ATTENTION IS DRAWN TO THE NON-PUBLICATION ORDERS MADE AT PARAGRAPH [65] OF THIS JUDGMENT

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 123
EMPC 307/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TITIIMAEA EUGENE ELISARA Plaintiff
AND	ALLIANZ NEW ZEALAND LIMITED Defendant

Hearing: 19-21 June 2019 and further submissions filed on 6 and 22 August 2019
(Heard at Auckland)

Appearances: S Worthy and HG King, counsel for plaintiff
H Waalkens QC and J MacGibbon, counsel for defendant

Judgment: 6 September 2019

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Elisara was Chief Executive and director of Allianz New Zealand Ltd, part of an international group of companies which provide insurance services. Allianz New Zealand reported to Allianz Australia Ltd. Allianz took a conservative approach to risk management and required strict compliance with the company's underwriting instructions.

[2] In early 2016 Allianz New Zealand secured a large portfolio of new business (referred to as the Prime Account), which included 29 Wellington properties. While this was regarded as something of a coup, it was not drawn to the attention of Allianz Australia in anything other than an oblique way. As it transpired, a significant proportion of the property within the Prime Account was located within a high-risk earthquake zone. The company's underwriting instructions set out three mandatory requirements for assessing new business risks, including that no more than 50 per cent of property situated within such a zone could be approved without dual sign-off. Because of the composition of the portfolio, it required dual sign-off. That was not obtained.

[3] The Kaikoura earthquake hit on 14 November 2016, causing a significant amount of damage in Wellington. A number of the buildings within the Prime Account were seriously damaged, triggering Allianz's underwriting obligations and serious potential financial repercussions for the company.

[4] Not surprisingly, Allianz Australia was concerned about the situation and decided to carry out a post-loss review which involved investigating what had occurred and why. This ultimately led to Mr Elisara's summary dismissal for serious misconduct. The actions of two other senior employees who had been involved in securing the Prime Account were also investigated. One (employee A) subsequently retired on medical grounds; the other (employee B) left the company on agreed terms. Interim orders were made by consent, prohibiting the publication of their names and the medical information relating to employee A. Permanent orders were subsequently sought by the defendant. I return to this application below.

[5] Mr Elisara contends that his dismissal was unjustified. The Employment Relations Authority dismissed his claim. That determination is challenged by way of hearing de novo. In essence, the challenge is answered by a consideration of whether what Allianz did, and how it did it, was what a fair and reasonable employer could have done in all of the circumstances. The relevant circumstances include the nature of the company's business and its culture, and the nature of Mr Elisara's role within it. No claim is advanced for unjustified disadvantage.

[6] I understood the focus of Mr Elisara's claim to be that the procedure followed by Allianz was flawed and resulted in an unjustified dismissal. There are four key procedural complaints. They are that the decision to dismiss was predetermined; there was a failure to provide all relevant information; the company failed to comply with the applicable managing poor performance policy; and there was a failure to provide Mr Elisara with a proposed disciplinary outcome to enable him to comment on it.

[7] Mr Elisara also claims that the decision to dismiss was substantively unjustified, in that the company did not have sufficient grounds for its finding that serious misconduct had occurred, and that summary dismissal was outside the range of permissible outcomes. In this regard it is said that the company failed to properly consider alternatives short of dismissal. Finally, it is said that the way in which Mr Elisara was treated was unjustifiably disparate from other employees who were involved in the sequence of events leading to the loss.

Background facts and business context

[8] In order to deal with each of Mr Elisara's claims it is necessary to understand the background context and the events leading to his dismissal.

[9] The Allianz group of companies adopts a conservative approach to risk assessment – indeed, Mr Elisara said in evidence that there was a standing joke within the industry that Allianz would only provide fire insurance cover for swimming pools fitted with sprinklers. Consistent with its approach, Allianz Australia took steps to strengthen its policies following the Christchurch earthquakes in 2010 and 2011 by implementing an underwriting instruction that allowed risks in earthquake sensitive areas (including Christchurch and Wellington) to be written (referred to as the Underwriting Instruction). Strict criteria had to be met, including that no more than 50 per cent of accounts could be written in Wellington, and any policy written outside of this instruction had to be signed off by both the Product Manager, Property, Technical Division, Allianz Australia (Mr Vernon) and the Corporate New Zealand National Underwriting

Manager. The National Underwriting Manager reported to Mr Elisara in the New Zealand office.

