IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 215
ARC 68/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND LANGUAGE CENTRES LIMITED (FORMERLY GEOS NEW ZEALAND LIMITED) Plaintiff
AND	DAVID PAGE Defendant

Hearing:	12-14 October 2011, adjourned part-heard Affidavits of defendant filed on 29 November and 16 December 2011 and 11 May 2012 Memoranda of counsel filed on 21 December 2011, 19 April and 8 August 2012 Affidavits for plaintiff filed 27 April and 17 May 2012 (Heard at Auckland)
Counsel:	Dean Kilpatrick and Alice Lysaght, counsel for plaintiff Garry Pollak, counsel for defendant
Judgment:	14 December 2012

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff company has challenged a determination[1] of the Employment Relations Authority (the Authority) which found that it had unjustifiably demoted the defendant, David Page, gave him an unjustified final warning, and then unjustifiably dismissed him, all of which actions were taken by the plaintiff without due process. The Authority found that the company had failed to comply with its statutory duty to provide Mr Page with wage and time records and to fulfil its undertakings to pay him holiday pay which it had acknowledged was due.

[1] AA 249/10, 25 May 2010.

[2] The Authority also rejected the plaintiff's counterclaim that Mr Page had breached his good faith obligations to it and its allegation that he had used the company's credit card for non-work related expenses.

[3] The Authority awarded Mr Page:

- compensation for lost remuneration of $55,000 gross;
- 5 percent superannuation of $2,750;
- the New Zealand dollar equivalent of Australian $5,000 for his Australian superannuation entitlements;
- a higher duties allowance of $8,076.92;
- New Zealand superannuation of $14,557;
- Australian superannuation of A$21,855.35;
- long service leave of $31,849.99;
- incentive bonuses totalling $14,556;
- holiday pay of $5,303.48;
- an underpayment of salary of $6,002 gross; and
- compensation for hurt and humiliation of $21,000.

[4] In a subsequent determination,[2] the plaintiff was ordered to pay Mr Page, as a contribution towards his fair and reasonable costs, $12,000 and the $70 filing fee.

Factual background

[5] The defendant was employed in 1999 by the plaintiff's associated company, GEOS Gold Coast Pty Ltd (GEOS Gold Coast), as the Principal/General Manager of its Language Centre. The GEOS Gold Coast School, as with the New Zealand schools, were part of the GEOS Corporation which was then owned by Mr Tsuneo Kusunoki.

[6] Mr Page reported to Ms Ikumi Miyamoto, a director of GEOS's International Division, and had a good working relationship with her. In late 2005 Ms Miyamoto suggested that Mr Page take up a new position in New Zealand as the Regional

[2] AA 249A/10, 24 September 2010.

Director of GEOS New Zealand (RDNZ). Ms Miyamoto arranged several one on one meetings between Messrs Page and Kusunoki. Mr Page was initially reluctant to move with his wife and family after six years in the Gold Coast position. He was assured by Ms Miyamoto that it would be a good move for him and for his professional growth and that there would be opportunities for further positions within GEOS International and, therefore, it would be a positive career move.

[7] Mr Page took up the position of RDNZ on 20 March 2006 and his job description included managing GEOS Auckland's Language Centre, as well as leading other GEOS schools in the region. His terms and conditions were set out in a letter dated 10 April 2006.

[8] At that time there were more than 500 GEOS schools world wide which were divided into four international regions:

- Oceania
- Europe
- North America
- Asia

[9] New Zealand fell within the Oceania region. The structure of that region during the time that Mr Page was employed was as follows:

CEO (Mr Kusunoki)
|
Executive Director (Ms Junko Nakamura)
|
International Director (Ms Ikumi Miyamoto)
|
Regional Director Oceania (Mr Gary Maserow)
|
Perth Adelaide Melbourne Sydney Gold Coast Cairns
Brisbane Cape Town New Zealand
|
Regional Director NZ (David Page)
|
Auckland Christchurch Wellington

[10] In theory, every principal of the GEOS Australia and New Zealand schools, as well as the RDNZ, reported to Mr Gary Maserow, the Regional Director Oceania,

although the decisions regarding financial and disciplinary matters were left to Ms Miyamoto as International Director.

[11] I find, from the evidence of Mr Page and his wife, Harsha Patel, that in practice Mr Page enjoyed a close working relationship with Ms Miyamoto, who was in effect his direct reporting line. They were in contact most days. Mr Maserow's evidence was not to the contrary. When Ms Miyamoto, or any other executive director was in town, Mr Page would organise a night of entertainment charged to the company.

[12] As the RDNZ, Mr Page was responsible for a full range of managerial tasks including planning, communications, and marketing and had a high degree of autonomy. The principals of each school were responsible for providing leadership, building morale, maintaining the reputation of their individual schools and achieving their school's financial targets.

[13] Soon after taking up his position as the RDNZ, Mr Page found that GEOS New Zealand was facing a number of problems that had arisen over the years before he had arrived. These included the need to reorganise or create organisational structures or systems to deal with accountability and responsibility for roles and outcomes, and also the need to address issues raised by the New Zealand Qualifications Authority (NZQA), which had been identified in successive audits since 2004.

[14] There were difficulties in arranging for Mr Page's pay for the first six months of his employment in New Zealand and there were considerable delays in reimbursing him for out-of-pocket expenses, which had been met by him on his personal credit card. The use of his personal card for company expenses, he stated in uncontradicted evidence, had been approved by Ms Miyamoto. There had been a problem in arranging a GEOS credit card, as it did not have sufficient credit in New Zealand and that is why Ms Miyamoto agreed Mr Page should use his personal credit card for company expenses.

[15] Mr Page also encountered financial and accounting issues which he claimed arose out of the work of the previous New Zealand Regional Finance Manager, who I will call "Mr A" as he did not give evidence but was subject to some stinging criticism. Mr A was based in Auckland and was responsible for the accounts and financial information of GEOS New Zealand. He was assisted by a financial assistant who, for similar reasons, I will call "Mr B". I find that following his appointment, Mr Page was told by Ms Miyamoto to leave financial and accounting issues to Messrs A and B.

[16] In February 2006 Mr A was appointed to the position of GEOS Oceania Regional Finance Manager, based in Brisbane and Mr B took over the responsibility for the GEOS accounts in New Zealand. Mr Page understood that Mr B would be supported from Brisbane by Mr A. After six months, the work proved was too much for Mr B.

[17] By June 2007 the accounts of GEOS New Zealand were still not able to be completed and there was no audit sign off. Mr Kusunoki, through Ms Miyamoto, expressed frustration with the lack of progress in completing this process and bringing the audited accounts up to date. Mr Page was then directed by Ms Miyamoto to fix the problems. He sought approval to appoint another accounts staff member. That was rejected by Ms Miyamoto, as was his proposal to instruct a firm of accountants to complete the historical matters and bring accounts up to date. Mr Page received some assistance from a firm of accountants, Inspired Business Solutions (Inspired), which had been previously recommended by the GEOS auditors (BKR Walker Wayland). Inspired, I find, had been appointed, with Mr A's approval, in 2004, two years before Mr Page's involvement in New Zealand. The auditors had also been appointed previous to Mr Page's engagement.

[18] In November 2007 Ms Miyamoto gave directions to Mr A to complete the outstanding matters. Mr Page alleged there were failures on the part of Mr A to bring entries up to date. Mr Page found that 12 months after completing the audit process for the financial year 2006/2007, the financial figures had been underestimated by approximately $500,000 by Mr A. It was not until November 2008 that GEOS New Zealand was able to report on accurate financial data.

