IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 179
ARC 91/10

IN THE MATTER OF	proceedings removed by special leave
BETWEEN	LAURA JANE GEORGE Plaintiff
AND	AUCKLAND COUNCIL Defendant

ARC 124/10

IN THE MATTER OF	proceedings removed
BETWEEN	AUCKLAND COUNCIL Plaintiff
AND	LAURA JANE GEORGE Defendant

Hearing:	13-23 May, 4 and 5 July 2013 (Heard at Auckland)
Appearances:	Tony Drake, counsel for Ms George Tim Clarke and Elizabeth Coats, counsel for Auckland Council
Judgment:	27 September 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Ms George was appointed to the role of Group Manager, Accounting Services with the Auckland Regional Council (the Council) on 2 October 2006. She had been engaged on a fixed term contract from May 2006. Her position changed to Team Leader, Transactional Services, on 29 October 2009. Ms George was dismissed for serious misconduct less than four months later. She claimed that her dismissal was

unjustified, and filed a personal grievance with the Employment Relations Authority (the Authority). The proceeding was removed to this Court.

[2] The Council subsequently filed a claim for breach of contract against Ms George. The claim alleged that Ms George had breached her contractual obligations to it during the course of her employment by failing to take any steps to implement external tax compliance advice she had received on behalf of the Council. The Council's claim was also removed from the Authority, and the Court directed that the two claims be heard together.

[3] The essence of Ms George's case is that the two claims are inextricably linked. She contends that the Council brought its claim to strong-arm her into dropping her personal grievance and that she was dismissed for reasons not disclosed to her at the time, namely because of suspicions her employer harboured about her failure to implement the tax compliance advice she had received.

[4] These proceedings raised a plethora of issues, which were carefully traversed by the parties in nearly two weeks of hearings and two days of closing submissions.

The facts

[5] Events giving rise to Ms George's dismissal arose from seemingly innocuous beginnings. They revolved around the engagement of a casual employee.

[6] In order to understand the chain of events that unfolded it is necessary to appreciate the circumstances existing within the Council at the time. The Council was to be merged into a newly created entity, the Auckland Council. This subsequently occurred on 1 November 2010. A transition agency (the Auckland Transition Agency, ATA) was established in May 2009.[1] As amalgamation approached the requirements relating to the recruitment of staff were tightened. The concern was to ensure that the newly merged Council was not saddled with an inflated number of permanent employees, duplicating functions and increasing its redundancy liabilities.

[1] See Local Government (Tamaki Makaurau Reorganisation) Act 2009.

[7] As Group Manager, Accounting Services, Ms George was a third tier manager. She reported to the General Manager, Finance (Mr Monk). Mr Monk's evidence (which I accept) was that while there were some differentials in terms of salary and other benefits enjoyed within the Level 3 group of managers, this did not affect their overall level of responsibilities. The role was a senior one, with a number of direct reports. Amongst other things Ms George was responsible for the delivery of financial accounting and transactional services, including payroll, accounts payable, GST, fringe benefit tax, and PAYE; financial and technical advice on accounting and tax matters; and customer and supplier relationship management. Ms George's role involved a high level of transactions and was a very busy one, with a constant flow of documentation crossing her desk. Ms George said that during the course of a month she would typically receive and read thousands of accounting, financial and operational documents. In her subsequent role as Team Leader, Transactional Services, Ms George reported to Mr Kerr (Group Manager, Finance).

[8] Ms George had a number of dealings with external suppliers, who provided tax and accounting services to the Council. One of those suppliers was Toovey Eaton and MacDonald Limited (TEAM). TEAM provided tax advice to the Council prior to the amalgamation of the Auckland local government bodies and the creation of the Auckland Council. Mr Fisher, of TEAM, took the day-to-day lead role in terms of client management with the Council, although Mr Eaton was the Lead Director at TEAM for this work. Ms George was TEAM's principal contact within the Council. She regularly met with Mr Fisher and occasionally with Mr Eaton.

[9] In the year prior to Ms George's arrival, TEAM provided the Council with a comprehensive suite of tax policies. These policies set out the Council's tax responsibilities, and were updated as necessary to reflect changes in the law. In April 2006 the tax policies were amended to include a section relating to the GST treatment of residential property income and expenditure. Ms George accepts that she was aware of, and understood, these policies.

[10] In late 2007 Mr Fisher received a query from Ms Torr, who held a comparable position to Ms George's in the Auckland Regional Transport Authority (ARTA). The query related to contractor accommodation and led to a discussion

about the tax treatment of contractors. This in turn led to further work being undertaken by TEAM. TEAM considered that the same issues may exist within the Council. Mr Fisher met with Ms George and issues relating to the Council's tax compliance were discussed, including issues relating to fringe benefit tax on motor vehicles and the engagement of contractors. Mr Fisher said that an agreement was reached that TEAM would provide further advice on the employee/contractor issue and the fringe benefit tax issue. Ms George could not recall the meeting, but accepts that it took place.

[11] Two reports were subsequently produced by TEAM for the Council. The first, which remained in draft form, was dated 21 December 2007 (the draft December 2007 report). It dealt with the contractor issue. The second was dated 8 February 2008 (the February 2008 report). It dealt with the fringe benefit tax issue. Both reports were sent to Ms George. Mr Fisher's evidence was that neither report was copied to any other person within the Council. This was consistent with the way in which the reports were addressed and is consistent with the nature of the relationship that Ms George had with TEAM at the time, her position within the organisation, and discussions leading up to the production of the reports.

[12] The draft December 2007 report set out a general overview of tax issues when engaging contractors, TEAM's assessment of risk in relation to the Council's treatment of contractors, and a recommended "best practice" procedure for implementation to mitigate further risk in relation to the engagement of independent contractors. The draft report identified a key risk for the Council, namely the absence of a formalised procedure for determining an individual's employee-contractor status at the time they were engaged by the Council. TEAM recommended that the Council document and implement a best practice procedure, and a "best practice" guide was provided. This guide had been discussed, Mr Fisher says, at the earlier meeting with Ms George on 13 November 2007. TEAM also recommended that once the Council had implemented the recommended best practice procedure, it should quantify the potential historic tax risk it faced, enabling the Council to decide the approach that should be taken to the Department of Inland Revenue (IRD). As Mr Fisher said in evidence, the risks faced by the Council in

relation to the contractor issue were not simply financial. Misclassification could give rise to adverse publicity, particularly if penalties were subsequently imposed.

[13] Ms George gave evidence that she could not specifically recall receiving the draft December 2007 report but accepts that she would have. Mr Fisher said that there was no record of Ms George responding to the report or providing any feedback on it. Nor, I note, is there any record of TEAM following up with the Council to ascertain whether it had any comments on the draft, or whether (like the report to ARTA) it could be finalised. In the event, it remained in draft form.

[14] There is nothing to suggest that any voluntary disclosure took place, as recommended in the draft report. This, the Council submits, reflects the fact that Ms George sat on the advice she received and did nothing about it. She refutes any such inference. Ms George is sure that she told Mr Monk about the draft report and that he asked her to send it to Human Resources, which she believes she would have done. She gave evidence that such an approach would be consistent with her usual practice of forwarding documents of interest, either via email or by way of hard copy distribution. She would then retain a copy in a folder on her desk.

[15] Ms Wiegandt-Goude gave evidence that when she took up her role as Human Resources General Manager she did not find the draft December 2007 report in the documentation held within the Human Resources department. She concluded from that that Ms George had failed to speak to anyone within the department about it. Mr Monk could not recall Ms George raising the issue with him or providing him with a copy of the draft report. He did however refer to her as a conscientious and careful person and there is nothing to suggest that she had a history of incompetence or carelessness in the way she undertook her tasks. To the contrary, she was described as a hard worker with an eye for detail.

[16] On 6 February 2008 Mr Fisher gave Ms George an update (by email) regarding the progress of the February 2008 report dealing with fringe benefit tax issues. He provided TEAM's report to her in final form two days later. It was, he said, sent directly to her and not sent to any other person within the Council. He also said that there was no record of any other person within the Council having any

discussions with TEAM about the report. This was consistent with his contact with Ms George and his earlier email.

[17] The February 2008 report contained a high level overview of areas where the Council had tax exposure in relation to the procedure it had adopted for determining fringe benefit tax on motor vehicles and identified that the Council had not maximised all available exemptions. It also noted that the current fleet management practice could leave the Council exposed to additional tax, use-of-money interest and penalties in the event of an audit by IRD, due to various perceived procedural weaknesses. The report recommended that the Council implement a best practice procedure to improve the robustness of its tax compliance.

[18] Ms George could not recall receiving the February 2008 report but accepts that she would have and says that if that is so she would have sent it to Mr Monk and her operational accountant and possibly others (in operations). She said that she would have relied on her operational accountant in terms of implementing the advice contained within the report.

[19] I return to the two reports again later on in the chronology of events.

[20] It is apparent that Ms George attended two TEAM tax training sessions with a local government focus in 2008. The first was on 26 February 2008 and included training on GST in property transactions. The second was held on 11 November 2008 and covered a range of topics, including GST risk areas and processes, the employee/contractor distinction and remuneration matters (including FBT on motor vehicles and PAYE). Ms George recalled attending this session and recalled a discussion relating to the provision of residential accommodation to park rangers.

[21] In mid to late 2009 Ms George spoke to Mr Kerr about workload pressures the accounts payable team was under. Mr Kerr says that he asked her to speak to Mr Simpson (Programme Manager, Corporate Services) and Mr Boyce (a contractor to the Council) to develop a business case to seek approval for an additional full-time employee. He says that he specifically explained to Ms George that she would need approval from him and approval from the Position Approval Team (PAT). Mr Kerr

was a member of PAT, a group which had been set up in the period leading up to the amalgamation in response to a concern to ensure that a careful process was conducted in relation to recruitment.

[22] The Council had a written recruitment policy. That policy was posted on the intranet for staff reference purposes. There was no dispute that on the date on which the events complained of occurred, the policy as posted on the intranet provided that line managers (of whom Ms George was one):

> May recruit the following with approval from their appropriate General Manager...
>
> Recruit casual and temporary staff.

[23] At some point the policy was amended. The parties were at odds over when those changes were made and/or became effective. The Council contended that the policy was changed to require PAT approval for the recruitment of casual staff prior to November 2009. A later version of the document is noted as being updated on 6 December 2009. Witnesses for the Council gave evidence that the reference to 6 December 2009 reflected the date on which it was placed on the intranet but that the changes were made, and communicated to staff such as Ms George, prior to this time. Ms George says that she was not aware of the change in policy.

[24] In October 2009 TEAM commenced a review of the Council's tax compliance. The review had been sought by Mr Kerr because of a concern that councils in Auckland would be subject to an audit by IRD prior to the amalgamation. As part of the review TEAM was asked to identify any material instances of non compliance, ensure that the Council's policies and procedures facilitated a robust tax compliance environment in relation to fringe benefit tax, GST and payroll taxes, ensure that documentation produced by the Council met the requirements of the Goods and Services Tax Act 1985 and to enable the Council to show that it had taken reasonable care in managing its tax affairs.