[10] The conservative approach to risk was also reflected in the company's well-developed compliance culture. That, in turn, was reflected in a number of documents, including:

(a) The Underwriting Instruction (which I have already referred to).

(b) The terms of the Pricing Licence which Mr Elisara held, and which reiterated the need to work within the requirements of various underwriting guidelines and manuals, and that quoting or binding business outside of a licence or the underwriting guidelines was a "very serious breach of Company policy and may result in … disciplinary action, up to and including dismissal".

(c) The Code of Conduct, requiring compliance with the company's "laws, rules and regulations that cover Allianz's activities. Compliance with Allianz's internal policies is also required." It also made it clear that there was a need to report concerns about compliance.

(d) The terms of Mr Elisara's Individual Employment Agreement, requiring compliance with the rules, policies and procedures adopted from time to time and the Code of Conduct.

(e) The job description for Mr Elisara's position which (under the heading "Compliance") required an application of business knowledge, in support of Allianz's commitment to a compliance culture, to ensure compliance requirements are met "100% of the time", and to "Immediately report any breaches in meeting compliance standards and provide a suggested resolution plan." The job description set out what Mr Elisara accepted in cross-examination was "A very key component of compliance" for

> underwriting in New Zealand by Allianz, namely the obligation to ensure underwriters underwrite profitable business in line with the underwriting guidelines.

[11] These obligations, and the company's concerns to ensure that they were met, were well known to Mr Elisara. Indeed, one of the reasons why Allianz considered his curriculum vitae attractive for the role of CEO at the time he applied was because he had extensive experience in underwriting and risk assessment principles. He was a lawyer with 20 years' experience, including in senior management roles, in the insurance industry.

[12] As I have said, the Kaikoura earthquake caused a considerable amount of damage, including to the Wellington properties which comprised part of the Prime Account. Allianz Australia promptly commenced a review which was focussed on compliance with the applicable Underwriting Instructions. One of the reviewers was Mr Elisara's manager in Australia (Mr Drinnan). A series of meetings was conducted as part of the review, including with Mr Elisara and others who had been involved in the underwriting process.

[13] During the review process Mr Elisara confirmed a number of things, including that he was aware that the Prime Account had not been signed off as an exception to the Underwriting Instruction, while noting that he had been confident that Mr Vernon would have supported the risk had he been asked; acknowledging that he had not done enough on the sign-off to ensure the risk had appropriate underwriting acceptance; and stating that he had been naïve in providing sign-off on the Prime Properties Account. Mr Elisara also provided written confirmation as to why he had taken/not taken the actions in question. An email he sent to Mr Drinnan on 9 December 2016 recorded that there had been a failure on his part to make due inquiries about the underlying risk and that all relevant components of the required underwriting sign-off had been obtained; that the process had been "lax"; that his sign-off had been "nowhere near standard"; that it had happened on his "watch"; that he was "part of an inadequate process"; and that it was, accordingly, his "responsibility".

[14] The review concluded that there had been multiple breaches of Allianz's underwriting policies, including (most particularly) the Underwriting Instruction, and that Mr Elisara may have committed serious misconduct. A formal disciplinary process was then commenced. Mr Hosking, the Chief General Manager, Broker and Agency, Allianz Australia, was given the decision-making task. He wrote to Mr Elisara on 23 December 2016 inviting him to attend a disciplinary meeting. A copy of the finalised review was attached, although it was noted that the views and opinions expressed in it were those of the reviewers only and did not reflect Mr Hosking's views, although they would likely be taken into account. The letter advised Mr Elisara that there were serious concerns that his actions/inactions may amount to serious misconduct and, if so, that dismissal might be the outcome. Mr Elisara was overseas on leave at the time the letter was sent to him.

[15] A further letter was sent to Mr Elisara on 18 January 2017 by Mr Fearnley, the Acting Group Manager, Human Resources, Allianz Australia. The letter reiterated the seriousness of the concerns which had been raised, recommended that Mr Elisara seek advice and bring a support person and/or representative to the meeting, and advised that once Mr Hosking had heard from Mr Elisara at the meeting, he (Mr Hosking) would consider whether any formal disciplinary sanction was appropriate. In the interim Mr Elisara was told that he was not required to attend the office.

