues as to who Mr Hall's employer was at the relevant time and, if it was solely DPL, then whether a representative of TFNZL was able to undertake the disciplinary process and dismissal.

[3] The plaintiff's arguments relating to the status of the decision-maker permeate the other grounds of complaint. It is further alleged that the process, including the decision to suspend, was predetermined; that Mr Hall was denied access to relevant information during the course of the disciplinary process; that the decision firstly to suspend and then to dismiss was procedurally and substantively unjustified; that his contract was breached; and that he is entitled to extensive relief.

The facts

[4] DPL was part of Dionex Corporation Inc which was acquired by Thermo Fisher Scientific Inc (Thermo Fisher), a global business enterprise, in May 2011. Following the acquisition, two senior Thermo Fisher employees were appointed as directors of DPL. They held their directorships by virtue of their positions within the Thermo Fisher group of companies.

[5] DPL continued to exist as a separate legal entity post-acquisition, as accepted by Mr Erickson (counsel for the defendant). Although DPL continued to exist as a separate legal entity, a business integration process was undertaken on a global basis which involved the integration of more than 350 employees across nine countries. New Zealand fell within the Asia Pacific Region for the purposes of integration planning. Integration leaders were appointed from within both Thermo Fisher and the Dionex Corporation, and they were tasked with leading the integration process within their particular regions and functions of the business. There is no dispute that Mr Hall took part in aspects of the integration process. He attended "Day One" events in Sydney, an "integrate and connect" webinar session, and the TFNZL annual conference in Rotorua in July 2011. He received product training on Thermo Fisher products in around August 2011, attended training on Thermo Fisher's code of business conduct and ethics, was added to Thermo Fisher's email distribution list, was allocated a Thermo Fisher email address, received training on TFNZL

information technology policies and signed an acknowledgment that he understood the policies and agreed to abide by them. Mr Hall was migrated onto Thermo Fisher's computer network, was given Thermo Fisher business cards, was given (and wore) Thermo Fisher's shirts in accordance with "corporate policy" and used a Thermo Fisher branded email signature.

[6] Mr Hall's manager was the country manager under the Dionex structure.[1] Mr Hall reported to him both before and after the acquisition, and until his manager's dismissal. His manager was also a director of DPL. There was some uncertainty as to his manager's reporting lines, and the extent to which they changed post acquisition. There was no written confirmation that his reporting line had changed, and Ms Pedersen (Human Resources Generalist for TFNZL) confirmed in evidence that the usual practice would be to do so. It appears that his position title was changed to CMB Business Development Manager - Thermo Fisher Scientific at some stage after the acquisition had occurred and that he reported to Ms Knebl, the Category Manager – Analytical Instrumentation for Thermo Fisher Scientific Australia Ltd, for some (but not all) purposes. Her position in turn reported to Mr Acciarito, the Director of Thermo Fisher Scientific Australia, with a dotted reporting line to Ms Cameron, Director, TFNZL.

[7] In late October 2011 concerns arose in relation to the conduct of certain DPL employees. Mr Hall was one of them; his manager was another. The concerns included expenditure on company credit cards and allegedly inappropriate and unprofessional conduct during training trips to Thailand. It was determined that the Thermo Fisher Australian/New Zealand human resources team would undertake the initial investigation and that Ms Cameron would undertake the disciplinary process in relation to Mr Hall. As Mr Erickson pointed out, Mr Hall's manager would have been the obvious person to investigate any allegations of misconduct against Mr Hall but was not in a position to do so given that complaints relating to his conduct were being investigated towards the end of 2011, which led to his subsequent dismissal.

[8] On 8 December 2011 Ms Cameron emailed Mr Hall and invited him to a meeting in Auckland on 12 December. He was not advised of the nature or purpose

[1] Although he was sometimes referred to as Managing Director.

of the meeting, although it is clear from the documentation before the Court that Ms Cameron was intending to discuss a suspension pending a disciplinary investigation into issues of concern. Nor did Ms Cameron advise him that Ms Pedersen was going to be present at the meeting.

[9] Mr Hall lives in the Wellington region and had to travel to Auckland for the meeting. He took the precaution of asking Ms Cameron whether he needed to prepare anything for the meeting or make any other arrangements. She confirmed that he did not.

[10] Ms Cameron said that she had formed a preliminary view, prior to the meeting, that Mr Hall would be suspended pending the outcome of the investigative process. She said that this was based on the seriousness of the concerns that had been raised in relation to alleged dishonesty and misuse of company funds, and the potential risk to the business if he remained in his position. She was also concerned to protect the integrity of relevant records and to ensure that potential witnesses were not unduly influenced.

[11] The 12 December meeting proceeded, and Mr Hall was suspended, despite the fact that complaints that had given rise to the investigative process had been withdrawn the previous day. While two other DPL employees had been identified as being people who might provide information potentially relevant to the investigation, neither had been spoken to before the suspension meeting took place. Further, it was after the meeting that copies of relevant credit card statements subsequently relied on were obtained. Although some of the details as to the way in which the meeting unfolded were in dispute, it is clear that it did not take long and that a relatively detailed letter was handed to Mr Hall at the conclusion of the meeting, advising of his suspension. This followed a brief adjournment. I return to the meeting below.

[12] The following day Ms Cameron and Ms Pedersen met with another DPL employee, Mr Jones. He gave a statement, dated 13 December and signed on 15 December 2011, outlining a number of concerns about Mr Hall's conduct during training trips to Thailand. Mr Hall's computer was also examined following the 12 December meeting.

[13] On 16 December 2011 Ms Cameron wrote to Mr Hall through his then solicitor, setting out a number of allegations. These were:

- Browsing inappropriate sites on the internet and storing objectionable material;
- Inappropriate conduct and unprofessional behaviour on trips to Thailand;
- Unauthorised and excessive expenses.

[14] In support of the first concern Ms Cameron stated that it appeared that on 30 November and 1 December 2011 Mr Hall had browsed inappropriate sites on his company-issued laptop. She attached a report of the browsing history which referred to two sites: www.lbd.com and www.newzealandgirls.co.nz. Reference was also made to the fact that Mr Hall had signed the Thermo Fisher "Operations Manual IT Policy Summary" on 29 November 2011 and that the Thermo Fisher internet policy included a prohibition on browsing inappropriate sites or sites with illegal content. Under the policy, inappropriate sites were said to include those with sexually explicit, pornographic or offensive content. Two photographs were also provided which were said to have been stored on Mr Hall's work laptop and which appeared to be of a topless Thai woman, with her back to the camera, sitting on a bed.

[15] Allegations relating to inappropriate conduct and unprofessional conduct on trips to Thailand were also identified and Mr Jones' statement was enclosed. Photographs of Mr Hall with Thai women wearing Dionex t-shirts were also included. This was said to give rise to a concern that Mr Hall had failed to represent the company favourably.

[16] Unauthorised and excessive expenditure were the final matters raised by Ms Cameron. It was said that the expense claims that had been identified reflected a consumption of alcohol that was excessive and inconsistent with "the company's" expense policies and codes of professional behaviours. Ms Cameron noted that further analysis of the expenses incurred by Mr Hall would be undertaken over the next few days and that any additional information would be provided to him.