[19] In July 2008, at a regional meeting in the Philippines, Ms Miyamoto gave the full responsibility for completing the 2007/2008 accounts for GEOS New Zealand to Mr Dave Ratnayake, who had became the Oceania Regional Finance Manager after Mr A's departure. In uncontested evidence, Mr Page said that Mr Ratnayake stated at that meeting that Inspired would continue to be responsible for putting the accounts together on behalf of Mr Ratnayake's office. I find that both Mr Kusunoki and Mr Ratnayake were aware of Inspired's continued involvement with the GEOS New Zealand accounts including giving advice to head office on their instructions. This is supported by reports provided by Inspired which were produced to the Court, at least two of which were directed to the attention of Mr Kusunoki. There were also occasions when senior financial advisors from GEOS head office, together with Mr Ratnayake, flew to New Zealand to have meetings with both Inspired and the auditors, Walker Wayland. I also find that up until the end of January 2009, Mr Page liaised with Ms Miyamoto and kept her and GEOS International head office informed of Inspired's work.

[20] There was no evidence that Mr Page had received any complaints about his personal responsibility for the costs incurred by Insight, the delays in updating GEOS New Zealand's accounts, the supplying of accurate financial information or complying with the audit requirements of NZQA, until the events that led to his dismissal.

[21] Indeed the evidence is to the contrary and demonstrates that Mr Page was still held in high regard by Ms Miyamoto and Mr Kusunoki in mid-2008. In July of that year, Mr Page was invited by Mr Kusunoki to a private function in Tokyo in appreciation of his efforts. Mr Page discussed with his wife that this might lead to opportunities for advancement within the organisation.

[22] In his evidence for the plaintiff, Mr Maserow claimed that he received a number of comments from staff about Mr Page's conduct and behaviour towards them which alleged that difficulties arose because Mr Page micro-managed them. He claims to have expressed his concerns to Ms Miyamoto and to the Executive Director, Ms Nakamura, on a number of occasions but that they seemed to accept Mr Page's conduct. Mr Maserow's evidence was that he did not address the issues

himself with Mr Page, as it was not his function to discipline managers. I find that none of these concerns were brought to the attention of Mr Page by anyone in the GEOS organisation until the events leading to Mr Page's dismissal.

[23] The evidence is clear that the first indication that higher management had any concerns about Mr Page arose at a conference of the GEOS Oceania Regional Management, in Thailand held on 17 November 2008. At this conference Mr Kusunoki publicly announced that Mr Maserow was now Managing Director of GEOS International and the GEOS New Zealand Managers were to report directly to him. Up until that point, Mr Page had been reporting directly to Ms Miyamoto.

[24] This announcement also appeared to have the effect of removing Mr Page from his position as RDNZ. At the time the defendant found that this was not entirely clear, as there had been no prior discussion with him or any explanation given as to the effect of the reorganisation on him. This demotion was later confirmed by his RDNZ allowance being stopped without any advice or notice.

[25] Mr Kusunoki also announced that Mr Page's position title was now to be GEOS Auckland Language Centre (ALC) Principal and that the other two GEOS Principals in New Zealand colleges were now to answer directly to Mr Maserow and not to Mr Page.

[26] Mr Page's evidence was that this was a humiliating way to be told of what was a demotion.

[27] I find (as did the Authority) that there had been no previous performance reviews, warnings, or discussions before Mr Page was publicly and humiliatingly demoted.

[28] On 19 December 2008 Mr Page raised by email a personal grievance in response to his treatment during the conference and the implications for his current position. He also requested payment of his unpaid bonus for the 2006/07 year, which he had previously sought. He received no response from anyone at GEOS to his email.

[29] In December 2008 Mr Page was invited to Bali to attend what was described as a "GEOS Millionaire's Club" meeting, at which he received an award.

[30] At the next regional management meeting, held on the Gold Coast, on 11 February 2009, Mr Page's evidence was that he was "subjected to further denunciation" by Mr Kusunoki when Mr Kusunoki announced that Sandra Wagener, of the GEOS Wellington school, would be transferring to Auckland and taking over the GEOS Auckland school role, which was then held by Mr Page.

[31] Again I find there had been no prior warnings or consultation, other than Mr Kusunoki's behaviour towards Mr Page at the prior conference in which Mr Kusunoki made it clear that Mr Page had fallen out of favour with him.

[32] After Mr Kusunoki's announcement that Ms Wagener was to take over the role as Auckland principal, Mr Maserow and Mr Page met together in a casual setting outside the formal meeting (the casual meeting). I find that Mr Page, while holding a glass of wine, told Mr Maserow, who was smoking a cigarette, that he was not prepared to go to Wellington. I find that Mr Page requested an opportunity to finally get Auckland into a profit making situation. Mr Maserow advised that he was prepared to give Mr Page that opportunity and indicated that his performance was going to be measured over the next five months. I also find that Mr Maserow requested that Mr Page present a plan on how he was going to achieve this. It was clear from Mr Kusunoki's behaviour at the formal meeting, and to both Mr Maserow and Mr Page during their casual meeting, that Mr Kusunoki was furious with Mr Page, but had agreed to give Mr Page the opportunity to fix matters.

[33] Mr Page received an email dated 17 February 2009 from Mr Maserow on his return to Auckland which stated:

> Dear David
>
> With regard to our meetings on the Gold Coast, we need to finalise the outcomes of our discussions.
>
> You have received three prior warnings that Auckland Language School needs to show a dramatic improvement in results, the first being in Thailand last year, the second being on the V-chat and the third on the Gold Coast.

> You did request an opportunity to finally get Auckland back into a profit making situation.
>
> I am prepared to give you this opportunity and your performance will be measured over the first five months of this calendar year, that is January – May 2009. Should the results of Auckland over this period not show the College back into a profit situation for the calendar year as at the end of May, your employment will regrettably be terminated as GEOS cannot allow the situation to continue.

[34] The V-chat, I was informed, was a video conference held in January 2009. It will be noted that the email made no reference to Mr Maserow's request at the casual meeting for Mr Page to present a plan.

[35] Mr Page considered it was not possible to turn around the financial position for GEOS Auckland in the time provided as there were a number of contributing factors that had resulted in the loss of student numbers for the 2007/08 year and therefore it was, in his view, a completely unreasonable expectation. Mr Page sought legal advice and an application was made to the Authority on his behalf which took issue with the final warning in the 17 February letter and also sought to address the non-payment of the bonus. The application was suspended by the Authority when the plaintiff indicated that it was prepared to attend mediation, which was also Mr Page's wish.

[36] Mr Page wrote to Mr Ratnayake and Mr Maserow on 2 March 2009, referring to Mr Ratnayake's recent visit to New Zealand, his report in February and making the suggestion of a capital injection of about $500,000, staggered over the next few months, to tide Auckland over until the next peak season from mid/late June 2009. He provided a cashflow forecast for the next six months as to how he had arrived at that figure.

[37] On 1 April 2009, Mr Maserow wrote to Mr Page inviting him to attend a disciplinary meeting on 8 April 2009 at 2 pm at the Heritage Hotel in Auckland. The letter (the disciplinary letter) stated:

> While, as you know, I had intended to review your performance against your undertaking to turn the performance of the Auckland Language Centre ("ALC") around by the end of May 2009, there are certain matters that have come to my attention now which when looked at together, give me cause to

> be concerned that the issues may be more serious than I had earlier anticipated.

[38] The letter then listed 12 matters on which Mr Maserow stated he would "like to hear your response".

[39] The 12th matter was an allegation that a number of Mr Page's colleagues had lost trust and confidence in him, and was supported by attached statements from those persons. The letter then stated:

> The company is concerned that the conduct … may constitute such gross underperformance and mismanagement so as to amount to serious misconduct. If I find that as a result of your alleged conduct the trust and confidence necessary to the employment relationship has been destroyed, you may be summarily dismissed.
>
> At the meeting … you will be given the opportunity to address the company's concerns and give an explanation. Full consideration will be given to any explanation you may provide before any decision about disciplinary action is reached.

[40] Ms Maserow's disciplinary letter went on to emphasise his view that the situation was extremely serious and, unless there was an acceptable explanation, disciplinary action, up to and including summary dismissal, was inevitable. Mr Page was encouraged to bring a support person or representative to the meeting and was allowed to take special leave away from work to prepare his response to the issues. He was directed not to discuss the matters with any other staff. He was told that if there were others who had information that could assist his explanation, he was to let Mr Maserow know before talking to them, and Mr Maserow would ensure that "the appropriate safeguards are in place for you to do that".