[25] It is apparent that someone from TEAM met with Mr Kerr in October and provided him with copies of the draft December 2007 and February 2008 reports. Mr Kerr had not seen these documents before. Both had been addressed to Ms

George and both raised potential tax compliance issues for the Council. Mr Kerr was concerned about the reports and the possibility that the Council may be exposed to liability in relation to any failure to implement TEAM's advice. He did not raise the issue with Ms George.

[26] On 4 November 2009 Mr Kerr received a memorandum from TEAM summarising its progress in terms of the review it was undertaking. It indicated that further work was required in relation to a number of issues, including whether the Council had applied the correct treatment to individuals engaged as "contractors", had correctly adjusted for GST input tax claimed on expenses relating to its park ranger residential properties and whether it had been correctly returning fringe benefit tax on its pooled motor vehicles.

[27] Mr Kerr says that he had a conversation with Ms George during the week beginning 16 November, in which Ms George informed him that she was losing the two casual employees in the accounts payable team and that there was a genuine need for additional resources within it. She asked Mr Kerr if she could recruit another casual employee and he told her that she could but that she would need to gain approval from PAT and that she should speak to Ms Brown (the Human Resources Manager) regarding how best to gain approval for a new position. Ms George disputes the timing and details of this conversation. She says that she had a discussion with Mr Kerr on 27 October, during which she identified a need for additional resources and that he told her to speak to Human Resources about the required process. Ms George says that following the meeting she talked to Ms Brown and Mr Simpson and checked the recruitment policy on the staff intranet, confirming that no PAT approval was necessary for casuals.

[28] On 25 November Mr Kerr observed an unfamiliar figure in the accounts payable area. He turned out to be a student called Mr Hudson, although Mr Kerr did not know who he was, or why he was there, at the time. Mr Hudson was sitting at a desk and it was evident, from the computer screen behind him, that he had been using the Council's secure financial system (SAP). Mr Kerr stopped to introduce himself on his way to a prearranged meeting with Ms Brown.

[29] Mr Kerr was concerned about Mr Hudson's presence and raised the issue with Ms Brown. He says that Ms Brown told him that Ms George had spoken to her about the process for gaining approval for new employees and that Ms George had indicated that she would gain approval from PAT. Mr Kerr says that he bumped into Ms George on his return from his meeting with Ms Brown and suggested that they speak somewhere away from the accounts payable area. He asked her to explain who Mr Hudson was. She told him that he was the new casual employee. He then asked if she had recruited him without approval, to which she said that Mr Simpson had said that approval was not required. Mr Kerr asked what Mr Simpson had to do with it given he had asked her to speak to Ms Brown. She did not respond. He then asked whether she had spoken to Ms Brown. She said that she had and that Ms Brown had said that it was "Okay to proceed". Ms George says that Mr Kerr was screaming at her, belittled her in front of other staff and that she felt humiliated and upset. I preferred Mr Kerr's evidence as to the way in which their exchange unfolded, namely that during the course of the meeting he was firm but professional.

[30] Because of the different accounts that he had received, Mr Kerr asked Ms George to accompany him to Ms Brown's office. This was to enable him to resolve what had happened. He asked Ms Brown to confirm the advice she had given to Ms George and Ms Brown said that she had told Ms George that in order to recruit a casual employee she needed to get approval from PAT.

[31] Mr Kerr emailed Mr Simpson shortly afterwards advising that:

> I just notice this morning that there is a new Student in AP. PAT approval was required to employ this person. I just spoke to [Ms George] who I had said last week that she needed PAT approval and she also checked this out with Susan Brown last week who confirmed this as well. She said that she spoke to you and that you had said to her that she didn't need PAT approval for a casual under 3 months. Laura has then acted on this and brought the person in.
>
> I sit on PAT for Brian so this is not a good look. Laura has acted outside policy.
>
> This is not directed at you but – is it true that you said to her that she didn't need PAT approval? I am just trying to ensure that what she has said to me is true, before I have a chat with her.

[32] Mr Simpson responded, noting that:

> Laura had already approved the student before that conversation, that [comment] is a fabrication and I can't say I am pleased if that is what was said.

[33] Mr Kerr was by this stage concerned not only about what appeared to be an unapproved appointment of a casual employee, but also that such appointment appeared to have been made against his instructions as to the process that would need to be followed and advice subsequently received from the Human Resources Manager. He says that he was concerned about the risk that this presented to the organisation. He accordingly spoke to Ms Wiegandt-Goude about his concerns and sought her advice on how to proceed. She suggested that he record his recollection of events in writing, which he did in an email some two days later. In his email he expressed the view that Ms George had acted inappropriately and that further investigation was warranted. He said that "clearly it would be at the end of an investigation that decisions would be made. There are certainly some missing pieces of information at this point." Ms Wiegandt-Goude agreed that there might be "a case to answer" and that a proper investigation was justified. Mr Bremner was tasked with conducting the investigation. He was considered appropriate because he was a contractor and was able to bring an objective approach to bear.

[34] The following day (on 26 November 2009) Mr Kerr received further advice from TEAM in relation to tax compliance issues, current and historic. TEAM recommended that the Council make a voluntary disclosure in relation to the incorrect treatment of fringe benefit tax on pooled motor vehicles.

[35] Ms George was invited to a meeting to discuss issues relating to Mr Hudson by way of letter dated 1 December 2009. The letter stated that the purpose of the meeting was to discuss an allegation of serious misconduct in relation to the recent recruitment of a casual employee and the access that person had to the Council's systems. Details of the recruitment allegation were set out and reference was also made to an alleged misuse of company resources to make a charitable donation. Ms George was encouraged to bring a representative to the meeting, which was scheduled to take place on 4 December 2009. The letter advised that a possible outcome might be disciplinary action, including dismissal. Ms George was offered access to employee assistance.

[36] Mr Bremner conducted a number of interviews with other employees before the meeting with Ms George took place. He took handwritten notes of each interview and then typed them into a Word document. Each of the witnesses was given an opportunity to review the notes of interview and make edits to them. Two witnesses appear to have taken up this opportunity and their statements were amended accordingly. This process concluded in early 2010.

[37] Ms George emailed Mr Bremner on 7 December 2009 advising that she had been informed that she was entitled to the "case and the evidence against [her] before the hearing." She said that while she had the letter dated 1 December 2009, which outlined the allegations, it did not provide sufficient detail. Mr Bremner responded advising that matters were at an investigative stage and that they were in the process of gathering all relevant information from witnesses and obtaining relevant documents. He made it clear that the upcoming meeting was not a disciplinary meeting, while acknowledging that a possible outcome of it was that a decision might be made to initiate disciplinary proceedings. He said that in such an event a separate disciplinary meeting would be held and during the course of any such meeting the allegations and evidence would be provided to her for response. Ms George was accordingly clearly on notice about the nature of the meeting and the potential seriousness of the issues that had been raised.

[38] While the date remained unclear in terms of the sequence of events, I pause to note that in early December 2009 IRD confirmed that it would be undertaking an audit in relation to the Council's tax compliance.

[39] Ms George prepared a very detailed written response to each of the issues that had been raised in the letter of 1 December 2009. She presented it at the meeting of 9 December 2009, which she attended with her lawyer (Mr Boyle). At the meeting (which was also attended by Mr Bremner and Mr Kerr) Ms George was asked a series of questions. Her responses gave rise to a number of concerns. In particular there was a concern that Ms George's responses were inconsistent with the statements given by other witnesses in relation to the events complained of, that it appeared that she was being fed answers by her lawyer, that she was overly reliant on her written statement, that she was not fully engaged with the investigative

process and that her body language and demeanour was defensive and evasive. Ms George was advised that an investigation report would be prepared and that a decision would then be made as to whether a disciplinary meeting would be held. She was advised that a copy of the report would be provided to her before any such meeting.

[40] On 21 December 2009 Mr Kerr instructed TEAM to extend its review to include a further visit. That did not occur until February 2010 (following Ms George's departure from the Council).

[41] On 12 January 2010 Ms George was invited to attend a disciplinary meeting to "discuss the allegations of serious misconduct in relation to the alleged recruitment of a casual employee and the access that person had to ARC systems." A copy of the preliminary investigation report and finalised witness statements were enclosed. Details of the allegations were set out in the letter. The letter went on to advise that:

> We also have serious concerns about the truthfulness of your explanation given that parts of your evidence are wholly inconsistent with evidence of other factual witnesses. We would invite your response to these concerns. If it becomes evident that your explanation has not been truthful then this may itself constitute serious misconduct.

[42] The preliminary report set out in detail the concerns relating to truthfulness. Ms George was advised that she was welcome to provide further explanation on the preliminary report at the meeting and "on the investigator's provisional view that you recruited a casual employee in breach of the Recruitment Policy without obtaining PAT approval." Earlier advice that the allegation relating to an alleged misuse of company resources had been withdrawn was reiterated.

[43] The disciplinary meeting took place on 28 January 2010, following an earlier deferral at Ms George's request. Ms George prepared a detailed written response to the matters referred to in the preliminary report, which she tabled at the meeting. Mr Boyle also made submissions on Ms George's behalf. Mr Winder (the Chief Executive), Ms Wiegandt-Goude, Mr Bremner and the Council's solicitor were in attendance.

[44] Mr Winder and Ms Wiegandt-Goude were the decision-makers. Mr Drake cross-examined Mr Winder on the appropriateness of him, as Chief Executive, taking on the role of decision-maker and the extent to which this was consistent with the Council's policy. I do not think that anything can be made of this point. As Chief Executive, Mr Winder held ultimate decision-making powers relating to disciplinary matters within the Council. While these powers were delegated down, consistent with usual practices within large organisations, it is well established that the ultimate decision-maker retains the ability to exercise his/her powers despite any delegation. There is no dispute that Ms Wiegandt-Goude could otherwise have undertaken the decision-making task. No issue was taken at the time with the shared role that Mr Winder and Ms Wiegandt-Goude adopted and the policy can be read consistently with joint decision-making.

[45] Nor do I consider that Mr Winder's involvement reflects anything untoward in the disciplinary process. He was the Chief Executive and Ms George was a senior manager who faced allegations of serious misconduct, including in relation to a lack of truthfulness. I do not accept that he can be criticised for choosing to involve himself in these circumstances.

[46] Both Mr Winder and Ms Wiegandt-Goude say (and I accept) that they carefully considered the matters raised, including Ms George's responses. An adjournment occurred to provide an opportunity for Mr Winder and Ms Wiegandt-Goude to deliberate and reflect on what had been raised.

[47] The meeting was reconvened on 2 February 2010. Ms George was advised that her explanation and all of the evidence had been taken into account, and that the following allegations had been substantiated and were considered to amount to misconduct:

- That a person was recruited without seeking or gaining approval from her General Manager, which amounted to a breach of the Recruitment Policy;
- By recruiting a person her delegated authority was exceeded;
- There was a failure to seek or gain approval from PAT as directed;

- That an unauthorised person was allowed to remain on secure premises with access to SAP, a key and secure financial system.

[48] Mr Winder also advised Ms George that there were serious doubts about the truthfulness of the explanations she had provided and that these were not accepted. He highlighted the importance of trust and confidence, particularly in a key financial position such Ms George's, and advised that Ms George's lack of truthfulness was regarded as serious misconduct.