[17] Mr Hall was advised that if proven the allegations made may constitute a breach of his employment agreement and "the company's policies" amounting to serious misconduct, and that termination was a potential outcome. Mr Hall was invited to a meeting to discuss the concerns that had been raised and was advised of his right to representation. He was provided with a number of documents, including the Thermo Fisher Operations Manual IT Policy Summary and the Thermo Fisher Operations Manual Internet Policy, along with the Dionex Corporation Code of Ethics.

[18] The disciplinary meeting was scheduled for 21 December 2011. Ms Cameron was due to depart on extended parental leave the following day.

[19] At the disciplinary meeting, Mr Hall was represented by counsel (Mr Drake). The meeting was a lengthy one. Mr Hall was given an opportunity to comment on the concerns that had been raised and he did so. In this regard, Mr Hall was asked about the internet browsing history that had been provided and he said that he had been browsing the internet in a hotel room in either Hamilton or Auckland and that he had been "looking for relaxation" and searching for a "therapeutic massage." He said, when asked, that he had been experiencing aches and pains. Specific questions were asked about the sites he had visited, pointing out that the sites referred to "sensual" rather than therapeutic massages. Ms Bondini, Director of Human Resources for Thermo Fisher Australia and New Zealand, who was present at the meeting, noted that the sites that Mr Hall appeared to have visited featured a number of pictures of breasts and women in lingerie, which would not normally be expected when searching for a therapeutic massage. It was not disputed, during the course of the meeting, that the two sites referred to had been visited. Rather, it is clear from the minutes of the meeting that the discussion moved to focus on the extent to which the material might be regarded as offensive.

[20] Mr Hall was asked whether he had taken the photographs of the topless Thai woman and he responded that he thought he had, indicating that they may have been taken in 2006 (some five years previously). However, he questioned whether they were offensive and in breach of the Dionex Corporation intranet policy.

[21] Mr Hall was also asked about issues relating to the expenditure on meals and alcohol, and the presence of Thai women. Mr Hall confirmed that he had been present during meals with Thai female companions but said that this was mainly in his own time. While he acknowledged that the company Westpac credit card was used for payment of food and drink on these occasions, he said that this had been authorised by his managers. He said that he always provided receipts for any food and drink consumed but did not think that he was required to provide itemised details and was unable to offer such details when questioned. Mr Hall said that "bar fines", which he confirmed were incurred during these occasions in respect of the attendance of Thai female escorts, were not paid for on the company credit card. Rather Mr Hall paid these expenses in cash.

[22] Mr Hall was also asked about the photographs of Thai women wearing Dionex t-shirts. Mr Hall was in these photographs. Mr Hall was asked whether they were Thai escorts and he said that a senior manager (Dr Jackson) had arranged for the t-shirts to be made, and for the photographs to be taken, and that he did not know anything more about the matter.

[23] The amount of expenditure on food and drink was also traversed. Mr Hall accepted that he may have had a Thai friend with him on one occasion but was only able to offer estimates as to how many people may have been present. He accepted that some of the expenditure appeared to be excessive but reiterated that he was directed to use the company credit card by senior management.

[24] During the course of the meeting Mr Drake raised an issue as to whether Ms Cameron had the requisite authority to undertake the disciplinary process and make any disciplinary decisions. Ms Cameron asserted that she did have the necessary authority and that such authority had been delegated to her in writing. Mr Drake asked for a copy of the delegation but it was not forthcoming. The "delegation" was, however, provided in the lead-up to the hearing and was incorporated into the bundle of documents for trial. I return to the adequacy or otherwise of the purported delegation, and the refusal to provide it at the time, below.

[25] Ms Cameron made it clear that she did not have, and had not seen, the Dionex Corporation intranet policy that Mr Hall and Mr Drake were referring to. A lawyer attending the meeting on behalf of the company acknowledged that it would be "very helpful" to have a copy of the policy, reiterating that no decisions had yet been made. Mr Drake made it clear that he was concerned that the company had proceeded in the absence of a relevant policy and indicated that he would provide a copy of it following the meeting. He also made it clear that he was concerned that Ms Cameron was proceeding without a full understanding of relevant processes and procedures within DPL. It is fair to say that Ms Cameron was untroubled by the concerns that Mr Drake had raised.

[26] Despite the outstanding issues relating to policies and procedures and the delegation issue, Ms Cameron stated towards the end of the meeting that she had all the information necessary to conclude the decision-making process and that a decision would be made and communicated to Mr Hall the next day.

[27] The following day, Mr Hall received a letter confirming Ms Cameron's view that he had committed serious misconduct and that she had decided that dismissal was the appropriate outcome. Ms Cameron advised him that his dismissal would take immediate effect.

[28] I note at this point that it was not until February 2012 at the earliest that the first remaining DPL employee was offered an individual employment agreement with TFNZL. From May 2011 to that time it is apparent that DPL continued to hold its own bank account, filed PAYE returns on behalf of its employees and paid ACC levies and Kiwisaver contributions.

[29] I return to some of the factual details below.

Who was the employer?

[30] During the course of submissions Mr Erickson mounted an argument that Mr Hall was jointly employed by DPL and TFNZL at the relevant time. I do not accept that argument is open to the defendant. In its amended statement of defence dated 4

November 2013 the defendant avowed that the plaintiff was "not at any stage employed by Thermo Fisher New Zealand" and that "subsequent to the acquisition the plaintiff remained employed by the defendant and continued to report to [his manager]". No affirmative defence was advanced pleading that Mr Hall was jointly employed at the time of the disciplinary process and dismissal.[2] Nor was an application for leave to file an amended pleading made at any time. In these circumstances, the defendant cannot pursue an argument of joint employment. Accordingly, I put this aspect of the defendant's case to one side.

[31] It follows that at the relevant time Mr Hall's (sole) employer was DPL.

Can a non-employer lawfully undertake the disciplinary process and make a decision to dismiss?

[32] Ms Cameron was not employed by DPL. She was employed by TFNZL. Mr Erickson submitted that Ms Cameron had the necessary authority and that there was no need for a formal delegation, although one had been obtained out of an abundance of caution. The purported delegation was from Mr Hoogasian, a director of TFNZL and DPL, and was contained in an email.

[33] Even if an employer could, as a matter if law, externally delegate or transfer its disciplinary decision-making function, I am not satisfied that an effective delegation was conferred in this case. The email relied on by the defendant is unclear as to its scope and application. It comes midway through an email chain and its import is somewhat ambiguous. On 8 December 2011 Ms Bondini sent an email to Mr Hoogasian, copying in Mr Piccione (Chief Counsel – Mergers and Acquisitions and Employment for Thermo Fisher Scientific Inc, United States), requesting that Mr Hoogasian:

> … provide Amanda Cameron with full delegated authority to investigate the actions regarding the allegations against Peter Hall and to take disciplinary action which may be necessary.

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[2] High Court Rules, r 5.48(4) "An affirmative defence must be pleaded." See *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZCA 154, (2012) 21 PRNZ 235 at [21]-[22].

[34] There was no direct response to this emailed request. On 10 December 2011 Ms Bondini emailed Mr Piccione advising that she had had no response and asking whether he could follow up given the timing of the matter. Mr Piccione then emailed Mr Hoogasian in the following terms:

> We are moving forward with suspensions of the Australian/New Zealand employees on Monday. Australian HR is looking for your approval as a Director of Dionex Australia to move forward. Could you please provide this approval by replying to [Ms Bondini's] email from Friday?