[41] Mr Page forwarded the disciplinary letter to Mr Richard Harrison, who was Mr Page's legal representative in the personal grievance claims already raised with the plaintiff and commenced in the Authority, which were awaiting mediation at this time. Mr Page requested Mr Harrison attend the meeting with him. Mr Harrison advised Mr Page that he was not able to attend the meeting on 8 April 2009 or any meetings with Mr Page, prior to the Easter break. Mr Harrison suggested that the matters raised in the disciplinary letter could be dealt with in the mediation. Mr Page agreed. Mr Harrison told Mr Page that he would liaise with GEOS's lawyers to

arrange an alternative date. In the meantime, it was agreed that Mr Page would set about preparing his responses to the matters raised in the disciplinary letter.

[42] The events that took place over the next six days are critical to the outcome of this case. My account is based largely on that given to the Court by Mr Harrison, whose evidence I accept in its entirety. No one from the plaintiff's former solicitors was called to contradict his evidence and, in light of the contemporary documents, that is not surprising. Mr Harrison's fair and reasonable responses in cross-examination confirmed my view that he was a witness of truth.

[43] Mr Harrison emailed the plaintiff's then solicitors on 2 April 2009 to advise that he had received the 1 April letter from Mr Page who wanted him to attend the meeting, scheduled for 8 April, as Mr Page's representative. He advised that this would not be possible before Easter. He proposed that, as the parties had indicated a willingness to attend mediation:

> I would appreciate if you would take instruction from your client as to whether we look at an early mediation date after Easter as it would appear that relations have deteriorated and mediation may be a more efficient use of our client's time.

[44] Mr Harrison did not receive a reply from the plaintiff's solicitors until 7 April 2009. This advised that, while the plaintiff was agreeable to attending mediation with Mr Page, their client was not available between 16 and 27 April 2009. With this in mind, they had liaised with the Mediation Service and had arranged a hold on the date 28 April 2009. The letter then stated:

> Given the seriousness of the matters canvassed in our client's letter to Mr Page dated 1 April 2009, our client is unable to delay the disciplinary meeting with him until after mediation has occurred. In this regard, our client requests Mr Page's attendance at a disciplinary meeting at the Heritage Hotel on 14 April 2009 at 2pm.
>
> The outcome of this meeting may, as our client noted in its letter of 1 April, be summary dismissal and accordingly, Mr Page is entitled to representation at it. Mr Page is welcome to provide whatever responses, explanations or other comments he may have in relation to the issues raised at that meeting and/or prior to it if he wishes.

[45] On 8 April the plaintiff sent another email to Mr Harrison at 6.27 pm discussing the mediation dates. The email advised that flights had been booked from

Perth to New Zealand in order to attend the 14 April meeting with Mr Page. The email concluded:

> Given the cost incurred, our client has instructed us that it will be proceeding with the meeting on this date and it directs Mr Page to attend. If Mr Page does not attend on this date, our client will make a decision on the matter based on the information that it has before it.

[46] Mr Harrison replied to that email by email on 9 April at 4.12 pm. He set out his schedule for the remainder of the month and stated that he would not have the opportunity to liaise with his client, particularly given the significant number of areas which the client now had to address in his response. He stated that the earliest he would be able to attend a meeting or a mediation was 7 May 2009 and gave alternative later dates when he would be available. He concluded:

> If your client proceeds ahead of my availability then it does so in breach of fair process.

[47] In 2009, 10-14 April was the Easter break, 10 April 2009 being Easter Friday. Mr Harrison had arranged a holiday over the Easter break and was intending to travel back to Auckland on Tuesday 14 April 2009.

[48] The plaintiff's then solicitors replied to Mr Harrison by an email sent at 5:45 pm on Thursday 9 April, stating that Mr Page had had ample time to prepare for the meeting and to arrange an alternative representative, and the meeting was going to go ahead on 14 April. Mr Page was directed to attend. The email also set out an additional new allegation against Mr Page of failing to follow lawful and reasonable instructions regarding credit card reconciliations.

[49] Mr Harrison did not view this email until after he returned from his Easter holiday having left the office before 5.45 pm on the Thursday evening, 9 April 2009.

[50] Mr Harrison had assumed that, if the plaintiff was intending to proceed with the meeting, the plaintiff's staff would liaise directly with Mr Page, as Mr Maserow was already doing. At the time of his leaving the office on 9 April, Mr Harrison had not personally been in contact with Mr Page or advised him of the email correspondence with the plaintiff's then solicitors.

[51] Mr Harrison later saw from his file that his secretary at the time had forwarded the plaintiff's solicitor's email of 7 April 2009, together with a letter from the Mediation Service, to Mr Page, but this had bounced back as undeliverable.

[52] The next communication Mr Harrison received from the plaintiff's then solicitors was a letter sent by email on 17 April 2009 advising of the plaintiff's decision and attaching a copy of the notice of termination that was sent to Mr Page the same day by Mr Maserow. This letter stated:

> Dear Richard
>
> **NOTICE OF EMPLOYER'S DECISION**
>
> 1. As you will be aware, on 1 April 2009, GEOS (New Zealand Limited ("GEOS") called your client, David Page, to a meeting to discuss serious concerns about his performance and conduct.
>
> 2. By email dated 2 April, you advised that you could not attend a meeting with Mr Page before Easter, but did not advise when you would be available. You suggested that the parties attend mediation.
>
> 3. GEOS was receptive to attending mediation. By letter dated 7 April (sent by email), we advised that a mediation was available on the morning of 28 April, and that this fixture had been placed on hold until 10.00am 8 April. We did not hear from you in time to secure that proposed fixture. The letter also advised that GEOS wished to proceed with its disciplinary meeting, and fixed a time for this meeting of 2pm 14 April 2009.
>
> 4. By email dated 8 April, we advised that Mr Maserow had booked flights from Perth in order that he could attend the meeting on 14 April. Mr Page was directed to attend this meeting and advised that, if he did not do so, GEOS would make a decision based on the information that it had before it.
>
> 5. By email dated 9 April, you advised that the earliest you could attend a meeting would be 7 May 2009, some five weeks after the letter inviting Mr Page to a meeting had been issued.
>
> 6. By email dated April 9, we reconfirmed on behalf of GEOS that the meeting scheduled for 14 April would proceed, and re-stated GEOS' direction that Mr Page attend. This email raised an additional allegation that Mr Page had failed to comply with an instruction that he provide tax invoices in support of his expenditure on the GEOS credit card. The email advised that GEOS would be seeking Mr Page's explanation in connection with that allegation at the 14 April meeting.

7. We are aware that Mr Page attended work on 14 April. However, Mr Page did not attend the 2pm meeting. GEOS has received no explanation for his failure to attend.

8. In these circumstances, and as advised in the email of 8 April, GEOS has now considered the information before it and reached a decision, as attached. Mr Maserow will be emailing this letter to Mr Page's work email address.

[53] Following the dismissal, Mr Maserow, through the plaintiff's solicitors, advised Mr Harrison that he was unable to attend a mediation until August of 2009. Mr Harrison later made an application to the Authority for a direction to mediation given this delay and a mediation date was finally arranged for 29 June.

[54] The following is Mr Page's account of the events leading up to his dismissal. After Mr Page was advised by Mr Harrison that he would seek alternative dates to 8 April, Mr Page continued to attend work and had responded to Mr Maserow's requests for information as well as attending to other day to day matters. He attended work on Tuesday 14 April, but was unaware that a meeting with Mr Maserow had been scheduled for that day or even that Mr Maserow was in New Zealand. He received no approach from Mr Maserow who, unbeknown to Mr Page, was in fact in Auckland at the Heritage Hotel. Mr Page left early that day in order to attend an appointment with a doctor who directed that he go home, signing him off on a medical certificate as "medically unfit for work" until 21 April 2009. Mr Page's wife advised the office the following day and forwarded the medical certificate, dated 14 April 2009.