[49] Ms George was asked for feedback in relation to possible outcomes and a further adjournment took place. It is apparent that Ms George was given a full opportunity to provide her feedback, which took around 20 minutes. The feedback provided included a submission that she should receive a reprimand for the misconduct and a final written warning for the serious misconduct. Ms George also submitted that Mr Kerr ought not to be involved in the decision-making process. It was confirmed that he was not.

[50] A further adjournment was taken to consider this feedback, however at this point Mr Winder was urgently and unexpectedly called away. It was agreed that the meeting would reconvene at the earliest mutually convenient opportunity.

[51] During the course of the meeting on 2 February 2010 Mr Boyle had sought an agreement on Ms George's behalf that she not be required to attend work prior to the reconvened meeting. He said that Ms George was under some stress. Ms Wiegandt-Goude was happy to agree to the request. It was accordingly agreed that Ms George would remain off work until the meeting had taken place. In these circumstances it is not surprising that Ms Wiegandt-Goude was taken aback when she observed Ms George at the office the next day. Ms Wiegandt-Goude asked Ms George to accompany her to a private area and asked her why she was at work. They talked in an office, with the door closed, and away from other staff members.

[52] Ms Wiegandt-Goude says that when she asked Ms George why she was at work, Ms George responded "why not?" Ms George then enquired whether she had been suspended and Ms Wiegandt-Goude confirmed that she had not. She told Ms George that she should return home on paid leave until the disciplinary meeting took

place the following day. This was consistent with the agreement that Ms Wiegandt-Goude had reached with Ms George's lawyer the previous day and was sensible given the concerns that Mr Boyle had raised on Ms George's behalf about the stress she was under.

[53] Ms George says that Ms Wiegandt-Goude screamed at her, demanding that she go home. Ms Wiegandt-Goude denies this and says that Ms George was extremely aggressive, that she felt concerned for her safety and that she had serious doubts about Ms George's state of mind given the way she was acting. Ms Wiegandt-Goude prepared an email shortly after the event. The email is broadly consistent with her evidence about what occurred, although it does not refer to the apprehensions she now says she had. She said that this was because she felt it appropriate for her email to reflect the facts, rather than emotion. Ms George also had a conversation with Mr Bremner, who told her she should not be at work and to go home.

[54] Ms Wiegandt-Goude says that she later bumped into Ms George in the hallway and saw that she was carrying a laptop and several files that appeared to belong to the Council. She thought that it looked like Ms George had been cleaning out her desk and was concerned to ensure that Council property was not removed, particularly in what Ms Wiegandt-Goude believed was Ms George's fragile state.

[55] Ms George emailed Mr Winder on 4 February 2010. She said that she was stunned by the allegations of untruthfulness and that she had been ordered home by Ms Wiegandt-Goude despite wanting to be at work. She said that this had been humiliating in front of other staff. She said she did not want to come back in and be humiliated again and asked that he advise her by letter what the outcome of the process was.

[56] In accordance with Ms George's request, she was advised of the outcome of the disciplinary process by way of letter from the Chief Executive. The letter set out the findings that had already been communicated to Ms George and advised her of the decision to dismiss for serious misconduct. Mr Winder advised that consideration had been given to Ms George's feedback relating to her record of employment and

personal circumstances, and that this was reflected in the fact that she would be summarily dismissed, effective immediately with one month's salary in lieu of notice. On 3 March 2010 Ms George filed a grievance in the Authority, claiming that she had been unjustifiably dismissed.

[57] As will be apparent from the recitation of events so far, the Council did not alert Ms George to the issues relating to an apparent failure to implement TEAM's draft advice of December 2007 and its later advice of February 2008. Mr Kerr was aware of these issues because TEAM had provided him with a copy of both pieces of advice in October 2009 – shortly before the Hudson matter arose. He said that he wanted to focus on understanding the impact, if any, of the apparent failure to follow TEAM's advice before giving consideration to whether any disciplinary action might be appropriate. He also received advice from Human Resources that it would be preferable not to "cloud" the investigative and subsequent disciplinary process with these matters. Mr Winder's evidence was that he considered it appropriate to assess the size and extent of the problem, if there was one, before considering whether any individuals might be at fault and, if they were, what action (if any) ought to be taken against them.

[58] TEAM had already been engaged to undertake a tax compliance review in light of the anticipated audit that the Auckland Council would require and it carried out additional work to assess what the impact might be of the apparent failure to implement its previous advice. It reported back in June 2010, some four months after Ms George's departure. The review found that none of TEAM's earlier recommendations in relation to the employee/contractor distinction or fringe benefit tax issues had been implemented and that this failure exposed the Council to a significant tax liability. The review also found that the Council had underpaid GST resulting from incorrectly claiming GST input tax on residential accommodation expenditure. In relation to the contractor/employee distinction TEAM concluded that nine persons had been treated incorrectly as contractors, leading to a potential tax liability of $380,000. TEAM calculated that the Council's failure to implement its recommendations relating to fringe benefit tax exposed it to a potential liability of $165,855.39 and (in relation to GST) a potential liability of $67,400. A voluntary

disclosure, prepared by TEAM, was made to IRD on behalf of the Council on 24 May 2010.

[59] Four months later a claim for damages and penalties for alleged breaches by Ms George of her employment agreement was filed. The amounts sought in the Council's Statement of Problem reflect the advice the Council had received at the time in relation to potential loss, although the quantum claimed was subsequently reduced. The following month IRD advised that the Council had failed to take reasonable care but that it was not imposing any short-fall penalty in light of the steps the Council had taken. While the Council was not liable to pay any short-fall penalties it had incurred costs in relation to the work undertaken by TEAM.

[60] On 1 November 2010 the Auckland Regional Council was merged into the Auckland Council.

Legal framework

[61] At the relevant time, s 103A of the Employment Relations Act 2000 (the Act) provided that:

> 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 action, 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.

Suspension

[62] I am not satisfied that Ms George was suspended. It follows that I reject her contention of unjustifiable disadvantage. An agreement was reached between the parties that Ms George would not be required to work for the limited period between the disciplinary meeting of 2 February and the reconvened (penalty) meeting. This was at the request of Ms George herself, through her lawyer, and was based on concerns about the stress that she was under. When she arrived at work the following day Ms Wiegandt-Goude and Mr Bremner reiterated what had already been agreed. While I have no doubt that Ms Wiegandt-Goude would have clearly articulated the position, I do not accept that she ordered Ms George off the Council's

premises or that she acted unprofessionally towards Ms George. I am satisfied that the conversation took place in a private area away from other staff.

[63] It appears that Ms Wiegandt-Goude was sufficiently concerned following her discussion with Ms George that her computer and building access were blocked. These steps were taken after Ms George had left the building and resulted from reasonable concerns about her state. I do not accept Mr Drake's submission that these steps reflect the fact that no agreement was reached as to paid discretionary leave.

[64] Even if I had been satisfied that Ms George had been unjustifiably suspended at the meeting of 2 February or subsequently (which I am not) I would not have ordered any relief in relation to it having regard to the surrounding circumstances and the very short timeframes involved.

Disparity of treatment

[65] This was not pleaded but was an issue that was touched on in the course of the plaintiff's case, specifically in relation to the recruitment of Mr Minton (a casual employee appointed in 2009, well before Mr Hudson's arrival) and the failure to take disciplinary action against managers who had recruited casual employees during 2009.

[66] In assessing a claim of disparity the Court must consider whether there was disparity of treatment; if so, whether there is an adequate explanation for such disparity; and, if not, whether the dismissal is justified, notwithstanding the disparity for which there is no adequate explanation.[2]

[67] The Council's first point was that no issue of disparity of treatment was raised by Ms George at the time of her dismissal. It was submitted that this means that it cannot be criticised for failing or refusing to address a parity of sanction issue before it dismissed Ms George because it was not raised by her, or by her counsel.[3]

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[2] *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA).
[3] Referring to observations in *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 40 at [24] in support of this proposition.

[68] It cannot be right that an employer can adequately meet an argument of disparity of treatment simply by asserting that the issue was not raised by or on an employee's behalf during the course of a disciplinary process. Having said that, an employer cannot be criticised for failing to proactively explore and consider each and every potential issue of parity however obscure.

[69] It is necessary to consider the events that occurred in context. Mr Minton was recruited in early 2009, before the establishment of ATA. Following its creation more stringent controls were placed on recruitment and "head count" within the Auckland councils generally and the Council itself. Mr Kerr was a member of PAT and he (together with management generally) was well aware of the increased need for circumspection. This factor influenced the way in which issues relating to Mr Hudson's engagement were viewed and explains any difference in approach. In any event, there was insufficient evidence before the Court surrounding Mr Minton's appointment to enable clear comparisons to be drawn.

[70] It appears that other appointments referred to by Ms George in support of her argument that there had been disparity of treatment may have resulted from the exploitation of a loop-hole in the applicable recruitment policy at the time rather than constituting a breach of the policy. In these circumstances it is not surprising that disciplinary action was not taken against the managers responsible.

[71] I am satisfied that the new requirements were well known to managers, including Ms George. The fact that employees may in the past have been treated leniently, or that a policy was previously enforced in a lax manner, cannot of itself ossify an employer's ability to take a different approach in the future. The Council was entitled to take a progressively stricter stance on recruitment and to impose additional requirements in relation to the approvals process having made them clearly known to staff.

[72] I conclude that the evidence falls short of establishing disparity of treatment. Even if disparity of treatment existed it was explicable in the circumstances.

[73] In any event, there is an additional difficulty with the argument relating to disparity. Ms George was not dismissed for her failure to comply with the recruitment policy. Concerns relating to the way in which Mr Hudson's engagement was dealt with resulted in a finding of misconduct rather than serious misconduct. Ultimately she was dismissed for failing to be truthful.

Bias

[74] The plaintiff contends (although did not plead) that the decision to dismiss her was substantively unjustified on the grounds of bias. As I understood the argument, Mr Kerr was biased against Ms George because of concerns that TEAM had raised, and which he was aware of, in relation to an apparent failure to implement the recommendations contained within the draft December 2007 and February 2008 reports. The allegations also extend to Mr Bremner, Mr Winder, Ms Wiegandt-Goude, Ms Brown and the Council's legal adviser. It was said that the decision-makers were unable to bring an open mind to bear on the disciplinary process because of the disclosure of TEAM's earlier advice and the concerns that this had given rise to.

[75] Mr Kerr accepted in cross-examination that an allegation relating to the misuse of Council resources was inserted as a makeweight. In the event, that allegation was removed following further investigation and in light of Ms George's response. But more fundamentally, Mr Kerr was not a decision-maker. That task had been assumed by Mr Winder in combination with Ms Wiegandt-Goude. It is notable that, prior to any decision as to disciplinary outcome being made, Ms George raised a concern that Mr Kerr not be involved in the disciplinary decision-making process. Mr Winder confirmed that he would not and there is no evidence that he was involved in the disciplinary process after raising his concerns with Ms Wiegandt-Goude and attending the investigation meeting with Mr Bremner.