[35] The next day Mr Hoogasian sent a reply to Mr Piccione, copying in Ms Bondini, advising: "I approve the proposed actions".

[36] While the reference in the 10 December email to Ms Bondini's earlier email may be taken to suggest that Mr Hoogasian's approval was being sought in relation to the proposed delegation, his subsequent reference to proposed actions (plural) may equally have related back to the suspensions of the Australian and New Zealand employees referred to in Mr Piccione's email. Further, Mr Piccione's email is expressed to be directed to Mr Hoogasian in his role as Director of Dionex Australia. Mr Hoogasian did not provide any direct communication to Ms Cameron. It is clear from the notes of meeting on 16 December that Ms Cameron had little knowledge of who Mr Hoogasian was and had no idea who he was employed by. Nor did Ms Bondini when the issue was raised on Mr Hall's behalf. Neither Mr Hoogasian nor Mr Piccione was called to give evidence. Ms Bondini was asked about the communications and put it in this way: "I can't account for what Mr Hoogasian's thought processes were…"

[37] Ms Cameron gave evidence that Ms Bondini had told her that she had delegated authority to deal with the issues relating to the disciplinary process, and the outcome of it, but she had no direct communication with Mr Hoogasian in this regard. All she had was a copy of the email chain which, as I have said, was equivocal in its terms and which she declined to provide Mr Hall or his legal adviser with at the disciplinary meeting, despite the request that she do so.

[38] The email exchange is relevant not just to the delegation issue but also to the allegations of pre-determination advanced on behalf of Mr Hall, which I return to later.

[39] Mr Erickson submitted that a delegation was not necessary and that while Ms Cameron was not an employee of the defendant company she was best placed to undertake the disciplinary process. Mr Drake did not accept this proposition. He submitted that, given the personal nature of the relationship between employer and employee reflected in both the Employment Relations Act 2000 (the Act) and well-established principles of common law, it was only a duly authorised representative of the employer from within the employer organisation, or employer personally, who could dismiss.

[40] DPL was a small entity. It is apparent that there were limited options in terms of who might, within the DPL structure, undertake a disciplinary process. There were, however, three other managers - Mr Moscau, Mr Caswell and Mr Albertson. The defendant contends that none of these people was appropriate to undertake the process because they were Mr Hall's peers. In addition, Mr Erickson pointed out that Mr Moscau and Mr Caswell had complained about Mr Hall's manager in relation to similar disciplinary concerns and this presented further difficulties.

[41] DPL had three directors at the time. Mr Hall's manager was one. The other two (one of whom was Mr Hoogasian) were senior employees of Thermo Fisher, holding their positions as directors of DPL by virtue of their position with that entity. They were both based overseas (in Adelaide and Massachusetts) and had no involvement in the day-to-day running of DPL. They were, in addition, directors of TFNZL at the relevant time.

[42] Mr Hall's manager was dismissed on 12 December 2011. Ms Cameron gave evidence that the fact that he was subject to investigation and was later dismissed meant that she was the best person to undertake the disciplinary process in relation to Mr Hall. She also gave evidence that no thought was given to any other DPL employee conducting the disciplinary process due to the nature of the organisation post-acquisition.

[43] Mr Erickson submitted that it was appropriate that a non-DPL employee undertook the disciplinary process in the circumstances, including because Ms Cameron had a better understanding of the New Zealand context than (for example) Mr Hoogasian and because it would be inappropriate for one of Mr Hall's peers to undertake such a task. He further submitted that the fact that there was no known authority on the point weighed in favour of the defendant's submission that a non-employer could undertake the disciplinary process and impose disciplinary outcomes. I draw no such comfort from the absence of authority.

[44] The relationship between an employer and an employee is a personal one. The parties to an employment relationship are bound by their contractual, common law and statutory obligations to one another. There is nothing in the Act to suggest that employers can divest themselves of their statutory obligations or unilaterally confer them externally. Nor is there any such provision relating to employees, other than as provided in s 236 of the Act (which deals with representation), or anything in the Act to suggest that another party can insert themselves into the process and take over the role that would otherwise be performed by the employer. Indeed Part 9 of the Act ("Personal Grievances") expressly provides that a "representative of the employer" must be someone employed by the employer.[3] More fundamentally it is unclear how a non-employer could form the view that the necessary trust and confidence in an employee had been damaged to such a degree that dismissal was justified.

[45] I do not consider that an employer can be divested of the ultimate decision-making process, as occurred in the present case. Plainly, once TFNZL became Mr Hall's employer the position would have been different. It had not, however, advanced to that point, as the defendant admitted in its pleadings.

[46] It follows from the foregoing that the decision to dismiss could not have been made by Ms Cameron because she was neither the employer nor the representative of the employer as those terms are defined within the Act. In any event there was no valid delegation even if it was otherwise lawful to delegate the decision-making function outside the employer entity.

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[3] Employment Relations Act 2000, s 103(2)(a).

Consequences of absence of lawful authority

[47] Mr Erickson then advanced an argument that even if Ms Cameron could not have lawfully conducted the disciplinary process this did not of itself render the dismissal unjustified. In particular, he submitted that Mr Hall did not suffer a material disadvantage by virtue of Ms Cameron's involvement and the outcome would not have been any different had DPL undertaken the decision-making. I have difficulty accepting this submission because it was clear, on the basis of the evidence before the Court, that TFNZL had a much less relaxed approach to issues relating to expenditure and standards of conduct generally than DPL had had.

[48] I apprehend that Mr Erickson's submissions on this aspect of the claim are founded on s 103A(5) of the Act. It provides that:

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

[49] I do not consider that the defects in process, including defects as fundamental as the identity of the employer, can realistically be described as minor. The employer issue was squarely raised on Mr Hall's behalf, during the disciplinary meeting, and it was an issue that Ms Cameron failed to adequately address at any stage.

[50] Nor do I accept that the defect did not result in Mr Hall being treated unfairly. While, as I will come to, I accept that there was a prima facie basis for concerns in relation to Mr Hall's alleged conduct which could reasonably have prompted further inquiry, there were also issues identified on his behalf about the actions of senior managers (who were said to have authorised certain activities) and the different culture within DPL as opposed to the new company. Indeed, this point was highlighted on behalf of the defendant in closing submissions in respect of the likelihood of Mr Hall continuing on in his employment. Mr Erickson emphasised that the acquisition of DPL represented a significant change in culture, that policies and procedures relating to conduct expectations had markedly tightened and that it

was unlikely that Mr Hall (imbued with the DPL approach to such issues) would continue to be employed by TFNZL for any significant period of time. If that is correct (and I accept that it is) it squarely raises an issue as to whether, if a representative of DPL had undertaken the disciplinary process and decision-making, it would have resulted in greater awareness of, and regard to, the culture and practices that existed within DPL at the relevant time and at the most senior level, rather than through the lens that the TFNZL representatives brought to bear. More fundamentally it undermines the likelihood of the same disciplinary outcome being visited on Mr Hall.