[55] Mr Page returned to work on Monday 20 April 2009. At 10 am, he found an email, dated 17 April 2009, in his in-box stating that he had not attended the 14 April 2009 meeting as directed, in spite of being told that if he did not attend, a decision would be made based on the information the plaintiff had to hand at that time. The letter went on:

4. GEOS has now taken some time to consider the concerns based upon the material to hand. Having done so, it has formed the view that, on the balance of probabilities, you have:

    a. failed to provide monthly reports to the company on time;

b. failed to accurately report back to the company regarding the financial position of the ALC at the quarterly regional meetings. In particular, at quarterly meetings you provided the company with "prediction figures" showing that the ALC was due to make healthy profits. These figures are wrong and the ALC is expected to make little or no profit this financial year;

c. failed to see and report the severely negative financial situation of ALC (requiring a $500,000 cash injection);

d. entertained your family in Queensland at the company's expense, as alleged by [Mr A] in his statement;

e. incurred unnecessary travel and accommodation expenditure despite ALC's cash flow issues. In particular, you have incurred business class fares and expensive accommodation as alleged by [Mr A] and Sandra [Wagener] in their statements;

f. approved the extraordinary cost of approximately $600,000 for accounting service when other options (such as contracting an accountant) are likely to have been more cost effective for the company;

g. failed to use the BECAS system (that all other managers use) to produce accurate reports;

h. asked Justin Mastoyo to tell the company that the Christchurch Language Centre was forecasting bleak forward projections in order to make the ALC look more favourable in comparison, as alleged by Justin [Mastoyo] in his statement;

i. caused some employees to resign from their employment with the GEOS, as alleged by Andy Calder and Lana Coles in their statements;

j. acted unfairly and disrespectfully towards staff, as alleged [by] Andrew Foster, Justin Mastoyo, Sandra Wagener and Uri Carnet in their statements;

k. caused agents to refuse to deal with the company, as alleged by Natalie Johnston; Justin Mastoyo, Larissa Owen and Dana Motlova and Peter Millington in their statements;

l. caused a number of colleagues to lose trust and confidence in you (as alleged in the statements provided); and

m. failed to follow a lawful and reasonable instruction to provide copies of tax invoices for expenditure charged to the GEOS credit card.

[56] The letter stated that GEOS had formed the view that this conduct constituted gross under-performance and mismanagement so as to amount to serious misconduct and that it had lost trust and confidence in him as an employee. Mr Page was directed to treat the letter as notice of his dismissal from his employment with immediate effect. He was also asked to reimburse GEOS for some $83,726.66 for expenditure on his company credit card, and was advised that GEOS was undertaking a more comprehensive review of credit card expenditure and reserved the right to seek additional recompense if it identified other unsupported expenses.

[57] Mr Page contacted Mr Harrison after he had received the letter of termination on his return from sick leave. Mr Page told Mr Harrison that he had not been advised of the meeting on 14 April 2009 and was unaware of it. He instructed Mr Harrison to amend the statement of problem in the Authority to include an unjustified dismissal claim.

[58] Mr Maserow's evidence was that, given the seriousness of the matters set out in the disciplinary letter, he did not wish to delay the disciplinary meeting until after mediation. Following the series of communications between Mr Page's solicitor and the company's then solicitors, he proposed a new meeting date of 14 April "in order to fit in with Mr Harrison's availability" and booked his flights from Perth to New Zealand.

[59] Mr Maserow claimed that no response was immediately forthcoming from Mr Harrison in relation to the deadline for a proposed mediation date and that he instructed his solicitor to email Mr Harrison on 8 April 2009 advising that the meeting would be going ahead on 14 April 2009 and that if Mr Page did not attend, a decision would be made in his absence.

[60] When Mr Harrison subsequently advised by email on Thursday 9 April 2009 at 4.12 pm that he was unable to meet or attend mediation until 7 May 2009, Mr Maserow stated that he did not believe that it was reasonable for the meeting to be delayed for a further three weeks to accommodate Mr Harrison's availability. He instructed his solicitors to send an email to Mr Harrison to that effect, which they did

at 5.45 pm on Thursday 9 April 2009. In that email an additional allegation against Mr Page was made. Neither Mr Page nor his solicitor responded to this email.

[61] In his evidence Mr Maserow accepted that previously he had found Mr Page's company enjoyable and that they had good times together, but that on this occasion, given the nature of his visit, he did not think it was appropriate to catch up with Mr Page in a social capacity. On the morning of his arrival in Auckland on 14 April, he called the Japanese marketing manager for the Auckland school to arrange dinner with her for that evening. Mr Maserow claims that he understood that when she mentioned to Mr Page that she was seeing Mr Maserow that evening, Mr Page went home sick. The Japanese marketing managing was not called and Mr Page denied that any such conversation took place between them on 14 April 2009. I accept Mr Page's evidence.

[62] Mr Maserow's evidence was that the disciplinary meeting went ahead on 14 April at 2 pm in the Heritage Hotel and, despite Mr Page being present at work that day, he did not attend the meeting. Mr Maserow's evidence was that he understands that Mr Page has subsequently claimed he was unaware of the meeting but, given all the communications that had taken place between the solicitors in the two weeks preceding the meeting, Mr Maserow said he found it difficult to accept that Mr Page was unaware that the meeting was going ahead on that date. In Mr Maserow's view, Mr Page deliberately chose not to attend the meeting and was simply avoiding the situation.

[63] Because Mr Maserow had previously advised Mr Page that if he did not attend the meeting he would make a decision in his absence, and reiterating his belief that Mr Page had intentionally avoided the meeting, Mr Maserow claimed in his evidence that he considered all the information before him and made a decision that Mr Page's conduct constituted such gross underperformance and mismanagement as to amount to serious misconduct. He therefore summarily dismissed Mr Page by his letter sent by email of 17 April.

[64] In evidence Mr Maserow said he found it hard to believe that Mr Page did not receive the letter of dismissal until the following Monday. Mr Maserow then gave evidence of the detailed enquiries he allegedly made after the dismissal.

[65] In answer to questions in cross-examination by Mr Pollak for the defendant, Mr Maserow was referred to his frequent statements in his brief of evidence that he "understood" something. Mr Maserow accepted that these "understandings" were not based on personal observations, but what he had been told by others, and he accepted that there was never any direct discussion with Mr Page about the issues that led to Mr Page's dismissal.

[66] Mr Maserow also accepted that he did not know the terms of Mr Page's employment agreement because he was "not privy to that". He accepted that if he had discussed the issues with Mr Page prior to the dismissal he would have had a much more complete picture. He also admitted he was not aware that the plaintiff had not responded to Mr Page's raising of his personal grievance on 19 December 2008 or that the plaintiff had not filed a statement in reply to the statement of problem Mr Page had lodged with the Authority.

[67] Mr Maserow claimed that at the casual meeting on the Gold Coast in February 2009, he had given Mr Page the opportunity of turning around the situation and that this amounted to the third and final warning. He accepted that he was not involved with the giving of any previous warnings and that they were verbal warnings, one at the Thailand meeting in November and one at the V-chat and the third had been given by Mr Maserow himself at the casual meeting. He claimed that at that meeting he wanted Mr Page to send him a plan for turning matters around. He accepted however, that his email of 17 February 2009 does not state anything about Mr Page being required to present Mr Maserow with the plan.

[68] Mr Maserow also accepted that, although his 17 February 2009 letter gave Mr Page five months to turn things around, Mr Page was dismissed some six weeks later. He still claimed that Mr Page was given ample opportunity to turn things around. Mr Maserow then endeavoured to claim that new matters had arisen after

the casual February meeting, including Mr Page's request for a $500,000 cash injection.

[69] It was put to Mr Maserow by Mr Pollak that Mr Page had clearly disputed a number of the things that were allegedly done to him, including the demotion and the failure to pay the bonus and therefore it was likely he would challenge the matters that were set out in the disciplinary letter. Mr Maserow agreed that he was sure that Mr Page would have challenged these matters and would have hoped that he would have, and that that was the purpose of the 14 April meeting.