[76] There was a somewhat suspicious coincidence of timing between Mr Kerr becoming aware of TEAM's earlier advice and the commencement of an employment investigation against Ms George. Suspicions alone are not, however, enough.

[77] There was no evidence before the Court to support an inference (other than an extremely tenuous one) that either Mr Winder or Ms Wiegandt-Goude was motivated by concerns about the TEAM reports and Ms George's role in implementing the advice contained within them. To the contrary, they were clear that this issue played no part in their consideration of the issues they were tasked with considering and the decision to take disciplinary action against Ms George. I accept their evidence that the TEAM advice issues were put to one side and I accept that these issues did not influence the way in which they approached the disciplinary process.

[78] I am unable to detect any basis for the suggestion that those who did make the decision to dismiss Ms George were biased in any way. I accept Mr Winder's evidence that he took no pleasure at all from taking disciplinary action against one of his senior managers, but took on the role because he was concerned about the nature of the concerns that had been raised and Ms George's position within the organisation. Neither he nor Ms Wiegandt-Goude were substantively involved in the investigative process. Nor were they witnesses to the events in question. It is clear that they carefully considered the explanations and submissions made by and on Ms George's behalf prior to reaching any concluded views.

[79] I reject any suggestion that Mr Bremner was biased or held a predetermined view in relation to the investigation. Mr Bremner ensured that the witness statements were confirmed by each of the witnesses as correct and took steps to include changes that were made. There was no requirement that he transcribe what they had to say verbatim. I do not accept that his recording of what each of the witnesses said during their respective interviews was inaccurate. While Ms George suggested that two witnesses had sought changes to their statements because they were unhappy with how they were crafted, there was no direct evidence that this was so and the evidence that was given pointed to their (relatively minor) amendments being incorporated.

[80] Criticisms were also levelled at Mr Bremner for the way in which the original letter of concern was crafted, enumerating various matters of concern although they were later reduced (it was said) to one single allegation of breach of the recruitment

policy. This characterisation over simplifies matters. The letter gave detailed information of the concerns that had been identified which, while arising out of the one matter (Mr Hudson's engagement), raised various issues. The way in which the issues were articulated had the advantage of putting Ms George squarely on notice of the nature of the Council's concerns and what she was being invited to respond to.

[81] It is true that the recruitment policy had not been updated on the intranet at the time Mr Bremner drafted his letter but it reflected the changes that had been made to the policy and which (for reasons that I come to) I am satisfied had been made known to Ms George and other managers.

[82] Nor do I consider that advising Ms George at the conclusion of the meeting of 28 January 2010 that "we will consider all the evidence including your response to the inconsistencies. We will announce the findings, invite submissions, then communicate the disciplinary actions if there are any," reflected a predetermined outcome. Rather it provided a convenient road-map for Ms George as to the process that would be followed going forward.

[83] An earlier draft of the 1 December 2009 letter (inviting Ms George to an investigative meeting) had omitted the allegation, as worded in the final letter, relating to a lack of truthfulness. While Mr Drake sought to make something of this in cross-examination of both Mr Bremner and Mr Kerr, essentially on the basis that they had sought to exaggerate the concerns in relation to Ms George, I do not accept that. There were genuinely held concerns relating to the version of events that Ms George had provided and there was plainly a reasonable basis for those concerns given the discrepancies between her version of events and those of other witnesses. The Council was entitled to take steps to explore those concerns further. I do not accept that the allegation relating to truthfulness was improperly designed to provide a platform for Ms George's subsequent dismissal.

[84] Ms Wiegandt-Goude took steps to ensure that the investigative process was objective. It was for this reason that Mr Bremner was selected for the role. He undertook the process in a conscientious and careful manner. Mr Bremner had previously enjoyed a good working relationship with Ms George and I do not accept

any suggestion that he was motivated (either consciously or unconsciously) to build a case against her. Further, Mr Bremner took care to ensure that his role as investigator was kept separate from the decision-making role, which was exercised by others. He was not involved in the decision to dismiss. Nor did he express any view to the decision-makers as to either the matters in contention or what, if any, disciplinary action might appropriately be taken.

Was the Council entitled to commence a formal process given the nature of the concerns?

[85] Mr Drake submitted that the concerns that had been identified about the alleged recruitment of Mr Hudson were minor and ought to have been dealt with on an informal basis under the disciplinary policy. While plainly not at the most serious end of the spectrum, the concerns that Mr Kerr had included not only a breach of policy in relation to the appointment of a casual, but also that the appointee had access to the Council's computer system. His evidence, which I accept, was that the two other casual staff, Mr Peart and Mr Minton, had security access which allowed them to perform accounts payable tasks, as they were required to provide cover for permanent staff. This raised issues about security that the Council was entitled to treat seriously. The fact that no damage appears to have been done, and that the Council secured four days of productive work by reason of Mr Hudson's endeavours, is beside the point.

[86] The submission also overlooks the fact that Mr Kerr did not immediately launch into a formal process. Rather, he had a discussion with Ms George, and then later with Ms George and Ms Brown. He appropriately sought advice as to how to proceed when these discussions did not cast sufficient light on what had occurred and why, and he made it clear in his email to Ms Wiegandt-Goude that he considered that there were some missing pieces of information that warranted further inquiry. Ms Wiegandt-Goude agreed and it was for this reason that the investigative process was initiated.

[87] In any event, the fact that there were alternatives open to the Council, as employer, does not mean that it was not entitled to commence a formal disciplinary process. Ms George was a senior manager within an organisation that was coming

under increasing pressure in terms of staff head count and the robustness of its policies and procedures going into the merger. It was well known that ATA would be taking a keen interest in such things and I am satisfied that Ms George was aware that this was so. While the Council could have sought to deal with Ms George's involvement in Mr Hudson's engagement informally it was not obliged to do so in the circumstances.

Applicable policy

[88] A determined argument was mounted that Ms George's actions could not have constituted a breach of the policy that was then in force. It was argued that the policy in force at the relevant time was the version posted on the staff intranet rather than a later version, and that the earlier version did not require PAT approval.

[89] I do not think that it is open to Ms George to say that the new policy did not apply, despite her knowledge of it, simply because it had not been placed on the staff intranet. The argument would have succeeded if she had been unaware of it. An employee cannot be bound by a policy that they are unaware of and which the employer has taken inadequate steps to draw to the employee's attention. As in most cases the facts, and what was and was not known, are pivotal.

[90] Ms Wiegandt-Goude and Mr Kerr were adamant that the policy had been updated and that this change, including the requirement that PAT approval be obtained for all appointments, had been widely communicated to managers prior to 16 November 2009. As a senior manager Ms George was privy to management discussions and initiatives. She would have been well aware of the increased scrutiny that was being applied to staffing issues, particularly in relation to the recruitment of staff, in light of the merger that was looming on the horizon. It would be surprising for a senior manager in Ms George's position not to have been aware of these developments and steps that the Council was taking to manage potential risk areas, which were discussed at meetings of senior managers within the organisation and communicated via missives from the Chief Executive. I accept Ms Wiegandt-Goude's evidence that these changes were well promulgated to managers. Her

evidence was reinforced by the evidence of others, including Mr Winder, Mr Kerr and Mr Bremner.

[91] I find that the requirements relating to recruitment were reiterated by Mr Kerr when he spoke to Ms George in November, telling her that she needed PAT approval and that she would need to speak to Ms Brown about the process. The details of the discussion are supported by Mr Kerr's email a few days later (of 27 November 2009) and Ms Brown's notes of interview with Mr Bremner.

[92] Even if Ms George is correct, and the earlier policy applied because she was unaware of the changes that had been made to it, the earlier version of the policy required the approval of the General Manager, Finance (Mr Monk). She accepted that she knew that this was so although said that she thought that it was sufficient to gain Mr Kerr's approval given that Mr Monk was, by this time, spending much of his time at ARTA on secondment. Mr Kerr did not have formal delegated authority from Mr Monk. And, in any event, Mr Kerr did not give his formal approval. Rather he advised Ms George of the steps she would need to take to obtain formal approval, which she did not follow. Mr Kerr's approval was neither sought nor obtained, even if he could have given it.

[93] It is plain that the Council's concerns were not based solely on a breach of policy. They also related to an alleged failure to follow Mr Kerr's direction as to what was required in terms of any appointment. And, as has already been observed, ultimately Ms George was not dismissed for breach of the Council's policy. A finding of misconduct only was made in respect of these matters. The finding of serious misconduct was squarely focussed on the allegation (found to be substantiated) that Ms George had been untruthful during the course of the investigative process and that this justified her dismissal.

[94] Ms George and her lawyer accepted during the course of the disciplinary meeting that she had committed a number of errors of judgement and that a final written warning would be appropriate with "the slightest future issue" leading to termination. In this regard Ms George accepted that with the benefit of hindsight she had "made a mistake." She could offer no explanation as to why she had not reacted

when she saw Mr Hudson working in the accounts payable area, despite asserting that she had had nothing to do with his recruitment. While Ms George disputed parts of the notes of the meeting as being inaccurate, I preferred the evidence of Mr Bremner and Ms Wiegandt-Goude in this regard. Mr Bremner took contemporaneous notes and typed them relatively soon after the meeting. Ms Wiegandt-Goude confirmed that the notes comprised an accurate summary of what had been said. Ms George did not take any notes.

Can dishonesty during the disciplinary process give rise to a dismissal?

[95] Mr Drake submits that it was unlawful for the Council to include an allegation of lack of truthfulness as part of the disciplinary process, relying on *Iakopo v Waikato Electricity Ltd*[4] in support. There the Court stated that:[5]

> That aside, taking annual leave at short notice was not in itself an act of misconduct for which he was liable to be dismissed. That is clearly acknowledged by both Mr Taylor and Mr Parmenter. I cannot accept that even if it were shown that he consistently lied about his reasons for doing something for which he was not liable to be dismissed, then those lies should in the circumstances of this case be elevated to the status of something so destructive of the employment relationship that they justified instant dismissal.

[96] Mr Drake submitted that, following *Iakopo*, Ms George could not be dismissed for telling untruths (which he says she did not do) because she could not have justifiably been dismissed for the conduct that formed the basis of the initial allegations made against her.

[97] In determining the scope of the employer's obligations and what is and is not permitted, it is useful to return to first principle. There is no doubt that dishonesty in the context of an employment relationship can give rise to disciplinary action and dismissal. That is because trust and confidence lie at the heart of the relationship between employer and employee. This is reinforced by the statutory obligations of good faith provided for in s 4 of the Act. I see no reason in principle why an employee who is untruthful to their employer during the course of a disciplinary process should be immune from disciplinary action. It would undermine the

[4] AEC 36/94, 24 June 1994.
[5] At 15.

obligation of responsiveness that rests on each party and would encourage deception, rather than openness and honesty.

[98] I respectfully disagree with the approach adopted by the Court in *Iakopo*. In any event it is distinguishable from the present case. The underlying allegation against Mr Iakopo was less serious than the allegations against Ms George, there were serious procedural flaws in the way in which the employer proceeded and the employer failed to establish that Mr Iakopo had been untruthful.