[51] As I have said, Mr Erickson submitted that it would have been inappropriate for one of Mr Hall's "peers" to have undertaken the disciplinary process. I do not accept this as a matter of general principle and no authority was cited for this proposition. While it will generally be desirable for a more senior person to undertake a disciplinary process and determine outcome, that will not always be possible or necessary. A key issue will be whether the person has the requisite authority of the employer to undertake the task.

[52] In the circumstances, and given the limited options available, it may have been appropriate for a peer to have undertaken the disciplinary process and determine the disciplinary outcome. This option was never adequately explored.

[53] Mr Drake submitted that if Ms Cameron had no lawful authority to dismiss Mr Hall, or suspend him, those decisions were void from the outset and plainly unjustified. I agree that the decisions were unjustified. The remedial provisions relating to personal grievances are accordingly engaged in terms of assessing the consequences of the breaches that occurred.

The suspension

[54] Mr Hall alleges that his suspension was unjustified on additional grounds, including a lack of consultation and the absence of a contractual provision to suspend. He also contends that there were no substantive grounds for his suspension and that the decision was predetermined. I have already dealt with the issue of Ms

Cameron's authority. She did not have authority to suspend and this rendered the decision to suspend, and the ultimate decision to dismiss, unjustified pursuant to s 103A. However, even if I had reached a different conclusion in relation to Ms Cameron's authority, there are additional difficulties with the suspension process and the outcome of it.

[55] It appeared that Mr Hall's written employment agreement with DPL was limited to three documents – a position description and two schedules. There was no express provision within Mr Hall's employment agreement enabling his employer to suspend him. While that is not necessarily fatal, it will be an unusual case where it is justifiable to suspend an employee in the absence of a contractual clause authorising such a step. What will be required in such circumstances is good reason to believe that the employee's continued presence in the workplace may or will give rise to some other significant issue such as safety issues, particularly relating to other employees or customers.[4]

[56] I do not accept that, at the time of the decision to suspend, the circumstances were such as to require such a step. Three employees based in Australia had complained about the conduct of senior DPL employees, including Mr Hall, in late October 2011 but had withdrawn their complaints before the suspension was imposed. Ms Cameron gave evidence that she took no account of those complaints in making decisions about Mr Hall. However, it is difficult to reconcile this evidence with the concerns she says she had at the time she decided to impose a suspension on Mr Hall. As I have already observed, a statement was taken from another employee (Mr Jones) but this did not occur until the day after Mr Hall had been suspended and it was not signed as correct until three days later.

[57] Mr Hall worked from home and travelled to see clients from there. He was not located in the DPL offices and accordingly concerns that might otherwise exist in relation to the preservation of records and the protection of potential witnesses did not arise or could have been adequately managed in other ways.

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[4] *Singh v Sherildee Holdings Ltd t/a New World Opotiki* EMC Auckland AC53/05, 22 September 2005 at [91]. See also *Graham v Airways Corp of New Zealand* [2005] ERNZ 587 (EmpC) at [104].

[58] I was not drawn to the assertion that the decision to suspend was not made in advance of the meeting. The contemporaneous documentary evidence overwhelmingly suggests otherwise and indicates that the plan was to meet with Mr Hall on Monday 12 December 2011 and that he would be suspended with immediate effect. The most telling references appear in the email exchange of 10 December (referred to above), confirming that: "We are moving forward with suspensions of the New Zealand/Australian employees on Monday" and in an earlier email from Ms Cameron to Ms Pedersen and Ms Bondini, copied to Mr Acciarito. That email advised as follows:

> Hi All
>
> Based on [Mr Acciarito's] email, 11am would work better b/c there is risk they'd have about an hour to communicate. But given they'll start piecing things together tomorrow/weekend, I think it would be ok to work with his existing flight. Plus [Ms Pederson] and I have a 9am disciplinary meeting with [another person] and I'm nervous that this is another any outcomes may take us longer than anticipated.
>
> So unless anyone disagrees I'll go with 1pm. [Ms Pederson], I agree that under the circumstances and due to the tight timeframes we will need to ask him to change his leave plans, but will defer to [Ms Bondini]. *He will assume he can visit customers in Auck on Tues/Wed and that won't be the case.*
>
> (emphasis added)

[59] Ms Pedersen gave evidence that this email reflected a concern that Mr Hall may not be in a position to visit clients because he might be upset following the meeting, and was not reflective of predetermination. I found her interpretation of the email strained. I am satisfied that the decision to suspend was predetermined and was communicated to Mr Hall, essentially as a fait accompli, at the meeting of 12 December. My conclusions are reinforced by the fact that a detailed letter confirming the suspension was given to Mr Hall at the end of what was a relatively brief meeting. There was a break, during which Ms Cameron said the letter was prepared, but the break was brief and would have allowed insufficient time for reflection, let alone drafting correspondence (even accepting that a template was used). Mr Hall gave evidence that while he said that he understood the need for an investigation to be completed, he was shocked at the meeting and that he could not recall the reasons for the suspension, as articulated in the letter of 12 December

2011, being explained to him during the course of the meeting or that his response was requested. I preferred his evidence in relation to this point.

[60] I do not accept that a suspension was justified. I return to the question of remedies below.

The process

[61] The letter of 12 December 2011 identified a number of allegations made against Mr Hall relating to his conduct during training trips to Thailand. As at the date of the letter the three complaints that had identified Mr Hall had been withdrawn. As I have observed, Ms Cameron said that the complaints formed no part of her enquiries. The letter identified a particular concern in relation to authorised expenses and inappropriate conduct and unprofessional behaviour on the trips. It was said that further details of the allegations would be set out in subsequent correspondence.

[62] It was not until 16 December 2011 that the specific allegations of serious misconduct, and the provision of further material said to be relevant to the allegations, was provided. The 16 December letter was forwarded to Mr Hall, through his solicitor, at nearly 8 pm on Friday 16 December. Four working days later Mr Hall was advised of his dismissal.

[63] A meeting was held on Monday 21 December 2011. At the conclusion of the meeting, Ms Cameron advised she had sufficient information to reach a decision and the meeting concluded on that basis. As I have already observed, there were matters that remained outstanding at this point – most notably her authority to conduct the process and access to relevant policies and procedures.

[64] The next day, 22 December 2011, Ms Cameron wrote to Mr Hall advising that she was satisfied that his actions constituted serious misconduct and that she had made a preliminary decision to dismiss him summarily and without further notice. Each of the allegations identified in her earlier correspondence was found to have been established. Mr Hall was given until 3 pm, 23 December 2011 to respond to

the proposed disciplinary action. Later that evening, Mr Hall emailed Ms Cameron advising that her letter had arrived after 5 pm and that his legal representative was not available until 16 January 2012 (because of the Christmas break). He asked that she allow him until 5 pm on that day to provide submissions in relation to disciplinary outcome. Ms Cameron did not accede to this request. Rather she wrote to Mr Hall advising:

> Due to the seriousness of the allegations against you and the seniority of your position, I do not consider that it is appropriate to delay the disciplinary investigation as you have requested. It is important that the company can resolve this matter as soon as possible and be in a position to move forward next year. However, I have not yet made any final decision and wish to hear your feedback before I do. I therefore confirm that you will have until 3pm to provide your feedback. Please note that I am only seeking your feedback on my preliminary decision on penalty, [i.e.] summary dismissal, not on my substantive findings.
>
> I look forward to receiving your feedback before 3pm today.