[70] Mr Maserow conceded that at the time he made the decision to dismiss Mr Page, he had not had any response from either Mr Harrison or Mr Page concerning the allegations, but continued to maintain that Mr Page had had the opportunity of attending the meeting and addressing them. He was then asked, given the explanation he had heard at the Authority investigation, why did he still maintain his belief that Mr Page had deliberately avoided the meeting. Mr Maserow relied on the correspondence and claimed he was certain that the meeting was going ahead.

Justification

[71] Mr Kilpatrick, counsel for the plaintiff, did not address the disadvantage grievances. He submitted that the plaintiff's actions leading to the dismissal were both procedurally and substantively justified in all the circumstances. There appeared to be no issue between the parties that the provisions of s 103A of the Employment Relations Act 2000 (the Act) as they were at the time of the dismissal, are to be applied in this case. Section 103A then provided:[3]

> **103A Test of justification**
>
> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer *would* have done in all the circumstances at the time the dismissal or action occurred.

[3] Emphasis added.

[72] Mr Kilpatrick submitted that the context to Mr Page's employment was crucial to this case, as he was not a front line employee who needed to undergo prolonged performance management processes, but was a senior manager, (a regional director) who was paid substantially and was familiar with the business, having worked for GEOS since 1999.

Management style

[73] Mr Kilpatrick first addressed Mr Page's "management style", which he described as negative and which did not fit with the defendant's obligations under his job description.

[74] Mr Kilpatrick relied on the evidence of Sandra Wagener, the Principal of the plaintiff's language school at Wellington who had described Mr Page's management style as pedantic, although she conceded that he had praised her for the cost effectiveness of the Wellington school. She confirmed that she had been asked by Mr Maserow to prepare a statement regarding her working relationship with Mr Page. She stated that Mr Page had seemed very helpful and supportive of her when he first started in New Zealand. She then said she was ordered to do demeaning jobs such as carry water and prepare the agenda and minutes at meetings, which she found humiliating. She said that she began to believe that Mr Page had begun to control her and "kept me on a close leash and my own staff eventually began pointing out that I was the principal of the school and didn't need his permission for everything".

[75] Ms Wagener claimed to have become intimidated around Mr Page and anxious at the prospect of being in his company. She claimed that things had improved since his dismissal. She gave other evidence in relation to credit card expenses but this was not being relied upon by Mr Kilpatrick to support his contention that the defendant had a negative management style.

[76] Mr Kilpatrick also stressed that the fact that Ms Wagener was not cross-examined meant her evidence was uncontested. This, he submitted, gave credence to the complaints relied on by Mr Maserow.

[77] Mr Kilpatrick, however, accepted that no one would normally be dismissed summarily for a negative management style and that usually there would be a performance management process providing guidance and the manager would be advised that his performance and management style impacted upon the employment relationship. He accepted none of that was done and that the first Mr Page knew of Ms Wagener's concerns was when he received the 1 April disciplinary letter annexing a copy of the statement she had been asked to provide to Mr Maserow.

[78] Mr Kilpatrick also conceded that the issues of management style, and the other matters extracted by Mr Maserow from other employees, some of which went back as far as 2003 when he was a principal of the Gold Coast School, were never the subject of any performance reviews or ever mentioned or put to Mr Page prior to the disciplinary letter. Further, even in those unflattering statements about his managerial style, there are positive statements about his professionalism and his ability with systems which may have enabled those relationships to have been repaired.

[79] Mr Kilpatrick accepted that at the casual meeting between Messrs Page and Maserow, on 11 February 2009, there were discussions about what had to be fixed, but he accepted that complaints such as those in the statements that were attached to the disciplinary letter were not issues that were previously raised.

[80] I find that the 1 April letter was not setting up a performance review: it was a disciplinary letter. In terms of s 4(1A) of the Act, the parties were required to be active and constructive, responsive and communicative. If any of these performance matters were of such concern to managers they should have been brought to Mr Page's attention in a way that he could have responded to them and they should not have been raised for the first time in the context of a disciplinary process, with the express threat of dismissal.

[81] Mr Kilpatrick accepted that the failure to communicate the performance concerns in a timely fashion was a huge hurdle for the plaintiff to overcome. The evidence given by Ms Wagener, whilst not contested by way of cross-examination, was not accepted by Mr Page. Even assuming (as I do) that it correctly records her

attitude to his management these matters cannot, in the absence of having been addressed in a proper performance review setting or at least previously brought to Mr Page's attention so that he had the opportunity of remedying them, provide any substantive justification for his dismissal.

[82] In these circumstances, even ignoring the events surrounding the 14 April meeting, it was difficult to accept Mr Kilpatrick's submission that the dismissal was procedurally or substantively justified. Mr Page was clearly never given the opportunity to address the performance concerns, relied on by Mr Maserow, some of which were historical and subsequent to which he had received his promotion to the RDNZ position.

[83] In terms of s 103A, I find that the defendant has failed to discharge the burden of showing that a fair and reasonable employer would have concluded that Mr Page's management style could justify the conclusion that it amounted to or contributed to gross underperformance and mismanagement and that Mr Page had acted unfairly and disrespectfully towards staff, as found in grounds 4.i., 4.j. and 4.l. of Mr Maserow's 17 April dismissal letter[4].

Credit card use

[84] The next issue Mr Kilpatrick addressed was the defendant's credit card use. Mr Kilpatrick submitted that the evidence of the plaintiff's witnesses, Messrs Maserow, Mastoyo, Binnie and Ms Wagener, showed that it was well known that company credit cards were to be used in accordance with basic and accepted practices. Their evidence claimed that credit cards were to be used only for the plaintiff company's business and I did not understand Mr Page to disagree with this. Indeed it was the basis of his defence that all of the expenditures he incurred (for which he sought reimbursement when he was required to use his own credit cards because the plaintiff company did not have sufficient credit to provide a company credit card) were business related expenses for which he had provided to the plaintiff tax invoices which supported them.

[4] As set out in [55] above.

[85] Mr Kilpatrick also submitted that while Mr Page claimed there was a hospitality culture, this was not supported by the evidence of Messrs Binnie and Maserow and Ms Wagener and whilst each accepted that there would be some requirement on the part of a manager or principal to entertain, this was not to the extent claimed by the defendant.

[86] The difficulty with these submissions is that Mr Page, from the outset, explained that his entertainment arrangements were approved by Ms Miyamoto, and were consistent with his role as RDNZ. The evidence of Mr Binnie and Ms Wagener, both principals of colleges, but not Regional Directors, does not assist on this aspect. Mr Maserow was not directly involved at the time that Ms Miyamoto was supervising Mr Page.

[87] The matters relating to the credit card appear to be covered in the findings in the 17 April letter in paragraph 4.d. where it is contended that Mr Page entertained his family in Queensland, paragraph 4.e. where he allegedly incurred unnecessary travel and accommodation expenses, including business class fares, and expensive accommodation, and the final allegation, added on 9 April, 4.m., that he failed to follow a lawful and reasonable instruction to provide copies of tax invoices for expenditure charged to the GEOS credit card.

[88] In respect of the last allegation, Mr Page has contended throughout that he did provide that material directly to Mr Ratnayake in Brisbane as required and there has been no evidence to gainsay that from the plaintiff.

[89] Mr Page also claimed that, his manager, Ms Miyamoto, accepted the way that he had conducted himself and there was no evidence of any complaint being made to him that he was using the wrong credit card procedures. These allegations cannot, therefore, amount to grave misconduct unless his attention was drawn to those procedures and he then ignored them, in which case it would become disobedience of reasonable instructions and therefore misconduct. There was certainly nothing in the terms of his engagement which would have supported the plaintiff's findings.

[90] The other difficulty is that the allegation that Mr Page failed to follow a reasonable and lawful instruction to provide the copies of the tax invoices was raised for the first time at 5.45 pm on the Thursday immediately prior to the Easter weekend and there is incontestable evidence from Mr Harrison that he had already gone on holiday at that time. This meant that this ground for dismissal was raised after work hours on the night before the holiday weekend. Mr Maserow's evidence was that it was entirely reasonable for Mr Page to be able to respond to that allegation over the Easter weekend. I find that a fair and reasonable employer would not consider such a serious complaint, that gave rise to another ground for summary dismissal, could be relied upon when it had never previously been raised and insufficient time to respond to it was provided.