[99] In *Honda New Zealand Ltd v New Zealand Boilermakers Union*,[6] a majority of the Court of Appeal observed that:[7]

> ... in an employment situation the telling of a lie, or even prevarication short of a lie, strikes at the fundamental requirement of honesty and good faith, so that its true relevance is as part of the total factual context in which the justification for the dismissal is to be considered ... A proved lie, told in denial or explanation of an allegation of misconduct, may not necessarily assist in the proof of the misconduct, but may be misconduct in itself.

[100] It will not suffice for an employer to merely assert that dishonesty has occurred and proceed to rely on it in determining what disciplinary action to take. This gives rise to a further issue, namely what steps the employer is obliged to take and the extent to which separate proceedings are required. This was considered by the Court in *Port Nelson Ltd v MacAdam (No 1)*[8] where Chief Judge Goddard stated that:[9]

> As a general rule, an employee who is called to answer an allegation that he has been guilty of conduct of a particular kind cannot be dismissed if suspicion emerges during the course of an inquiry into that allegation that the employee may have been guilty of conduct of a different kind, including lying to the employer. That needs to be the subject of a separate set of disciplinary proceedings.

[101] In order to undertake a fair and proper disciplinary process an employer is obliged to meet certain minimum standards, including adequately particularising the

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[6] [1991] 1 NZLR 392 (CA).
[7] At 397. The Court has held that lying during the course of a disciplinary process may justify dismissal in a number of cases. See, for example, *Blaker v B & D Doors (NZ) Ltd* EMC Auckland AC8B/07, 21 September 2007 at [97]; *New Zealand Sugar Co Ltd v Connelly* [1998] 3 ERNZ 198; and *Ballylaw Holdings Ltd v Ward* EMC Wellington WC45/01, 13 November 2001 at [33]-[34].
[8] [1993] 1 ERNZ 279.
[9] At 289.

concerns that he/she has; identifying the potential consequences of a finding against the employee; providing sufficient information and a reasonable time to respond; and giving adequate consideration to any explanation given. I do not accept, however, that an employer who becomes concerned that an employee is not being truthful in his/her responses is obliged to conclude a disciplinary process that is already in train and then embark on a new process, or initiate parallel processes. That would lead to unnecessary complexity, delay, and inefficiency. Provided that the requirements of fair process are met, an employer may identify a concern about truthfulness and deal with that concern in the course of a pre-existing process. Whether the process that was adopted in this case met the minimum standards is answered by a consideration of what in fact occurred, rather than an application of blanket rules.

Was there a basis for commencing an investigation into truthfulness?

[102] The Council was entitled to have concerns about truthfulness given the nature and extent of the inconsistencies between Ms George's version of events and the statements of other witnesses interviewed. Those inconsistencies included whether she had given approval to Mr Peart in relation to the recruitment of Mr Hudson during August/September 2009; the timing of Mr Kerr's discussion with Ms George prior to Mr Hudson's recruitment; what was discussed between Ms George and Mr Kerr; the details and timing of Ms George's discussion with Ms Brown; the timing and content of Ms George's discussion with Mr Simpson; the timing and nature of the discussions between Ms George and Mr Hudson between 19 November and 25 November 2009, and her reaction to seeing him at work on 25 November 2009; and the steps Ms George took in relation to processing Mr Hudson's employment, including providing him with the relevant employment forms.

Adequate notice of concerns

[103] Ms George had ample notice of the nature of her employer's concerns relating to truthfulness. The letter of 12 January 2010, in which she was invited to attend the disciplinary meeting, set out each of the allegations in some detail and included specific reference to allegations relating to whether she had been truthful in her responses. A copy of the preliminary investigation report (which itself set out in

detail the concerns relating to truthfulness) and finalised witness statements were enclosed. Ms George was advised that she was welcome to provide further explanation on the preliminary report at the meeting and that is what she did.

Sufficient time to respond

[104] Ms George had sufficient time to consider and respond to the allegations relating to truthfulness. It is notable that a request to delay the disciplinary meeting was acceded to by the Council. The meeting did not occur until 16 days after the letter had been provided to her.

[105] Ms George was represented throughout the process by an experienced lawyer. No issues were raised about the process that was being followed in relation to the truthfulness allegations or concerns raised that they had not been adequately particularised or that she required additional time or information to respond. It is apparent that Ms George prepared a detailed written response to the matters referred to in the preliminary report, which she tabled at the meeting, and which was carefully considered. Mr Boyle made submissions on Ms George's behalf and Ms George was given, and took up, an opportunity to be heard personally.

Sufficient basis to find truthfulness allegations made out?

[106] Mr Winder and Ms Wiegandt-Goude did not accept Ms George's explanations after hearing from her and considering all of the information they had available to them. They concluded that her explanation was contrary to material aspects of what the other witnesses had had to say; that her explanation was not consistent; that she was unable to adequately explain the discrepancies between her statements and the statements of other witnesses; and that her explanation as to missing employment documentation relating to Mr Hudson continued to change.

[107] It is correct, as Mr Drake submits, that humans have an imperfect recall and that differing versions of the same event may be explicable on this basis. However it was open to Mr Winder and Ms Wiegandt-Goude to conclude that the

discrepancies in this case went well beyond the usual vagaries of the human mind and to draw the conclusion that Ms George was not being truthful in her responses.

Demeanour

[108] There was also a concern about Ms George's demeanour during the course of the disciplinary meeting, a factor that had been identified in Mr Bremner's earlier investigation report. Particular reference was made to her failure to answer questions directly, a lack of eye contact and the formulation of her responses. It was said in evidence that this reflected a marked departure from the way in which she usually interacted and an adverse inference was drawn against her.

[109] There are dangers associated with drawing inferences from the way in which people respond during interviews, particularly in relation to an over-reliance on non verbal cues. There are a range of reasons why a person may avoid eye contact, many of which are entirely innocent. Stumbling over answers, sweating, turning red, or wanting to refer to notes may demonstrate nothing more than nervousness or anxiety at being in an unfamiliar environment with a significant amount at stake. As Dobson J recently observed in *A v Attorney-General*:[10]

> As to the advantage Ms Rebstock had from seeing and hearing A in his response to the questioning on two occasions, current academic research on the reliability of methods of fact-finding is redolent with cautions about over-reliance on perceptions gained from the manner in which witnesses (or suspects) answer questions. The reliability of many behavioural and verbal cues classically thought to indicate truth or falsity in answers is subject to question.

[110] Ms George was put on notice that the way in which she had responded to questions relating to events surrounding Mr Hudson's engagement were of concern, both in Mr Bremner's investigative report and subsequently. She was supported by a lawyer at each meeting she attended. She was given adequate time to prepare for the meetings and given a full opportunity to respond to the questions that were posed,

[10] [2013] NZHC 988 at [52]. While referring to the dangers of a reliance on non verbal cues, Dobson J noted that Ms Rebstock had nevertheless raised during the second interview with A her concerns about the equivocal nature of his responses in the first interview so that there was an adequate warning that A's equivocation on critical issues as to what had happened with the Cabinet papers was a source of concern. These observations were not disturbed on appeal, see *A v Attorney-General* [2013] NZCA 289 at [42].

and adjournments were taken as necessary to provide a further opportunity for reflection and advice. Even putting concerns about Ms George's demeanour to one side, there were numerous matters of fact that formed the basis of the adverse conclusions drawn against her.

[111] Honesty and integrity are core elements of the employment relationship. Ms George was a senior employee with responsibility for financial management within the Council. Her role necessarily required that her employer could repose a high degree of trust and confidence in her. The Council could reasonably expect that she would be open and frank in explaining her actions and inactions.

[112] I am satisfied that the procedure followed by the Council in relation to the truthfulness allegations was full and fair, and that there was a sufficient basis for Mr Winder and Ms Wiegandt-Goude's conclusion that Ms George had not provided truthful responses during the course of the investigative and disciplinary process, and to reach the view that this amounted to serious misconduct warranting dismissal.

Characterisation of the process

[113] Mr Drake submitted that the 9 December 2009 meeting was a disciplinary meeting and that Ms George was effectively ambushed at it. However Ms George accepted in cross-examination that she was aware that an investigative process was underway at this time. It was made clear, both before and at the meeting, that the meeting was being held as part of the investigative process. This was consistent with the Council's disciplinary policy, which anticipates that an investigative meeting will precede a disciplinary meeting. Ms George was given advance notice of the matters that would be discussed at the meeting, and the allegations made against her, by way of letter dated 1 December 2009. At the meeting she was asked to respond to questions relating to the allegations. Her responses were subsequently considered, along with the information provided by other witnesses. A decision was then made to hold a disciplinary meeting. Prior to that meeting she was provided with all of the evidence, including the notes of interview with the other witnesses and the preliminary investigation report.

Letter of 1 December 2009

[114] Mr Drake put it to Mr Bremner that he ought to have investigated the allegations to determine whether they had substance before proceeding. I agree with Mr Clarke that such an approach would effectively require a pre-investigation investigation. It was appropriate for the Council to advise Ms George of the allegations being considered, to undertake an investigation and then to commence a disciplinary process based on the outcome of the investigative phase. At no stage were any concerns raised about the process being followed (other than in Ms George's email to Mr Bremner advising that she was entitled to the "case against her") and Mr Boyle confirmed that no criticisms were made of the process during the course of the meeting of 2 February 2010.

[115] Nor do I accept that Mr Bremner was required to consider how casual staff had previously been employed in the context of his investigation. His role was to engage in a factual inquiry and to report the outcome of that. It was not to determine whether Ms George should be subject to any disciplinary action or what (if any) penalty should be imposed.

[116] It is notable that Ms George accepted the following propositions in cross examination, namely that all relevant information was before the decision-makers by the time of the disciplinary meeting; that she had a reasonable opportunity to prepare for the meeting and to respond to the Council's concerns; that she was given a separate opportunity to make submissions on possible outcomes; and that the Council considered her explanation before making its decision.

Alleged breach of contract by Council

[117] Mr Drake submitted that there had been numerous breaches of the disciplinary policy and that these amounted to a breach of contract, being terms incorporated into the employment agreement. I have already dealt with these alleged breaches above.

[118] Ms George says that the Council breached a number of duties to her, including an alleged duty not (without reasonable cause) to conduct itself in a manner calculated or likely to destroy or seriously damage her reputation or cause her undue anxiety, humiliation, loss of dignity or injury to feelings, or to damage the relationship of trust and confidence between them and to ensure that a careful, thorough and fair investigation was carried out, to a standard commensurate with the gravity of the accusation and the potential effect on Ms George, prior to deciding to dismiss her in a situation where her reputation and ability to work in her profession could be injuriously affected by a dismissal for alleged untruthfulness.

Do heightened standards apply in disciplinary processes involving senior managers?

[119] While there was some suggestion by Mr Drake that a heightened standard of care might apply depending on the seniority of an employee's position and possible damage to reputation,[11] I have reservations about such an approach. It runs the risk of making assumptions about worth and the potential impact on future employment prospects, valuing one employee's career over another's and of imposing a higher threshold of justification depending on the perceived status of an employee's position. While the Act requires regard to be had to the justifiability of a decision to dismiss in "all the circumstances" I doubt that this requires a more rigorous approach to decisions to dismiss senior executives than, for example, junior clerks. Each case must be assessed in light of its own individual circumstances.