[65] Mr Hall responded advising that given the late timing with which her earlier letter had been sent, the fact that most businesses had closed for Christmas, and that his lawyer was not available until after the Christmas vacation, he did not understand why it would not be fair and appropriate to grant a further extension. He said: "I will provide submissions on 16 January, I cannot do so before then."

[66] Despite this, Ms Cameron emailed Mr Hall on 23 December at 3.13 pm attaching a letter confirming the decision to summarily dismiss.

[67] I do not accept that it was fair and reasonable to proceed with the process as quickly as Ms Cameron did in the circumstances. Mr Hall was on paid suspension and the Christmas holidays were looming. No satisfactory explanation was put forward as to why Ms Cameron had to move with such haste and could not have accommodated the reasonable request for an extension. While Ms Cameron gave evidence that she was under no pressure to conclude the process before Christmas it is common ground that she was leaving for an extended period of parental leave from 22 December. I do not accept, based on the evidence before the Court, that there was any legitimate operational, or other, reason why the decision on disciplinary outcome was required to be made within one working day of the preliminary decision being notified, and in circumstances in which Ms Cameron had

invited further response and knew that legal advice was unavailable to Mr Hall. He was prejudiced as a result.

[68] I am driven to the conclusion that the speed with which the process unfolded, the way in which the suspension was dealt with and the precipitous way in which the disciplinary outcome was announced firmly support Mr Hall's contention that the ultimate outcome of dismissal was predetermined. The decision to dismiss Mr Hall was unjustified in all of the circumstances.

[69] I accept that there were prima facie concerns relating to Mr Hall's activities which justified investigation and which may ultimately have led to the conclusion that misconduct had occurred, including having regard to Mr Hall's explanations during the course of the disciplinary meeting. It was reasonable for concerns to be raised about the sites that Mr Hall was said to have accessed on his work computer, particularly given that such access appeared to have occurred very shortly after he had received training on such matters. Dr Jackson, who had established DPL and had been a director of it (and who was called to give evidence on behalf of Mr Hall), confirmed in evidence that there was flexibility and latitude allowed to DPL staff in terms of their personal use of company laptops and computers. Nevertheless he did accept in cross-examination that viewing the website referred to may not have been regarded as acceptable personal use.

[70] Mr Hall was unable to detail how the expenses identified by Ms Cameron had been incurred. When questioned during the course of hearing Dr Jackson said that he did not consider the amounts at issue to be significant. He conceded that he would have wanted to know who had been present in order to assess the reasonableness or otherwise of the expenditure but went on to note that he would have been well aware that it related to expenses while in Thailand. Dr Jackson confirmed that he had approved Mr Hall's use of the company credit card to buy drinks for bar staff and suggested that this may well have contributed to the level of expenditure incurred by Mr Hall. Dr Jackson was not drawn to the suggestion that the presence of Thai women during evening meals attended by DPL employees, and others, was problematic even accepting that some staff (including Mr Jones) may have found it distasteful.

[71] The Dionex Corporation policy documents emphasised high personal standards of integrity and financial record keeping, and set out a number of examples of improper intranet use. While there were similarities between the TFNZL and Dionex Corporation policies there were, as Mr Drake pointed out, some differences – including that the TFNZL policy related to internet use and the Dionex Corporation policy referred to by Mr Hall during the disciplinary meeting was expressed to relate to intranet use. Mr Hall's evidence was that he had very limited access to the company's intranet. A limited inquiry as to whether there were any Dionex global expense or travel policies was made at the relevant time but this came to nothing, Ms Kinsley, Vice President of Human Resources, responding to an email request by making the following salient points: "we simply don't know enough about these employees" and that there appeared to have been "really no or little HR support and strategy outside the US at Dionex."

[72] Mr Erickson referred to the Court of Appeal's observation in *Northern Distribution Union v BP Oil New Zealand Ltd* that:[5]

> The fact that controls were non-existent provided opportunity but not excuse. The fact that others were culpable in countenancing the general pattern does not justify or excuse the [employee's actions].

[73] In that case the employer became concerned about the way in which social club funds (which included employer contributions) were being handled by social club members. One employee, who had received two prior warnings for conduct involving issues of integrity, was dismissed after he was found to have banked a large sum of social club money into his personal account. He initially denied the allegation but then later provided a wholly unsatisfactory explanation for his actions. It is apparent that the social club had few, if any, financial management controls in place. The Court of Appeal upheld the dismissal.

[74] The present case involves broader issues of corporate culture and accepted conduct within the senior management structure. As Ms Bondini agreed in cross-examination, it is relevant to have regard to acceptable practices or standards of behaviour in the particular workplace, in addition to any written policy, and that

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5 *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 at 487.

these are typically set by the Chief Executive and flow down through senior management. There was a failure to carry out sufficient inquiries into DPL practices and procedures during the course of the process. It is readily apparent that a relaxed approach to credit card use, business expenses and general standards of conduct was accepted by DPL management at the relevant time. The relatively lax corporate culture within DPL, and the extent to which Mr Hall's actions were authorised or condoned by senior management, was relevant to an assessment of whether serious misconduct had occurred justifying dismissal. This received inadequate consideration and undermined both the procedural and substantive justification for the dismissal in the circumstances.

Remedies

Lost remuneration

[75] Mr Hall sought orders for lost remuneration up to the date of trial. It was accepted that he had taken adequate steps to mitigate his losses. He is in his sixties and had amassed four Eastlight folders of job applications since his dismissal. Mr Hall has been unable to find alternative work, despite his best endeavours to do so (other than a brief stint of part-time employment).

[76] Section 128(2) provides that where an employee has a personal grievance and has lost remuneration as a result of the personal grievance the Court must order the employer to pay the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. That is subject to s 128(3), which provides that the Court may in its discretion order an employer to pay to an employee by way of compensation of remuneration lost by the employee as a result of the personal grievance a sum greater than that to which an order under subsection (2) may relate. I am satisfied that it is appropriate to exercise my discretion under s 128(3) in the circumstances of this case.

[77] In *Sam's Fukuyama Food Services Ltd v Zhang* the Court of Appeal observed that:[6]

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6 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482.

> [36] It is axiomatic that the full financial losses suffered by the respondent as a result of the unjustifiable dismissal merely set the upper limit on an award of compensation. But there is no automatic entitlement to full compensation. As the decision of this Court in *Nutter* makes clear, moderation is required in setting awards for lost remuneration. Any award of compensation in a particular case must have regard to the individual circumstances of the particular case. Having said that, as with any awards of compensation which involve a discretionary element, precision is difficult and the award will inevitably involve a broad brush approach.
>
> [37] … It is also necessary to have regard to the counter-factual analysis and make an allowance for all contingencies that might, but for the unjustifiable dismissal, have resulted in the termination of the respondent's employment.
>
> [38] In this context, we do not consider that we are required (as the respondent argues) to ignore the factual events that occurred during the period of employment. The fact that those events were relevant to another aspect of the case, such as whether or not a personal grievance was established, does not make such matters irrelevant on the very different question of remedies. What actually happened, if relevant, cannot be ignored. The key feature on appeal is that this Court must respect the factual findings of the Judge. But as we have already noted, the Judge made no findings on the s 128(3) point.