[91] Mr Kilpatrick's submissions were not assisted because, when he chose to cross-examine Mr Page on the alleged unauthorised credit card use, Mr Page gave a reasonable explanation to both of the matters Mr Kilpatrick raised, which was consistent with them being proper charges to be met by the plaintiff. In one respect, there was a tour group and on the other, it was a claim for work related expenses while Mr Page was working over a holiday period and was being paid for that work. The plaintiff had initially taken the view that because it was a holiday period, those expenses could not have been legitimately incurred on behalf of the plaintiff. The defendant's explanation, supported as it was by the work payment he received during that period, gave a complete answer.

[92] The plaintiff's allegations were also undermined because its operations in Australia went into receivership and there has been considerable difficulty in recovering records, including those Mr Page asserted he had sent, on the directions of Mr Maserow to Mr Ratnayake in Brisbane. Mr Ratnayake was not called to give evidence about the defendant's explanation.

[93] Again I find that the plaintiff has failed to discharge the burden of showing that a fair and reasonable employer would have concluded that there was substantive justification for those three findings against the defendant.

[94] Mr Kilpatrick returned to the matter of the credit card expenditure in support of a claim for some $40,000 from Mr Page. I will deal with the matter again under that head.

Financial Issues

[95] Mr Kilpatrick then dealt with the financial issues and referred to the historical financial issues which had affected the Auckland school since the time of Mr Page's employment, including:

a) the time Mr Page spent dealing with them;

b) the costs that were spent on Inspired;

c) Mr Page's alleged inability to produce accurate monthly reports because of these issues.

[96] Mr Kilpatrick submitted that these issues, amongst various others, were relevant to Mr Maserow's decision to dismiss Mr Page and that may be so. These matters indeed appear to be the first matters that had led to the conclusion that there was serious misconduct because they appear as items 4.a. and 4.b. as well as 4.f. in the dismissal letter.

[97] Mr Kilpatrick submitted that in terms of the 10 April 2006 letter, which set out the duties of Mr Page's RDNZ role, Mr Page was required:

> To enhance the profitability of GEOS New Zealand through:
>
> - Monitoring and improving all areas of the GEOS New Zealand organisation and procedures so all areas of finance and expenditure are run effectively and accurately.

[98] Mr Page took no issue with this. Mr Kilpatrick accepted that Mr Page's first and primary responsibility was to deal with the difficulties that had arisen in the past over financial matters and also to comply with the NZQA requirements as a result of the previous yearly audits.

[99] The plaintiff's own witness, Nelson Almazar, a certified public accountant who was still employed by the plaintiff at the time of the Court hearing, was engaged

first as a temporary employee in October 2006, by Mr Page, and then later as a permanent employee in January 2007. His evidence corroborated that of Mr Page as to the most unsatisfactory state of the financial affairs of GEOS New Zealand. He confirmed that it was not until after Mr Page's dismissal and in late 2009, that, with the assistance of the outside accountants Insight, and the auditors, Walker Wayland, and considerable work on Mr Almazar's part, that the financial accounts of 2004 to 2007 were finally finished. Mr Almazar also confirmed Mr Page's account that the auditors recommended the appointment of Insight. Further, Insight continued to be used by the plaintiff after Mr Page's dismissal.

[100] Mr Almazar's evidence, which I accept, was that he came up with the idea of using Excel spreadsheets instead of the BECAS system, which was the description of the management system GEOS used to monitor students' accounts. It was not an accounting package but, according to Mr Almazar's evidence, it could produce a revenue report. It was apparently used by GEOS schools in Australia at the time.

[101] Mr Page was not an accountant but he accepted Mr Almazar's advice to use the Excel spreadsheets instead of the BECAS system. This became one of the grounds, paragraph 4.g, for his dismissal. It was alleged that he had failed to use the BECAS system (that all other manager's used) to produce accurate reports. It is difficult to see why this should have been a ground for disciplinary action against Mr Page when he was simply accepting Mr Almazar's expert advice and Mr Almazar remained in the plaintiff's employment.

[102] I also accept Mr Almazar's evidence that he produced the forward projections or "prediction figures" for which Mr Page was found by the plaintiff in ground 4.b. to have provided and which were wrong and apparently misleading. Again, it is difficult to see how Mr Page's reliance upon the plaintiff's own in house accountant can constitute serious misconduct on Mr Page's part.

[103] The same comments apply to ground 4.f. for his dismissal which was approving the extraordinary cost of approximately $600,000 for accounting services, when other options, (such as contracting an accountant) were likely to have been more cost effective for the company. The evidence of Mr Almazar again supports

that of Mr Page. The auditors, who had previously been appointed by the plaintiff before Mr Page came on the scene, had recommended the employment of Inspired, and the work of that latter firm was continued after the defendant's dismissal. I find that, in all the circumstances I have outlined, no fair and reasonable employer would have found Mr Page responsible for the accounting costs he did not incur and which others had arranged.

[104] In the circumstances, and in summary on the financial issues, I find that no fair and reasonable employer would have held Mr Page responsible for the failure to provide accurate monthly or regional reports on time (paragraphs 4.a., 4.b. and 4.c.). This was never specifically required of him by Ms Miyamoto. Or in failing to see and report on the "severely negative financial situation" (paragraph 4.c.) when that was the initial and primary duty of the financial managers and their staff, the accountants and the auditors on whom Mr Page relied. For these reasons, I reject Mr Kilpatrick's submissions that the financial issues provided any substantive grounds at all for a summary dismissal, or that Mr Page was given ample opportunity to respond to those allegations. He was not.

Complaints

[105] Turning back, as Mr Kilpatrick did, to the matter of the complaints of other staff referred to in paragraphs 4.i., 4.j., 4.k. and 4.l. and also contained in the twelve statements provided to Mr Page with the disciplinary letter, Mr Kilpatrick submitted that these were another component of the plaintiff's decision to dismiss Mr Page. He also relied on the evidence from the complainants called by the plaintiff during the hearing to support the justification of Mr Page's summary dismissal.

[106] I have already referred to the fundamental problem of the plaintiff relying on such complaints of performance and management style to justify the dismissal without first having given Mr Page the opportunity to respond to the complaints and to address both his performance and any concerns about his management style. I find therefore that they cannot now be relied on in terms of s 103A of the Act to justify the dismissal.

[107] Although not expressly relied on by Mr Kilpatrick in his submissions on justification, similar comments apply to allegation 4.h. where it is alleged Mr Page asked Mr Mastoyo to forecast bleak forward objections for the Christchurch Language Centre and allegation 4.k. that Mr Page caused agents to refuse to deal with the company. These allegations were not previously put to Mr Page. I also have difficulty in accepting Mr Mastoyo's evidence which made serious allegations against Mr Page, because these matters were never raised at the time by Mr Mastoyo who exhibited a clear bias against Mr Page in the evidence he gave. Where there is a conflict between Mr Mastoyo and Mr Page, I prefer the evidence of Mr Page.

Conclusion on justification

[108] I accept Mr Kilpatrick's submission that a senior employee can be dismissed in instances where poor performance impacts upon the trust and confidence of the employer to the degree that the employer can no longer rely on the senior employee. I accept the law and cases that he cited in support.[5] I also accept his submission that an employer will not be held to "minute" or "pedantic" scrutiny on the process that has been followed, but rather that the Court should have regard to fairness.[6] This, however, was a case where an employee was summarily dismissed without any enquiry, or the procedural fairness expected of a fair and reasonable employer and where the majority of the issues relied on were in relation to performance matters which, had Mr Page been advised of the plaintiff's concerns, he may well have been able to remedy in a timely manner. With regard to the other matters relied on, he had a complete explanation which he was not given the proper opportunity to present.