[120] Even accepting the nature and scope of the duties contended for on Ms George's behalf, it will be evident from my earlier findings that her claim must fail.

Breach of obligation of good faith by failing to advise knowledge of TEAM reports?

[121] It is alleged that the Council breached its obligation of good faith by failing to advise Ms George at an early stage about the concerns raised in relation to TEAM's advice, and the concern that she had failed to implement the advice, thereby exposing the Council to risk.

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[11] See *Salford Royal NHS Foundation Trust v Roldan* [2010] EWCA Civ 522 at [13].

[122] I do not accept that the failure to advise Ms George of the potential issues relating to the draft December 2007 and February 2008 reports reflected a hidden agenda to secure her departure from the organisation. The timing does however impact on its ability to establish its claim against Ms George. I consider this further below.

[123] Mr Drake submitted that, as a decision was being proposed that had an adverse impact on Ms George's employment, Mr Winder was under an obligation to advise her of Mr Kerr's suspicions. However, the TEAM reports had nothing to do with the decision to dismiss. Mr Winder made it clear that he was focussed on trying to assess the extent of any problem rather than determining who (if anyone) bore responsibility for any failings. In these circumstances the failure to provide information to Ms George about the reports did not render the disciplinary process unfair.

[124] The allegation of breach of good faith centred on the failure to advise Ms George that Mr Kerr had concerns that TEAM's draft December 2007 and February 2008 reports may not have been acted on and that he decided to keep this information from Ms George. It remained unclear what advantage Ms George thought Mr Kerr might obtain by taking such a course. I am satisfied that it reflected nothing more than the fact that there was a distinct lack of clarity as to whether there were in fact any concerns that needed to be raised with Ms George, given the nature and the scope of the issues remained unclear at that early stage. The timing is relevant. Mr Kerr was provided with the TEAM advice in October 2009. On 4 November 2009 TEAM advised him that further work would need to be done, including as to whether the Council had applied the correct employee/contractor treatment. And this occurred within the wider ambit of an anticipated audit that had nothing to do with the circumstances Ms George later found herself in. In the event, TEAM did not report back until May 2010, after Ms George's departure from the Council. Nor did Mr Kerr act unilaterally. Rather he took the appropriate step of seeking Human Resources advice as to whether he ought to raise the issue with Ms George and he was advised that there was no need to. I am not satisfied that the allegation of breach of good faith is made out in the particular circumstances of this case.

Conclusion: Personal grievance claim - ARC 91/10

[125] It is not for the Court to substitute its own view of the appropriate disciplinary outcome. Standing back I conclude that it was open to the Council to find that Ms George had committed serious misconduct and that her dismissal was appropriate. How the Council acted, and what it did, was what a fair and reasonable employer would have done in the circumstances.

[126] Ms George's claim is accordingly dismissed.

Residual issues

[127] It is not necessary to determine the residual issues raised by the parties in the context of Ms George's personal grievance, in light of the above. However, in deference to counsel who addressed me at some length on these points, I turn to briefly consider them.

Claim for special damages relating to investigation

[128] Given my factual findings, Ms George's claim for special damages against the Council in relation to its investigation must fail. However, I would not have awarded damages on this basis in any event. In *Harwood v Next Homes Ltd*[12] Judge Travis distinguished between a claim for damages and a grievance concerning an employment relationship problem, holding that it would not be appropriate to classify costs incurred prior to the filing of a Statement of Problem as special damages to enable them to be recovered in full. I respectfully agree with that approach. Nor am I drawn to Mr Drake's submission that *Binnie v Pacific Health Ltd*[13] requires a different approach. 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.

Claim for general damages

[12] [2003] 2 ERNZ 433 at [37].
[13] [2002] 1 ERNZ 438 (CA).

[129] Ms George also claimed substantial general damages (both reputational and aggravated).

[130] While the Court of Appeal in *Trotter v Telecom Corporation of New Zealand Ltd*[14] stated that there was no reason in principle to exclude a claim for damage to reputation from a personal grievance, there do not appear to be any cases in which they have been awarded as a separate head. This may well reflect the fact that compensatory awards under s 123(1)(c)(i) of the Act will usually suffice to compensate for any such damage, and a concern to avoid double recovery.

[131] There was a paucity of evidence in relation to the reputational damage that Ms George is said to have suffered. While I accept that she found it embarrassing and difficult to explain that she had been dismissed that, of itself, does not amount to damage to reputation caused by her employer. Nor is the fact that she found it hard to find alternative work at a commensurate level. There was evidence that a prospective offer of employment was nearly withdrawn on the basis of concerns about the circumstances of her departure from the Council but those concerns were able to be resolved. The fact is that Ms George *was* able to secure employment as an accountant. Any damage that was suffered could otherwise have been adequately addressed by way of compensation under s 123(1)(c)(i) without resorting to an alternative basis for relief.

Aggravated damages

[132] There is uncertainty about the availability of aggravated damages for breach of an employment agreement.[15] The concerns that have been raised include the risk of double recovery and the view that s 123(1)(c)(i) "codifies the principles of aggravated damages, and therefore in practice it is more likely for relief to be sought under this section."[16] Concerns relating to double recovery were relatively recently

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[14] [1993] 2 ERNZ 659 (CA).

[15] See, for example, Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) at [13.4.3] and *Kelly v Accident Rehabilitation and Compensation Insurance Corporation* [1997] ERNZ 173 at 192.

[16] Ibid.

emphasised, in a different context, by the Supreme Court in *Couch v Attorney-General*.[17]

[133] Mr Drake made it clear that Ms George was not seeking to "double dip". If I had been drawn to her claim of breach of contract I would not have awarded aggravated damages. Her losses could have been adequately compensated under the statutory heads of redress. In my view the Court should be slow to look outside the detailed statutory scheme for relief in order to supplement remedies provided for by statute.

Claim for penalties

[134] There is no basis for an award of penalties against the Council on the facts. This aspect of Ms George's claim is accordingly dismissed.

Calculation of interest over time

[135] There appears to be some uncertainty as to how interest is to be calculated over extended periods of time, such as in the circumstances of this case which has taken approximately three years to come to hearing.

[136] Clause 14(1) of sch 3 of the Act states that:

> Subject to subsection (2), in any proceedings for the recovery of any money, the Court may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or any part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.

[137] The current interest rate is 5 percent, as prescribed by the Judicature (Prescribed Rate of Interest) Order 2011. The interest rate from 1 July 2008 to 30 June 2011 was 8.4 percent. Prior to 1 April 2011, cl 14(1) stated that the Court may award interest at "such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2 percent, as the Court thinks fit." Under the previous clause, the

[17] [2010] NZSC 27, [2010] 3 NZLR 149 at [98].

interest rate would be approximately 5 percent, based on the current 90 day rate of around 3 percent.

[138] An issue arises as to whether cl 14(1) applies retrospectively to causes of action arising prior to 1 April 2011. The issue has not been determined.[18] It appears that since 1 April 2011 the Authority has applied the current rate of interest to periods prior to that date.[19]

[139] As Mr Clarke points out, in *Takaro Properties Ltd v Rowling*[20] the Privy Council observed that the current prescribed interest rate should not apply retrospectively and that:[21]

> [Their Lordships] are clearly of the opinion that the intention of the enactment was that regard should be had to the rate of interest from time to time prescribed during the period between the arising of the cause of action and judgment, and that the maximum rate of interest for each part of the period should be reckoned accordingly.

[140] There is a presumption against enactments having retrospective effect.[22] I consider that the appropriate approach is to apply the relevant rate of interest for particular time periods during the course of the life of the proceeding, rather than a retrospective application of the current rate of interest. The latter approach could unfairly prejudice one or other of the parties. The former approach is consistent with basic principles of fairness.

Breach of contract claim: ARC124/10

[141] The Council has brought a claim against Ms George for breach of contract. It is alleged that Ms George breached her contract with the Council by:

- Failing to act on or implement the recommendations and advice given to her by the Council's tax advisers (TEAM) in relation to the employee/contractor distinction and fringe benefit tax on motor vehicles;

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[18] Although discussed in *North Dunedin Holdings Ltd v Harris* [2011] NZEmpC 146 at [12].
[19] See, for example, *Amian v Reipen* [2011] NZERA Wellington 192.
[20] [1987] 2 NZLR 700 (PC).
[21] At 719.
[22] Interpretation Act 1999, s 7.

- Failing to implement the Council's tax policies and to take steps to mitigate the Council's tax risk in relation to GST.

[142] Ms George's first point (advanced by way of counter-claim) is that the Council's claim constitutes an abuse of process because it was filed for an ulterior purpose, namely to apply pressure on her to withdraw her personal grievance. A declaration to that effect is sought.

Was the claim brought for improper purposes?

[143] The allegation that the Council brought its breach of contract claim in order to dissuade Ms George from proceeding with her personal grievance is a serious one. It is true that the breach of contract claim was filed after Ms George had filed a personal grievance in the Authority and after leave had been granted to remove the personal grievance to this Court. However, it is evident that the timing was associated with an assessment of the potential exposure of the Council and where responsibility for that exposure might lie. The Council formed the view, based on external advice from TEAM, that the potential exposure was high, that Ms George had been the sole recipient of two significant pieces of advice that TEAM had provided, it appeared that she had failed to act on or implement that advice, and that these failings had caused the Council significant loss.

[144] While it is possible to speculate that the Council may not have brought the claim in the absence of Ms George's personal grievance, there was no evidence that this was so and, even if there had been, it does not follow that the claim is improper. While it is, as Mr Drake says, unusual for an employer to sue a former employee for breach of contract that does not mean that it is unlawful to do so. Nor is it improper to pursue a novel claim. It is, in any event, clear that the Council has previously taken legal proceedings against a former employee for breach of contract, and was (in that instance) successful in its claim.[23] On balance I am not satisfied that this aspect of Ms George's claim is made out on the facts.

[23] *Auckland Regional Council v Tilialo* ERA Auckland AA368/09, 15 October 2009.

Damages for breach available?

[145] There is nothing to suggest that Ms George wilfully breached any term of her employment agreement in the context of the Council's claim against her. Mr Drake submitted that even if a breach was made out (which was denied) there was an implied term in Ms George's employment agreement that the Council would not pursue her for breach of contract for unintentional loss or damage caused by her in the course of her duties. His primary argument focussed on a term which he contended was implied by custom. He developed an alternative argument based on the wording of the indemnification clause contained within the employment agreement.

[146] An elderly House of Lords judgment, *Lister v Romford Ice & Cold Storage Co Ltd*,[24] has generally been thrown up to ward off arguments aimed at limiting an employer's ability to recover against an employee for damage caused by them in the course of their duties. The House of Lords found that the employee owed his employer an implied duty to exercise skill and care in the performance of his duties and that there was no implied term in the employment contract precluding the employer from seeking indemnity from the employee where the employer had been found vicariously liable for the employee's negligence.