[78] Mr Erickson contended that a number of contingencies were relevant to the counter-factual analysis, after having emphasised the general requirement for moderation in awards. In this regard he said that even if Mr Hall had not been dismissed it was almost certain that some form of disciplinary sanction would have been imposed rendering his employment considerably less secure; that the discovery of post-dismissal material would have placed Mr Hall's ongoing employment in jeopardy; that there had been significant damage to the necessary relationship of trust and confidence; and that it was possible that a restructuring may have taken place in the future that may have impacted adversely on Mr Hall's employment.

[79] The counter-factual analysis that must be undertaken is not straightforward and involves a degree of speculation. While in *Zhang* it was said that an allowance for "*all* contingencies that might have resulted in the termination of the respondent's employment" ought to be made in conducting the counter-factual inquiry it cannot have such broad application as to include the prospect of further unjustified action by an employer, imperilling the employment relationship.[7] The point was emphasised

[7] See also *Booth v Big Kahuna Holdings Ltd* [2014] NZEmpC 134 at [12].

by the English Court of Appeal in *O'Donoghue v Redcar and Cleveland BC* (referred to with approval in *Telecom New Zealand Ltd v Nutter*[8]):[9]

> [44] An Industrial Tribunal must award such compensation as is "just and equitable". If the facts are such that an Industrial Tribunal, while finding that an employee/applicant has been dismissed unfairly (whether substantively or procedurally), concludes that, but for the dismissal, the applicant would have been bound soon thereafter to be dismissed (fairly) by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that compensation for the unfair dismissal should be awarded on that basis.
>
> [45] There is no need for an 'all or nothing' decision. If the Industrial Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

[80] I am confident that it is unlikely that Mr Hall's employment would have continued for long. This is reinforced by the clear lack of insight Mr Hall displayed into aspects of his conduct. He continued to assert that there were no issues with what he had done and went so far as to suggest that he would have been comfortable with his grandmother viewing the images of the topless Thai woman over his shoulder. He begrudgingly accepted in cross-examination that some female colleagues might be offended if they had viewed them, but otherwise significantly minimised the concerns that had been raised. He was not prepared to accept that viewing pictures of near-naked women on a work laptop might give rise to legitimate concerns.

[81] Relevantly, Mr Hall had accessed the sites very shortly after attending training on internet access and TFNZL's approach to it. He signed the policy as having understood it and agreeing to be bound by it. There were, as Mr Drake submitted, issues as to the extent to which the policy was enforceable against Mr Hall having regard to the fact that he was not at that time an employee of TFNZL and having regard to Mr Hall's evidence that he considered that he would only be bound by the policy once TFNZL became his employer. And, as Mr Drake observed, the Dionex Corporation policy was expressed in somewhat different terms and was

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8 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA).

9 *O'Donoghue v Redcar and Cleveland BC* [2001] IRLR 615, Court of Appeal (Civil Division). See also *Gover v Propertycare* [2006] EWCA Civ 286, [2006] ICR 1073.

said to relate to intranet, not internet, use. Mr Hall did not have access to the company's intranet on the two dates in question. However, the fact that Mr Hall viewed the sites so soon after concerns had been raised about the propriety of such actions reinforces the defendant's argument about the likely security of Mr Hall's employment going forward.

[82] Mr Hall did have a good work record but it is clear that TFNZL took a robust approach to issues relating to inappropriate behaviour, as it is entitled to do. I have no doubt that Mr Hall would have had real difficulty adjusting to the new environment and that this would have been likely to have presented significant difficulties for the sustainability of a long term relationship. The relationship with TFNZL, then in its infancy, had also been damaged at the outset by Mr Hall's conduct and accordingly made it more fragile.

[83] As Mr Erickson points out, it is possible that Mr Hall's position may have been restructured. As it transpired Mr Hall's role was changed following his departure. However, it largely speculative as to if, when and how Mr Hall's position may have been affected had he remained in employment. I am not prepared to place any weight on it for the purposes of the counter-factual analysis.

[84] Applying a counter-factual analysis in the circumstances, I conclude that it is likely that Mr Hall's employment would more likely than not have come to an end around six months after his dismissal had in fact occurred and that it therefore would not have continued in a secure manner.

[85] There was evidence of some inappropriate material being discovered on the laptop that Mr Hall had used, following his dismissal. I allowed that evidence in, over Mr Drake's objection. Mr Drake had submitted that it was excluded by s 137 of the Evidence Act 2006. This Court has broad powers to admit evidence as in "equity and good conscience it thinks fit, whether strictly legal evidence or not,"[10] and is not strictly bound by the provisions of the Evidence Act, although its principles may provide useful guidance in the exercise of this discretion.[11] The documentation had

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10 Employment Relations Act 2000, s 189(2).

11 *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [13]-[14].

been included in the common bundle for trial, was relevant to the matters at issue and no objection to it had been taken in advance of the hearing. I concluded that any prejudice that the plaintiff might otherwise be exposed to could adequately be addressed by way of cross-examination and through the evidence of his own expert witness.

[86] In the event there were difficulties in establishing that Mr Hall had in fact been responsible for the images in question. While Mr Hall confirmed that he may have viewed a small number of them, there was no evidence as to when he might have done so. The evidence, as it came out at hearing, does not establish a basis for reducing the remedies that might otherwise be awarded applying the approach of the Court of Appeal to subsequently discovered misconduct in *Salt v Fell*,[12] and I did not understand Mr Erickson to be seriously pursuing this point.

Compensation

[87] The plaintiff sought a compensatory award under s 123(1)(c)(i) of $20,000 in respect of the suspension and $45,000 in relation to the dismissal ($65,000 in total). His first point was that the quantum of compensatory awards has fallen woefully behind in both the Authority and this Court. I have some considerable sympathy for this view. Commentators have recently noted that average compensatory awards made by the Court have remained at stagnant levels for the last 20 years, despite the inflationary effect that might otherwise be expected to have increased them.[13] They further note that while in *NCR (NZ) Corp Ltd v Blowes* the Court of Appeal attempted to set an "upper limit" on compensatory awards of $27,000, consistent with inflation from the award of $20,000 made in *Telecom South v Post Office Union Inc*, if a similar inflationary approach was applied today an upper limit for compensation would be $33,000.[14] By contrast, between July 2013 and July 2014 awards in this Court were said to have ranged from between $3,000 and $20,000, with the average award before taking contribution into account being $9,687.50.[15]

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12 *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193 at [90].

13 See Kathryn Beck and Hamish Kynaston, "Remedies – we've been thinking…" (paper presented to New Zealand Law Society 10th Employment Law Conference, October 2014) at 457.

14 At 457, citing *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA) at [40]-[42], and *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA).

15 At 458.

[88] Mr Erickson suggested a global figure of $5,000 compensation for both the unjustified suspension and unjustified dismissal, consistent with the sort of quantum that would usually be applied in an analogous case. I observe that while there is a need for a degree of consistency with other cases, there is a danger of using consistency to keep awards at an artificially low level. The starting point must be the particular circumstances of the case.