[109] I have considerable reservations as to whether Mr Maserow honestly believed that the allegations contained in his 1 April letter had been made out. Mr Maserow's responses to questioning during the course of the hearing indicated that his underlying justification for the dismissal was his belief that Mr Page had intentionally avoided attending the 14 April meeting. Mr Maserow could not be shaken from that alleged belief notwithstanding the correspondence between the solicitors, Mr Page's evidence and the finding of the Authority.

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[5] *Carlton and United Breweries (NZ) Pty Ltd v Bourke* [1994] 2 ERNZ 1; *Centre for Advanced Medicine Ltd v Sprott*, AC 20/05, 10 May 2005.
[6] *Air New Zealand v Sutherland* [1993] 2 ERNZ 10 at 18.

[110] I consider it more likely than not that Mr Maserow was looking for a reason for dismissing Mr Page and this is why he solicited the statements from Mr Page's colleagues, which are referred to in the disciplinary letter. Mr Maserow admitted in evidence that he was directed by Mr Kusunoki at the Gold Coast meeting to dismiss Mr Page.

[111] Mr Maserow attempted to minimise Mr Kusunoki's previous demotion of Mr Page as nothing but Mr Kusunoki's "rantings" which should have been taken by Mr Page as merely "water off a duck's back". However by February 2009, Mr Maserow was taking Mr Kusunoki's statements about wanting to get rid of Mr Page as serious comments which he could not put to one side in the hope that they would go away. He claimed at this point in time that Mr Kusunoki was furious and that he was caught in the middle of how to deal with the situation. He claimed that he persuaded Mr Kusunoki not to take any steps to dismiss Mr Page, because he had persuaded Mr Page to provide a plan to turn around the financial position of GEOS New Zealand. He claimed that this had appeased Mr Kusunoki.

[112] Mr Maserow then stated that he had become really annoyed at not receiving such a plan from Mr Page after Mr Page returned to New Zealand following the casual meeting. He was unable, however, to explain why he did not refer to this in his letter of 17 February, in which he gave Mr Page five months to turn things around. That letter also contained the first direct threat of dismissal. It was clearly a serious letter following the casual meeting at which Mr Maserow, I am prepared to accept, asked Mr Page to provide a plan.

[113] If the plan was so central to Mr Maserow's alleged intention to appease Mr Kusunoki, it is inconceivable that Mr Maserow would not have referred to it in his letter of 17 February, written so soon after these events.

[114] As to why Mr Maserow did not allow Mr Page the five months' grace period set out in his letter of 17 February, Mr Maserow said it was because matters had become critical. I do not accept that evidence.

[115] Mr Maserow accepted that at the February meeting it became clear that GEOS New Zealand was facing a loss in excess of $900,000. It appears that Mr Page's initial response was to write on 2 March 2009 to Mr Ratnayake, copying the email to Mr Maserow, seeking the cash injection of up to $500,000, staggered over the next few months. That, I find, was clearly in the context of the financial loss which had become clear at the February meeting.

[116] I find there was nothing in that letter which would have led Mr Maserow to find that the situation had become so critical from Mr Maserow's point of view that he was forced to cut short the five months' grace period and write his letter of 1 April.

[117] There was nothing revealed in the 2 March email that had not been made clear in the February meeting. Mr Maserow could not provide an adequate explanation as to why he had waited until 1 April from 2 March to write his letter, if he was so concerned about the lack of a plan.

[118] It also did not explain why it was necessary for Mr Maserow to proceed with the 14 April meeting in the clear knowledge, from the communications Mr Harrison had sent to the company's solicitors, that Mr Harrison would not be available at that meeting, and that to proceed without him would lead to the argument that there had been a breach of fair process. Mr Maserow was aware by his own admission, that Mr Page was at the Auckland premises of GEOS at 2 pm on 14 April when Mr Maserow was in the Heritage Hotel for the meeting. Notwithstanding this, he did not cause any communication to be made with Mr Page to remind him of the necessity to attend that meeting.

[119] Instead, Mr Maserow proceeded on the basis that all of the allegations were proven and made the decision to dismiss Mr Page summarily. I find there was no basis at all upon which Mr Maserow could reasonably assume that Mr Page knew of the meeting and was deliberately not attending it. At that time Mr Page had taken personal grievances over each of the allegations of demotion warnings and the lack of bonuses, had filed a statement of problem in the Authority, was seeking mediation and was contesting the steps taken by GEOS against him. It is inconceivable that he

would not have also challenged the matters being raised for the very first time in the 1 April letter and the communications Mr Harrison had with the plaintiff's solicitors made that plain.

[120] Perhaps even more remarkable is that Mr Maserow continued to assert that the new allegation added at 5.45 pm on the Thursday before the Easter vacation, could have been responded to by Mr Page over the course of the Easter weekend, so that the extensive documentation to support the credit card claims could have been made available to Mr Maserow by 2 pm on Tuesday 14 April.

[121] These were not the actions of a fair and reasonable employer. They were the actions of a senior manager under pressure from the owner of the business to dismiss a senior employee, after a show of due process.

[122] For all these reasons, I find that the allegations were not substantively justifiable and there was a major breach of procedural fairness.

[123] Although the disadvantage grievances were not specifically addressed in submissions, I understand they were still being claimed by the defendant. The employer's actions in disadvantaging and dismissing the defendant were not the actions that a fair and reasonable employer would have taken in all the circumstances and at the time of the summary dismissal and the earlier demotion and alleged warnings. The plaintiff's challenge against the Authority's findings of an unjustifiable dismissal and unjustifiable disadvantages, with which I entirely agree, is therefore dismissed.

Contributory conduct

[124] As an alternative to his submissions that the allegations made in the 1 April letter provided substantive justification for the dismissal, Mr Kilpatrick argued that they also provided grounds for finding contributory conduct on the part of Mr Page. In terms of s 124 of the Act, where the Authority or the Court determines that an employee has a personal grievance, they must, in deciding both the nature and extent of the remedies to be provided, consider the extent to which the actions of the

employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[125] I found that there were no substantive grounds to support the dismissal. For those reasons, I also conclude there are no grounds for a finding of contributory conduct against Mr Page. Each of the allegations made has either been adequately explained, as I have indicated earlier, or, because they were never put, and related to matters of performance and management style, deprived Mr Page of the opportunity of modifying his conduct in a timely fashion, or of complying with clear directions on financial matters.

Credit card expenditure

[126] Mr Kilpatrick submitted that the evidence provided by the plaintiff demonstrated that the defendant had used the company credit card for personal and/or unauthorised expenditure and that there was in excess of $40,000 of unexplained and unaccountable expenditure. He stated that while the plaintiff sought to recover the full amount, he submitted that, even conservatively, between $25,000 to $30,000 of this amount related to Mr Page's personal expenses which the plaintiff was entitled to recover.

[127] In the Authority, the plaintiff had counter-claimed against Mr Page, initially for in excess of $80,000, on what it stated was an estimate of the significant losses it sustained as a result of Mr Page's misuse of the credit cards. It then sought for the figure to be set at a conservative 25 percent of the total expenditure unable to be justified on the documentation allegedly provided by Mr Page to the company and this amounted to $52,847.30 over the period in question.[7]

[128] The Authority did not accept the plaintiff's counter-claim for the following reasons:

a) It preferred Mr Page's evidence of relevant events;

[7] AA 249/10, 25 May 2010 at [82].

b) no evidence was produced challenging Mr Page's claim that his credit card use and the expenses he incurred were known to Ms Miyamoto, and condoned by her;

c) no evidence was produced challenging Mr Page's claim that he sent relevant tax invoices to Brisbane;

d) that the credibility of the company's witnesses was undermined by its gross conduct towards Mr Page in unilaterally demoting him, issuing a final warning without due process and ultimately dismissing him also as a result of the absence of due process;

e) the plaintiff's failure to comply with its statutory duty to keep and provide wage and time records in respect of Mr Page, and to fulfil its undertaking to pay him holiday pay acknowledged to be due.