[147] I have reservations about whether *Lister* remains the stumbling block that it has previously been perceived to be. Rather it is strongly arguable that in the modern context of employment relationships in New Zealand, and in light of the mutual obligations conferred on the parties under the Act, an employer may not seek to recover damages from an employee arising from acts of negligence committed during the course of their duties. If it were otherwise it would likely have a chilling effect on the way in which employees undertake their duties, could lead to reactive claims or threats of claims against those taking personal grievances which would undermine the statutory framework for resolving employment relationship issues, and expose employees to significant potential financial liability for a breach even in circumstances that could never justify a dismissal. It also raises policy concerns

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[24] [1957] AC 555 (HL).

about the fair allocation of risk and which party is best placed to mitigate potential liability.

[148] It is notable that the Court of Appeal has expressly left open the issue of whether an employer can recover damages in such circumstances. In *Katz v Mana Coach Services Ltd,*[25] an employee sought to be indemnified by her employer for legal costs incurred after being prosecuted for careless driving while in the course of her duties. Arnold and France JJ declined leave to appeal but went on to state:[26]

> That does not mean, however, that we necessarily accept that Mana could recover the losses it has suffered from Mrs Katz. The considerations relevant to whether an employee is entitled to be indemnified for legal costs following a prosecution for a fault-based offence may be different from those which arise where an employer seeks to recover its losses from its employee. That question should be addressed when, if ever, it arises.

[149] In a separate judgment, Glazebrook J observed that:[27]

> I accept that there may be a good argument that Ms Katz was performing her duties (driving) at the time of the accident and that mere negligence may not affect her right to indemnity. I also accept that the comments of this Court in *Christchurch City Council v Davidson* may not be the last word on the issue of indemnity or that there is an issue as to how the comments should be interpreted and applied in cases of negligence.

[150] Ms Coats (who shouldered the argument on the breach of contract claim) accepted that there was a need for some control in relation to the way employers might bring claims against current or former employees but submitted that the other elements of a breach of contract claim (such as foreseeability and loss) provide an adequate safeguard. I do not agree. These elements are likely to provide an employee with decidedly cold comfort once a breach (however minor) is established against them.

[151] In the present case cl 6 of Ms George's employment agreement relevantly provides that:

> The ARC shall indemnify the employee from and against all actions, claims, proceedings, costs and damages incurred or awarded in respect of or arising

[25] [2011] NZCA 610.
[26] At [14].
[27] At [17].

> out of any act or omission or statement by the employee in the course of employment, provided that the indemnity shall not be available for wilful loss, or damage caused by the employee or where the loss or damage is the result of misconduct or an unlawful activity.

[152] The evident purpose of cl 6 is to make it clear that Ms George will not be liable for losses caused by her during the course of her duties except in limited circumstances. When read in context, it is clear that the limitation relates to loss or damage resulting from a wilful act ("*the* loss or damage" referring back to "wilful loss or damage"). If it were otherwise, it is difficult to see what work the clause would have left to do.

[153] Ms Coats submitted that cl 6 is directed at claims by third parties and does not extend to claims by the employer itself. However, it would make little sense for the Council to agree to indemnify Ms George for unintentional loss or damage caused to a third party but reserve to itself the ability to sue her in such circumstances. If this had been the parties' intention it is likely that it would have been expressly stated. While the Council has previously pursued a claim for damages against an ex-employee (in *Tilialo*), that case involved wilful misconduct.[28]

[154] I consider that the agreement prevents the Council from pursuing a claim for damages for breach of contract against Ms George for unintentional loss or damage caused by her during the course of her employment. This sits comfortably with the other terms (both express and implied) of the parties' agreement and the Council's statutory "good employer" obligation conferred on it by the Local Government Act 2002.

[155] Mr Drake submitted that there is an implied term in custom that an employer will not commence legal proceedings against an accountant employee for negligent breach, citing *Everist v McEvedy*[29] in support of this proposition. It is well established that a contract may be subject to terms that are sanctioned by custom, although they may not have been expressly provided for by the parties.

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[28] It does not appear that there was an indemnity clause in the employment agreement at issue in *Lister* and *Masonry Design Solutions v Bettany* (2009) 6 NZELR 834, and the indemnity clause in *Davidson v Christchurch City Council* [1997] 1 NZLR 275 (CA) expressly referred to indemnification from third party claims.
[29] [1996] 3 NZLR 348 (HC).

[156] *Everist* involved a solicitor (Mr McPhail) who fell below the applicable standard of care when dealing with a property transaction. The client advanced a claim against Mr Everist (the principal of the law firm). Mr Everist argued that he was entitled to be indemnified by Mr McPhail following *Lister*. Mr McPhail contended that there was an implied term in his contract of employment abrogating the effect of *Lister*. The alleged implied term was that Mr Everist would indemnify him against any personal liability he might have for erroneous conduct in the performance of his duties, save in cases of fraud and dishonesty. As a consequence he argued that the implied term prevented Mr Everist from seeking to recover the amount of his loss from his employee.[30] Justice Tipping agreed.

[157] While, as Ms Coats pointed out, *Everist* involved a different factual context (a claim by a third party against the employer who then sought indemnification from the negligent employee), it is authority for the proposition that the *Lister* doctrine does not trump a term implied by custom, or by necessary implication, into an employment agreement that is to contrary effect.

[158] Implication by custom will occur where the Court is satisfied that the custom has acquired such notoriety that the parties should be taken to have known of it and intended that it should be part of their contract. The custom must also be certain; it must be reasonable; it must be proved by clear and convincing evidence; and it must not be inconsistent with any express term of the contract.[31] As Tipping J observed, in such circumstances "the employee's implied duty of care continues to exist, but there is no monetary-sanction as between employer and employee for any breach."[32]

[159] In *Everist* the President of the New Zealand Law Society gave unchallenged evidence that it had been the invariable practice of legal firms to stand by their employed solicitors in the event of a successful claim, in circumstances where the employee's actions had fallen within the normal scope of their employment. He also gave evidence that personal liability for negligence was not an issue which needed to be raised, or was raised when firms were employing staff solicitors. It was common ground that the custom or invariable practice of the sort contended for existed and

[30] At 359.
[31] At 360.
[32] At 361.

that, except in the case of dishonesty or fraud, legal firms in New Zealand invariably indemnified employed solicitors for any personal liability they might incur in the ordinary course of practice.[33]

[160] Ms Coats submitted that the fact that the Council had previously pursued a breach of contract claim against an employee told against the implication of a customary term. However, as I have already observed, that case involved wilful misconduct and it did not involve a professional accountant.

[161] Mr Drake referred to the evidence of Messrs Lynch and Weber to support the existence of an implied custom. Both gave evidence about the inevitability of errors being made and discovered within accounting systems, and the extent to which data is relied on by accountants. Both witnesses emphasised the features of a large organisational structure, including the interrelationship between the role of in-house accountants and others (above and below) within the organisation, and the shared nature of the responsibilities being discharged by each. Mr Lynch gave evidence that in his 25 plus years as a practising accountant he had not encountered a situation where a client organisation or company had commenced legal proceedings against an employee accountant in respect of his/her alleged failures. While this aspect of the evidence was unchallenged, it is not sufficiently clear and convincing (in the sense referred to by Tipping J in *Everist*) to support the existence of a customary term of the sort contended for.

[162] Ultimately, however, and notwithstanding the observations above, the Council's claim fails on the facts. My reasons follow.

Breach of contract?

[163] As Group Manager, Accounting Services, Ms George was a senior manager with a number of direct reports. She was responsible for managing and delivering efficient accounting services to the Council. The position description for her role included a number of outcomes, including the delivery of accounting services, and financial and technical advice on accounting and tax matters. The listed key

[33] Ibid.

activities included the delivery of financial accounting and transactional services, including payroll, accounts payable, GST, fringe benefit tax and PAYE. Ms George's responsibilities also involved managing the relationship between the Council and the suppliers of tax and accounting services. This meant that she was the primary contact within the Council for TEAM. Ms George's role was a busy one. Many papers came across her desk each day. She accepted that the two TEAM reports were important pieces of advice and the only pieces of written advice she received from TEAM.

[164] It is indisputable that Ms George owed a number of duties to her employer, including a duty to exercise reasonable skill and care.

GST

[165] TEAM provided tax policies to the Council and updated them as required. The policies included a section on the GST treatment of residential property income and expenditure. While these policies were put in place prior to Ms George's arrival, she accepted that she was aware of them. TEAM ran a number of training seminars including one on 26 February 2008 and one on 11 November 2008. Ms George attended these seminars and both touched on issues relating to GST, together with a raft of other issues.

[166] When TEAM undertook a review of the Council's tax compliance a number of concerns were raised, including a concern that the recommendations contained within its draft December 2007 and February 2008 reports had not been implemented, and that the Council had a GST underpayment resulting from incorrectly claiming GST input tax on residential property. The Council alleges that Ms George failed to implement the tax policies and the training she received in relation to GST input tax, and that this constituted a breach of her duties to it.

[167] The Council's accounting system contained a GST calculation functionality. It is common ground that the system contained an incorrect setting which affected the way in which GST returns were calculated. Mr Fisher accepted in cross examination that the setting error may have existed within the system for a

considerable period of time, perhaps dating back to when GST was introduced. There is no evidence to suggest that any of Ms George's predecessors had identified the error in the system. Nor is there anything to suggest that the Council's internal auditor, or any external auditors, detected the error. Ms George was not the only accountant within the organisation – there were a number of others, including operational accountants who worked specifically with the Council's Parks department. TEAM had put forward a proposal in May and September 2006 that a GST audit review be undertaken by them but Mr Monk had declined both proposals. If such a review had been undertaken the system error may well have been discovered and remedied at that time.

[168] Ms George made the point that thousands of invoices were entered into the system by a number of people across the organisation from various departments each month. Plainly it was not possible to check each of those invoices and only a small sampling occurred. Ms George did not prepare the monthly GST return. Another accountant who reported to Ms George undertook this task.

[169] Ms George says that she was not aware that the Council had residential properties until April 2009, although it appears that she had a meeting with Mr Fisher in November 2007 during which accommodation issues were discussed. Mr Fisher could not recall the details of the meeting and nor could Ms George. It is evident that Ms George spent time each week dealing with payroll issues, and park ranger rental payments were a deduction from pay which was processed by payroll. Ms Wiegandt-Goude believed that it was common knowledge within the organisation that the Council provided residential accommodation to park rangers, although her arrival at the Council post-dated the alleged breaches.

[170] While there was a degree of uncertainty as to when Ms George became aware of issues relating to park ranger accommodation it is evident that she came across an error in an amount claimed for GST input tax on expenses relating to park residential property and made a one-off adjustment for GST incorrectly claimed in that period. The error had arisen out of the Council's transactions settings. It was submitted that, having become aware of the error, Ms George should have considered the extent of

the Council's historic risk; identified the best way to mitigate any risk in terms of underpaid GST in previous years; and ensured the correction of the system error.

[171] Ms George's evidence was that she would have raised the issue with Mr Monk as to whether the previous years should also be checked and assumes that he told her not to do so since that step was not taken. Mr Monk had no specific recollection of Ms George raising the issue with him but could not exclude the possibility that she did. Ms George also said that errors were frequently discovered and the common practice within the Council at the time was to make the one-off adjustment, not undertake a voluntary disclosure to IRD, and "carry on as normal". I am prepared to accept her evidence that this was so.