[89] I have no doubt that Mr Hall found his suspension and his dismissal hurtful and humiliating. He had worked within the company for over seven years and had been recognised for his successes at a senior level. He had never been suspended and gave evidence (which I accept) that he became extremely anxious, suffered sleepless nights and felt depressed. The process was effectively steam-rolled. Mr Hall was forced into the position, just days before Christmas, of being pressed for a response on the most significant disciplinary action available to an employer without the benefit of support and advice. Against that, I am satisfied that the circumstances surrounding the disciplinary process and outcome had not generally become known and that he has been able to deal with enquiries from recruitment agencies on the basis that his former employer was taken over by a large American company, without the need to detail the reasons for his departure. Mr Hall remained on pay during the course of his suspension. There was no medical or other evidence in support of this aspect of the claim such as is frequently available in cases attracting higher awards. However, I accept that the way in which the process unfolded, and the haste with which it was brought to a close, exacerbated Mr Hall's feelings of stress and anxiety.

[90] The suspension and dismissal took place within a short period of time and I propose to deal with compensation for hurt and humiliation globally. In the circumstances, and mindful of the need not to keep compensatory payments artificially low while balancing that against the expressed need for moderation, I would award a global compensatory figure of $18,000.

[91] Mr Hall also sought $167,000 by way of compensation (under s 123(1)(c)(ii)) for loss of benefits, including the benefit of stable, permanent employment and anticipated future loss of income. The claim for loss of future benefits does not need

to be considered, given the finding that Mr Hall's income would likely not have continued beyond six months.

[92] Mr Hall is however entitled to commission payments he would likely have received had he continued in employment for this period together with annual holiday pay. Leave is reserved for either party to refer the question of quantification back to the Court for final determination if agreement as to an appropriate figures cannot otherwise be reached.

Contribution

[93] Section 124 of the Act provides that where the Court determines that an employee has a personal grievance, the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded.

[94] Mr Drake submitted that s 124 was not engaged because the actions giving rise to the grievance were invalid from inception. That cannot be correct. The starting point under s 124 is the employee's actions, and the extent to which they have contributed to the grievance.

[95] Mr Erickson submitted that Mr Hall wholly contributed to the situation that he found himself in and that any remedies awarded to him ought to be reduced by 100 per cent for contribution, although observing that some doubt has been expressed by Chief Judge Colgan in the recent case of *Harris v The Warehouse Ltd* as to whether a discount of this magnitude can be made under s 124 of the Act.[16] Whether or not a 100 per cent reduction can be made as a matter of law is not an issue that I need to resolve as this is not the sort of situation where such a reduction is warranted, even if it is available, including having regard to the differing standards of acceptable conduct held by DPL at the time.

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[16] *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [170]-[202]. Compare *Booth v Big Kahuna Holdings Ltd* [2014] NZEmpC 134 at [96].

[96] Although Mr Hall's behaviour did not in any way contribute to the fundamental procedural infelicities in the process, it is established that s 124 applies notwithstanding a lack of procedural justification.[17] That is because s 124 refers broadly to "the situation" giving rise to the grievance. It is necessary, in assessing the extent to which Mr Hall's actions contributed towards the situation, to have regard to the prevailing culture of DPL at the time. It is also however relevant that some of the actions occurred during the integration period and after Mr Hall had been put on notice of concerns about appropriate behaviour and the use of office computers and laptops. I pause to note that the contributing conduct need not be such that would, in itself, have justified dismissal.[18]

[97] Viewed objectively I consider that Mr Hall's conduct was blameworthy and requires a reduction in remedies. I consider it appropriate for the award of compensation under s 123(1)(c)(i) to be reduced by 50 per cent.

Penalties

[98] Mr Hall seeks the imposition of penalties in relation to alleged breaches of good faith by the defendant, most particularly in relation to the failure to provide documentation relevant to the disciplinary process (being the purported delegation) and the failure to pay Mr Hall his commission entitlements (with interest) in a timely manner following his dismissal. An order that any penalties be paid to Mr Hall is sought.

[99] Mr Drake made the observation that the employment institutions do not routinely impose penalties and suggested that a de facto test of exceptional circumstances may have been introduced, although not provided for under the Act. I agree with Mr Drake that there is no requirement of exceptionality before a penalty can appropriately be imposed.

[100] I do not consider that the non-payment of a commission or interest warrants a penalty in this case. It is clear from the evidence that the non-payment of a

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17 See *Lexis Nexis Employment Law Personal Grievances* (online ed) Reducing Remedies by Reason of Employee's Contributory Actions at 11.47.4.

18 *Scissor Platforms (1997) Ltd v Brien* [1999] 2 ERNZ 672 at 683 (EmpC).

commission arose from difficulties in calculation, exacerbated by the poor records that had been kept. Mr Hall accepted in cross-examination that this would have impeded the defendant's ability to finalise the applicable figure and make payment to him. It is these difficulties that also undermine the claim for interest in relation to the commission and the plaintiff's claim for recovery of money due at the date of termination.

[101] There was a failure to provide a copy of the purported instrument of delegation. The issue of Ms Cameron's authority to undertake the investigative and disciplinary process was squarely raised during the course of the meeting and she advised Mr Hall that she had delegated authority to proceed, and that it was in writing. When asked for a copy of the delegation she declined to provide it. It was plainly relevant to the matters at issue and could have assisted Mr Hall in responding to the concerns that had been raised and provided the basis for additional arguments to be put forward on his behalf. I balance this against the fact that Ms Cameron took the step of seeking, and obtaining, legal advice as to whether the purported delegation ought to be provided to Mr Hall. Her evidence, which I accept, was that she did not accede to the request on the basis of legal advice she received. This undermines the plaintiff's submission that her actions amounted to a breach of good faith, warranting the imposition of a penalty.[19]

[102] In any event, as Mr Erickson points out, the Court has made it clear that penalties are not to be imposed where other remedies have already addressed the issue. In *Xu v McIntosh* it was observed that:[20]

> [43] The other penalties sought by the defendant correspond exactly with the grounds of her grievance; there is a risk of doubling up if penalties are to be awarded for the same breaches of the employment agreement. I now turn to the amount of penalty that is proper.
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> …
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> [45] If an employee seeks recovery of money underpaid or lost as a result of a personal grievance that is also or includes a breach of an employment agreement, then it seems wrong that a penalty should also be imposed unless there are special facets of the breach calling for punishment of the employer

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19 *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 40 at [193], [203]; *Bourne v Real Journeys Ltd* [2011] NZEmpC 120, [2011] ERNZ 375 at [165].

20 *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC).

> on top of compensation for the employee. In particular, a penalty is not a mechanism for topping up the compensation. If recovery of moneys due is in issue, the remedy for the delay is interest, not a penalty. In this case, no special facets have emerged.

[103] I have taken into account the failure to provide Mr Hall with documentation relevant to the decision-making process in assessing compensation, and in respect of the justification for the suspension and dismissal. These findings and the remedies which flow from them adequately mark out any breach.

Conclusion on remedies

[104] The defendant is ordered to pay to Mr Hall:

a. The equivalent of six months' salary, plus interest on that amount at the prescribed rate from the date of his dismissal;

b. Payment of an amount to be agreed between the parties or, in the absence of such agreement, to be fixed by the Court, equivalent to the amount of commission that Mr Hall would have received had he continued working for an additional period of six months following termination of his employment, together with annual holiday pay for this period, plus interest on that amount at the prescribed rate from the date of his dismissal;

c. $18,000 compensation under s 123(1)(c)(i) of the Act;

d. The sum ordered in Mr Hall's favour under (c) above is to be reduced by 50 per cent for contribution.