[129] The first three reasons are equally applicable in this challenge. As I have found, when dealing with the issue of the credit card use as a ground for the dismissal, the only two matters put to Mr Page in cross-examination about unauthorised usage of the credit card, were satisfactorily answered. They clearly supported Mr Page's claim throughout that all the expenditure was for the plaintiff's purposes and in accordance with the instructions he had received from Ms Miyamoto. I also accept Mr Page's evidence that he has sent the credit card vouchers and the supporting tax invoices to Mr Ratnayake in Brisbane.

[130] For these reasons I too, reject the plaintiff's claim to recover unauthorised expenditure on credit cards.

Remedies

[131] At the conclusion of the hearing on 14 October 2011, it was agreed by counsel that the issue of remedies would be left to one side because of the unsatisfactory state of the plaintiff's records following a receivership in Australia. Counsel would then endeavour over the ensuing three months to agree on remedies

and if they could not, then they would produce further evidence by way of affidavits initially, and supplementary submissions. I therefore adjourned the matter part-heard.

[132] On 29 November 2011 the defendant filed what was described as his "first supplementary evidence", which consisted of an affidavit annexing a 17 page document as Exhibit 1 and, as Exhibit 2, what he described as "a large bundle of documents which I have photocopied or printed which coincides with each chronological item". This totalled exactly 500 pages.

[133] Mr Page deposed that he was available to answer any questions, if any arose, as to any of these matters by video conference, telephone or email, the affidavit having been sworn in Brisbane, Australia.

[134] On 16 December 2011 Mr Page filed what was described as the defendant's "second supplementary affidavit". He deposed that he appreciated that aspects of his evidence about salary, accrued leave, superannuation entitlements and bonuses were complicated, due in part to the terms of his employment incorporating both Australian and New Zealand contractual provisions. He deposed that part of the confusion which he claimed resulted in the Authority partly determining his employment conditions incorrectly, was because the plaintiff did not provide accurate pay and leave entitlement documents despite being requested to do so on a number of occasions. He set out seven pages outlining the differences between the awards of the Authority and what Mr Page claimed he should have been correctly paid. He then provided further material, including comments on the various emails received concerning his bonus.

[135] On 21 December 2011, counsel for the plaintiff filed a memorandum in which he advised that counsel had consulted in regard to the materials provided by the defendant on 7 October 2011 and the subsequent affidavits with attachments filed on the defendant's behalf on 29 November and 16 December 2011. Counsel observed that the total number of pages to view was approximately 860 and that a reasonable amount of the documents related to financial claims and would require assessment by the plaintiff using both in house, and potentially external accounting

advisors. Counsel advised that the plaintiff had to accommodate the Christmas break, its business commitments in Thailand and Taiwan and the fit out of its Auckland premises in March 2012. The plaintiff therefore required a reasonable amount of time to review the documents and arrange for a suitable method of questioning the defendant on any matters that arose and therefore requested the Court provide the plaintiff until 2 April 2012 to conduct its review. Counsel also agreed that if the need for questioning arose, they would agree on the best practical method of dealing with this. I approved this timetable.

[136] A joint memorandum of counsel was filed on 19 April 2012 advising that the plaintiff had completed its review of the further evidence and also sought additional documentation from the defendant. Counsel for both parties agreed that the plaintiff had no questions of the defendant in respect of the supplementary evidence he had provided to the Court. They agreed that the plaintiff would give evidence of its review of that material, and other relevant matters, by affidavits to be filed by 27 April 2012, and any further responses by the defendant would be provided by affidavit. They also agreed that any questioning in respect of the evidence of the parties would be addressed and responded to by further affidavit and, for ease of reference, all the additional documents referred to by the parties and not already provided to the Court, would be compiled into a further joint bundle, which would be filed with the plaintiff's affidavit. Counsel for both parties noted that if any questioning was required, it was likely to be limited, given a large part of the evidence provided by the parties was an explanation of the documentation provided. By a minute of 23 April 2012, I recorded that the agreed directions in the joint memorandum were acceptable to the Court and reserved leave to apply for further directions.

[137] On 27 April 2012 a further joint bundle of documents was filed, running to 39 pages together with affidavits of Mr Mastoyo and Miles MacGregor Stewart, both sworn on 27 April. Mr Page responded by an affidavit filed on 11 May 2012 and Mr MacGregor Stewart replied by an affidavit sworn on 17 May 2012.

[138] Counsel then advised the Court by way of email correspondence, that the evidence was finally concluded and could be referred to me for judgment.

[139] When I commenced work on the judgment, I viewed all this material and the plaintiff's affidavits from Mr Mastoyo and Mr MacGregor Stewart made detailed attacks on the defendant's supplementary evidence including various statements which went to the defendant's credibility. In turn, the defendant's affidavit of 10 May, attacked the two affidavits of the plaintiff and asserted that they were wrong in material respects. This included an attack on Mr MacGregor Stewart's qualifications for expressing an opinion on the quality of the defendant's application. Mr MacGregor Stewart in turn purported to answer that in his subsequent affidavit.

[140] Counsel having communicated with the registry and advising that the matter could be referred for judgment, presumably did not seek the opportunity to question the deponents on their affidavits although this was never expressly stated. Because of the conflicts of evidence I deduced from those affidavits I was left in the position of being unable to resolve questions of credibility and the accuracy of the various allegations. I therefore required counsel[8] to provide supplementary submissions dealing with these matters and indicating how the various conflicts in the evidence and in the submissions contained in the affidavits should be resolved. I also allowed counsel to consider a timetable for those submissions and whether they ought to be the subject, once they had been reduced to writing, of a further oral hearing to enable the Court to address questions of counsel. Mr Kilpatrick had advised by that stage that he would be on leave until 30 July 2012 and I suggested that the resolution of the matters in my minute be postponed until after his return.

[141] Counsel for the plaintiff and the defendant filed a joint memorandum on 8 August confirming that neither the plaintiff nor the defendant had any further questions for the witnesses in respect of the affidavits filed by Mr Page, Mr Mastoyo and Mr MacGregor Stewart. In regard to further submissions, they advised that counsel were unclear as to how they could assist the Court in respect of the conflicts of evidence, whilst acknowledging that there were differences in the evidence of Mr Page against the evidence of Messrs Mastoyo and MacGregor Stewart. They advised that Mr Page's affidavits provided an analysis of his claimed remuneration entitlements, including arrears claimed and details of his claimed attempts to secure new employment. They advised that Mr Mastoyo's affidavit of 27 April 2012

[8] In a minute of 19 July 2012.

provided "a counter-analysis to Mr Page's analysis of his remuneration entitlements confirming what the plaintiff believes Mr Page's entitlements are". They advised that Mr MacGregor Stewart's first affidavit challenged Mr Page's attempts to obtain secure employment based on Mr MacGregor Stewart's experience as an employer, as he outlined in his second affidavit of 17 May. In each instance, counsel noted that there is documentary evidence which has been provided, reviewed and analysed by the witnesses.

[142] Both counsel acknowledged that the evidence of Mr Page, in essence, disagrees with the evidence of Messrs Mastoyo and MacGregor Stewart. Counsel indicated that they understood that the Court would need to assess the evidence of the witnesses to determine what evidence is to be preferred and which analysis is preferred against the documentation. Counsel stated that they were unclear how they may assist the Court further, although if I had any specific questions, they would be prepared to attend a telephone conference at the Court's convenience.

[143] I took the view, following that exchange, that counsel were not in a position to assist me any further in this matter at that stage and that I would need to issue this judgment dealing with the challenge and the allegation of contributory conduct and the plaintiff's claim for reimbursement of credit card expenses.

[144] To obtain the benefit of counsel's submissions on remedies, which I have not yet received, I direct the resumption of the hearing to address these. Counsels' submissions will need to address the precise figures sought and rejected, and the relevant evidence, the decisions of the Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang*,[9] and Mr MacGregor Stewart's expertise.[10] A telephone directions conference will be convened to set a timetable for the conclusion of the hearing.

B S Travis
Judge

Judgment signed at 12.15pm on 14 December 2012

[9] [2011] NZCA 608.
[10] See *Maritime Union of New Zealand v TLNZ Ltd* [2007] ERNZ 593 and *Hayllar v The Goodtime Food Company Ltd* [2012] NZEmpC 153.