[172] While the issue had been touched on at a training session some time previously I do not consider that Ms George's failure to institute an historic review or system change going forward amounts to a breach of duty in all of the circumstances, including having regard to her evidence as to the prevailing practices at the time and the conversations she says she had.

The draft December 2007 report

[173] The draft December 2007 report was sent to Ms George and Ms George alone. The report set out a recommended "best practice" procedure for the Council to implement in order to mitigate future tax risk in relation to the engagement of independent contractors and made it clear that there were real risks associated with an absence of a formalised procedure. TEAM recommended that once the Council had implemented the best practice procedure it should carry out a potential historic tax risk assessment to enable the Council to assess whether a voluntary disclosure was warranted to IRD.

[174] It was submitted that Ms George ought to have distributed copies of the report to Mr Monk, the Council's Executive Management Team and the Council's Human Resources department; discussed the issues raised by the December report with Mr Monk and the Council's Human Resources department; and acted on and implemented the advice contained within the report.

[175] Mr Drake accepted that, in principle, it was incumbent on Ms George to take steps following receipt of the 2007 report, consistent with her contractual responsibilities, but submitted that Ms George had in fact done what she was required to do.

[176] The report was provided in draft form and was never finalised by TEAM. Ms Coats submitted that this was irrelevant to the issue of whether or not Ms George was obliged to implement it. I do not consider that its status can be so readily swept to one side. It was provided in draft form to enable comments or corrections to be made to it. While the Council sought to emphasise the importance of the report and the recommendations contained within it, that needs to be balanced against TEAM's apparent failure to take any steps to follow up the report with Ms George or anyone else within the Council to ascertain whether it could be finalised or required further amendment, despite the importance now being attributed to it. In the event it was never finalised or signed off.

[177] Ms George says that she was sure that she told Mr Monk that TEAM had sent her the draft report, that they discussed it, that she believed that Mr Monk asked her to send a copy to the Human Resources department and that she did so. In cross-examination she could not specifically recall forwarding the report to Mr Monk but assumed that she had based on her usual practice.

[178] Ms Wiegandt-Goude was not with the Council in December 2007. Her evidence about the documentation that she found in Human Resources when she was appointed does not materially assist. Further, Ms George gave evidence that Human Resources had been relocated within the building to a different floor and that some documentation may have gone missing in the move. The then manager of Human Resources did not give evidence. There certainly appears to have been nothing done by way of implementation in terms of the draft checklists that TEAM had developed relating to the contractor/employee distinction. But if Ms George did draw the report to Mr Monk's attention (as she says she did) and was told by him to draw it to the attention of Human Resources and she did (as she is sure she would have done), the default in implementation may well lie with Human Resources.

The February 2008 report

[179] The February 2008 report was also sent to Ms George and Ms George alone. The report dealt with fringe benefit tax issues, and identified that the Council was not maximising all available fringe benefit tax expenditure in relation to its motor vehicles. In particular, the report identified that from 1 April 2006, due to changes in the relevant income tax legislation, it had been possible for the Council to elect for the fringe benefit tax day to commence and finish at an hour of the day other than midnight (which could have the effect of halving the Council's fringe benefit tax liability in relation to motor vehicles used for private use). This was also noted in the Council's tax policies, which Ms George accepted she had access to at the relevant time. Specifically, the February 2008 report advised that:

> Our understanding is that Council has not availed itself of the ability to elect for an FBT day ... Council should review its position in this regard, and if no election has been made for an FBT day, consider this opportunity as a priority.

[180] The Council contends that given the serious matters identified in the report Ms George was obliged to notify Mr Monk of TEAM's recommendations; send a copy of the report to the Operations division of the Council; and take steps to implement the recommendations. Mr Lynch gave evidence that if Ms George had been advised by the Council's tax advisers that there had not been a fringe benefit tax election then she should have made one without delay. Such an election was a relatively straightforward process, as Ms George accepted.

[181] Ms George could not recall receiving the report but accepts that she was the addressee and that it is likely that she would have. She said that she would have told Mr Monk that TEAM had reported on fringe benefit tax and that she would have discussed it with him. She also believed that she would have sent a copy to her operational accountant and possibly others.

[182] It is, of course, conceivable that Ms George received a copy of the draft December 2007 and February 2008 reports, filed them away but otherwise completely ignored them. She may also have advised Mr Monk of them, and

referred them to others within the organisational structure. Mr Monk could not exclude the possibility that she had spoken to him.

[183] While Mr Monk raised a concern about Ms George's upward reporting it is not immediately apparent why a hard working and conscientious employee such as Ms George, who had her professional reputation to consider, would neglect to take any steps at all in relation to not one but two important reports. After all, it would not have been difficult for her to refer these matters on and to otherwise meet the obligations that the Council contends that she breached. This suggests that it would be out of character for Ms George to do nothing and to simply place a hard copy of each report in a folder on her desk and let them gather dust.

[184] Issues relating to what was and was not done over five years ago are not easy to resolve. The difficulties are exacerbated by the effluxion of time. Somewhat ironically, if the Council had raised a query about the implementation or otherwise of TEAM's tax policies and the recommendations within the draft December 2007 and February 2008 reports at the time the initial concerns were raised, both parties may have been able to provide additional support for their respective versions of events. Effectively the Council forfeited the opportunity to obtain a contemporaneous response and assistance from Ms George as to what she had or had not done and why, and what may have happened to the reports, when events were fresh in her mind.

[185] Memories inevitably fade over time, and Ms George had (in the intervening period) to deal with the effect of the dismissal on her, finding alternative employment against the backdrop of the circumstances surrounding her departure from the Council, supporting her two young children as a solo mother, and the significant health issues that she was confronting. It is perhaps not surprising that she cannot recall precisely what occurred and when. She was, however, clear on what her usual practice was and what she believes she would have done in the circumstances. And while it appears that TEAM interviewed a number of people in the course of conducting its 2010 review, including Ms George, there were no notes of interview before the Court that might otherwise have assisted in casting light on what occurred and why.

[186] It is tolerably clear that no steps were taken to implement the recommendations contained within TEAM's advice. This suggests that it was either Ms George's default, the default of others, or a combination of the two. The Council asks me to draw the threads of circumstantial evidence together and infer that Ms George breached her contractual duties to it. While I accept that there is some circumstantial evidence that can be taken to support the inferences it seeks to draw, at the end of the day the burden is on the Council to establish its case. Standing back and carefully considering the evidence before the Court, I am not satisfied on the balance of probabilities that Ms George breached her obligations to the Council.

Remedies

[187] I do not need to deal with the Council's claim for relief in relation to the alleged breaches of contract by Ms George.

[188] I record, however, that there were difficulties in relation to the quantum of the Council's alleged loss.[34] Mr Clarke accepted that there would need to be an adjustment in any award in relation to use of money interest, to reflect the interest earned by the Council on deposits over the relevant period or a reduction in the interest paid by the Council on its overdraft facility over the relevant period. He also accepted that there was little evidence before the Court to allow an adjustment to be made.

[189] The Council claimed what it characterises as "conservative" costs in relation to the consultancy work that TEAM undertook following disclosure of the alleged failure to follow its earlier advice. In *Binnie v Pacific Health Ltd*,[35] the Court of Appeal accepted that legal expenses incurred prior to the issue of proceedings (such as for investigations into employee conduct) could be treated as special damages rather than party/party costs. The effect of treating these expenses as special damages, rather than as costs, is that: "as special damages the costs in question

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[34] Although noting that difficulties in assessing damages is not fatal. See, for example, *Attorney-General v Gilbert* [2002] 1 ERNZ 31 (CA) at [95].

[35] [2002] 1 ERNZ 438 (CA).

would be recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution."[36] And further that:[37]

> 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.

[190] The Court concluded that there was insufficient evidence to make any reliable apportionment in *Binnie*. Counsel submitted that a direct line could be drawn in this case.

[191] There are difficulties associated with the evidence relating to the costs said to have been incurred in investigating Ms George's alleged breaches. The claim is based on TEAM's assessment of the costs that related to its assessment in August 2010 for the Council, set out in a memorandum to its client where it stated that:

> ... the delayed correction of the tax non-compliance increased the level of tax consulting work required and consequently, the tax fee cost to Council. We would conservatively assess the tax fees arising as a consequence to be in the region of $53,350 since November 2007. This excludes the cost of the original advice amounting to $15,548.

[192] Mr Fisher's evidence was that most of the work performed by TEAM dealt with three matters of note (the tax compliance review, the IRD investigation and the voluntary disclosure). It is clear that total costs from 31 October 2009 to 30 November 2010 (excluding helpdesk, consulting and training invoices) came to $97,000. There was evidence that a straightforward tax compliance review might cost between $25,000 and $30,000. Counsel invited me to deduct these costs (on the basis that they were "sunk costs"), leaving approximately $70,000 for work on the three issues, leading to a conclusion that the $53,500 was conservative.

[193] This assessment came nearly three years after the advice had been given. Mr Fisher gave evidence (now nearly six years later) as to how the assessment figure had been arrived at, although he had no documentation to support his workings other than an invoice that had been tendered to the Council.

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[36] At [18].
[37] Ibid.

[194] Mr Fisher said that he had reviewed the list of all invoices between 1 March 2005 and 30 November 2010 in order to calculate the amount of fees incurred and to assess the proportion of those fees which were attributable to the additional work in assessing Ms George's alleged non compliance at the time of doing the tax compliance review and voluntary disclosure. While Mr Fisher believed that the estimate of $53,350 was conservative, I do not share his sense of confidence that this is so. The invoices that he refers to are sparse on detail. Some of the costs incurred would have been incurred even if steps had been taken at an early stage to implement TEAM's advice, including in relation to the review (which Mr Kerr had sought in any event) and the eventual disclosure to IRD. In relation to the latter it remains unclear why the Council felt obliged to file a voluntary disclosure in relation to the contractor/employees issue in light of the results of its own inquiry (which suggested that of the nine originally identified problem categorisations only one was "arguably" an employee). While I accept that in order to get to the point of assessing whether a disclosure was warranted a review had to be conducted, that does not explain why a disclosure was proceeded with. And TEAM's initial advice had always been that an historic review would be required.

Claim for penalties

[195] The Council sought penalties against Ms George for breach of good faith. This was predicated on the basis of a finding that she had breached her obligations to it. I have not been persuaded to make such a finding and accordingly the claim for penalties is dismissed.

Conclusion

[196] Ms George's claim for unjustified dismissal and disadvantage is dismissed. The Council's claim against Ms George for breach of contract is dismissed.

[197] All issues relating to costs are reserved. In the circumstances the parties may be in a position to resolve any issues as to costs between themselves and without the need for further recourse to the Court. If that does not prove possible costs can be the subject of an exchange of memoranda, to be filed and served by the successful

party in each proceeding within 40 working days of the date of this judgment, and any reply within a further 20 working days.

Christina Inglis
Judge

Judgment signed at 1pm on 27 September 2013