Mr Hall's breach of contract claim

[105] The plaintiff also claims damages for breach of contract. The alleged breaches are two-fold. First, the failure to carry out a thorough and fair investigation to a standard commensurate with the gravity of the accusation Mr Hall faced and having regard to the potential effects on him. Second, the transfer of the defendant's obligations as employer on to Ms Cameron and permitting her to suspend and

dismiss him. The remedies claimed relate to alleged damage to the plaintiff's reputation and special damages, being legal expenses relating to the disciplinary investigation and meeting.

[106] Mr Erickson submitted that this aspect of the claim foundered on s 113(1) of the Act. It contains a restriction on the way in which a dismissal can be brought before the Court, providing that:

> (1) If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this Part as a personal grievance.

[107] Mr Erickson submitted that the matters Mr Hall wished to pursue by way of a claim of breach of contract fell within the factual matrix that gave rise to the dismissal and accordingly comprised a challenge to "any aspect of [the dismissal]". He submitted that it was artificial to separate out different aspects of the chain of events which began with the suspension and culminated with Mr Hall's dismissal.

[108] The effect of s 113(1) is to prevent employees from challenging a dismissal through a common law action for wrongful dismissal, an action for breach of contract or under the Contractual Remedies Act 1979. As the authors of *Mazengarb's Employment Law* point out, the effect of the provision would appear to be far reaching.[21] The authors of *Brookers Employment Law* suggest that the appropriate approach is as follows:[22]

> … if a common law action can be brought by a (dismissed) plaintiff, with no reliance on the fact or manner of dismissal as an element in the cause of action, then such a claim will clearly not be barred by s 113(1).

[109] In the present case there is a clear causal connection between the failings of the disciplinary investigation, Ms Cameron's lack of authority and Mr Hall's ultimate dismissal. I agree with Mr Erickson's submission that it would be artificial, in the circumstances, to separate out the failings relating to the process leading up to the dismissal and the dismissal itself. All were inextricably intertwined. In my view

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21 *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [ERA113.3].

22 *Employment Law* (online looseleaf ed, Brookers) at [ER113.04].

s 113 applies and prevents the plaintiff from pursuing a claim for damages for breach of contract.

[110] Even if s 113(1) is not engaged there are other difficulties in relation to this aspect of the claim. That is because the claim of breach of contract effectively mirrors the matters raised in the personal grievance (the failure to carry out a thorough and fair investigation and Ms Cameron's authority to suspend and dismiss) in relation to which remedies are sought. Section 123(1) of the Act provides that where the Court determines that the employee has a personal grievance it may, in settling the grievance, provide for one or more listed remedies. In declining a similar claim for breach of contract seeking damages for loss of reputation and special damages for the legal costs incurred by the plaintiff in the context of an allegedly flawed employment investigation, it was said in *George v Auckland Council* that:[23]

> [128] … Simply crafting a separate claim for damages cannot suffice. While Ms George has sought damages against the Council, what she essentially seeks is resolution of her employment relationship problem.

[111] Further, there is authority for the proposition that in the context of an employment relationship problem it is not appropriate to classify costs incurred prior to the filing of a statement of problem as special damages to enable full recovery as opposed to the application of the Authority's costs regime: *Harwood v Next Homes Ltd*.[24]

[112] However, as Mr Drake points out the Court of Appeal in *Binnie v Pacific Health Ltd* observed that:[25]

> [17] We offer an additional observation on this aspect of the present case. Legal expenses properly incurred in relation to issues such as wrongful suspension of employees and investigations into their conduct might well be classified as special damages rather than as party and party costs. The latter generally have as their focus the issue of proceedings, preparation for hearing and the hearing itself.

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[23] *George v Auckland City Council* [2013] NZEmpC 179, [2013] ERNZ 675 (EmpC) at [128] (footnotes omitted).

[24] *Harwood v Next Homes* [2003] 2 ERNZ 433 (EmpC) at [37]. See however *Hayward v Tairawhiti Polytechnic* EMC Auckland AC43A/05, 22 December 2005 at [50] where the Court appeared to accept that such costs could be recovered as special damages.

[25] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA).

> [18] If the proportion of [the appellant's] total costs which might have been classified as special damages were treated as such, the amount of party and party costs would be materially reduced. This would have a significant effect on the proportionality issue. In addition, of course, as special damages the costs in question would be recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution. The line between special damages on this footing and party and party costs will often be blurred at the margins, but the point is valid as a general proposition. We do not wish to encourage unduly precise apportionments in this area. Use of the special damages approach should be reserved for cases in which a proper line can be drawn, albeit only in broad terms.

[113] The first point is that *Binnie* concerned a common law claim for breach of contract, rather than a personal grievance. Further, the plaintiff had been suspended and subjected to investigation in relation to suggestions of professional misconduct which were found to have been completely unfounded. That is not the position in the present case. While there was a breach, in the sense that TFNZL could not lawfully suspend and dismiss, there were otherwise genuine concerns about Mr Hall's conduct which justified further inquiry and which warranted a response.

[114] I accept that there may be limited circumstances in which an employee can claim the legal expenses associated with an employment investigation. Such relief may, for example, be available where the employer has commenced a baseless investigation reasonably requiring the employee to engage the services of a lawyer. It is possible, although not argued in this case, that such costs may be recoverable as compensation under s 123(1)(c) (that head of relief being expressed in inclusive rather than exclusive terms).

[115] Damages for reputational loss were also claimed. I do not accept, based on the evidence before the Court, that Mr Hall has suffered any damage to reputation as a result of the defendant's breach of its obligations to him. It is clear that his departure was dealt with in a low-key manner and that Mr Hall was able to deal with queries from future prospective employers and clients in a way that minimised any fall-out.

[116] I record that a claim for general damages was not advanced at hearing.

Defendant's breach of contract claim

[117] The defendant filed a counter-claim against Mr Hall for losses it said were attributable to Mr Hall's default. Those alleged losses (amounting to $6,255.48) related to the expenditure in Thailand.

[118] Mr Erickson submitted that Mr Hall was bound by his job description and DPL's policies not to misuse the company's assets and to display high standards of integrity. He was also bound by a number of implied duties, including of fidelity and good faith. It was submitted that Mr Hall breached the terms of his employment agreement by using the company credit card to purchase amounts of alcohol in excess of his authorisation, and that he was unable to provide a satisfactory explanation, when asked, as to how the expenditure had been incurred.

[119] I do not accept that the defendant has adequately made out its claim. Mr Hall's evidence was that the expenditure had been approved by senior managers, consistently with (it seems) the culture that existed within DPL at the time in relation to such matters.

[120] The defendant's claim of breach of contract is dismissed.

Costs

[121] If the parties are unable to agree costs they may be the subject of an exchange of memoranda, with the plaintiff filing and serving any memoranda and supporting material within 30 days of the date of this judgment; the defendant filing and serving any memoranda within a further 20 days; and any memoranda strictly in reply within a further 10 days.

Christina Inglis
Judge

Judgment signed at 3 pm on 13 March 2015