[16] Mr Elisara prepared an extensive document in advance of the meeting which he provided to Mr Hosking beforehand, and which Mr Hosking read. The response included an admission that he had been "careless at least (probably worse)" in respect of how the Prime Account had been managed, but that he had not knowingly signed off on a breach of the Underwriting Instruction. It also stated that there had been no intention on his part to deliberately harm the company; that he had relied on others when he "should have done more"; that he deeply regretted his role in how the file was managed; and that he saw very clear lessons for himself given his seniority and responsibilities.

[17] Mr Elisara chose not to take a support person or representative with him to the meeting. At the outset of the meeting Mr Hosking reiterated that the purpose of the meeting was to consider Mr Elisara's response and that a possible outcome was termination of employment due to the seriousness of the matters raised. Mr Elisara confirmed that he understood the gravity of the situation. In essence, he said that he was unaware that two of the underwriters that were involved in securing the Prime Account had not followed the correct procedure. I pause to note that at the hearing he accepted in cross-examination that he should have asked to see the documentation demonstrating compliance with the dual sign-off requirement, although his evidence as to why he had not done so was not straightforward. He also accepted, when pushed in cross-examination, that alarm bells ought to have been ringing because of the risks associated with the transaction.

[18] The cornerstone of Mr Elisara's response to the company's concerns from the outset appeared to be centred on the actions of employees A and B. The point is, however, that it was Mr Elisara's actions and/or inactions which were relevant. The fact that others may have been partially to blame could not absolve Mr Elisara from all responsibility, particularly given his role as Chief Executive. Nor did I find Mr Elisara's evidence as to what he had allegedly said to the two employees at the time, and what he understood the position to be, consistent with other aspects of his evidence relating to the steps he ought to have taken with the benefit of hindsight. The critical issue is what he told Mr Hosking and what Mr Hosking could reasonably take from all of the information he had (or should reasonably have had) available to him at the time he considered matters.

[19] The 24 January meeting concluded on the basis that Mr Hosking would consider all relevant material, including what Mr Elisara's response, and would reach a concluded view. Mr Fearnley rang Mr Elisara later that day and scheduled a meeting for the following day for the purpose of delivering Mr Hosking's decision. At the 25 January meeting Mr Hosking advised that he was satisfied that serious misconduct had occurred and advised Mr Elisara that he had decided to summarily dismiss him. Mr Elisara indicated his acceptance of the decision to terminate his employment but questioned whether it could be on notice. Mr

Hosking said that he would think about that, which he later did. The summary nature of the dismissal was later confirmed.

Analysis

Summary dismissal justified?

[20] It is submitted on Mr Elisara's behalf that summary dismissal was not an outcome that was open to a fair and reasonable employer for a number of reasons, including because Mr Elisara expressed regret for what occurred and a willingness to learn from his lesson; there were failings within the broader company structure in terms of risk management; Mr Elisara had been deceived by one of the people who reported to him and who had told him that dual sign-off had been obtained when it had not; and Allianz had accepted that Mr Elisara had not been deliberate in his actions/omissions.

[21] I accept that another employer may not have decided to summarily dismiss Mr Elisara. Another employer might have decided to dismiss him on notice. It is perhaps conceivable that another employer might have decided to issue him with a warning. But the question is not what another employer might have done – it is whether what *this* employer did was what a fair and reasonable employer *could* have done in all the circumstances. As I have said, the circumstances include the nature of this employer's business and Mr Elisara's role in it. The failings, while ultimately not found to have been deliberate, were significant and had serious potential financial ramifications. Mr Elisara had not met the fundamental requirements of his role as CEO and the company was entitled to view his actions/omissions very seriously.

[22] Some might characterise the summary nature of Mr Elisara's dismissal as harsh and unnecessarily punitive. The company could, without any obvious disadvantage to it, have provided Mr Elisara with notice and then not required him to work it out. Mr Elisara did, after all, have a family to support and was the sole breadwinner. The company chose not to go down this path despite Mr Elisara's request that it do so.

[23] Dismissal on notice would have been well within the permissible target range. I cannot say that the decision to summarily dismiss was outside the permissible range, although closer to the edges of what a fair and reasonable employer could have done in all of the circumstances.

Disparity of treatment?

[24] I turn to consider the claim of disparity.

[25] The mere fact that different employees are treated in a different manner does not suffice. The disparity of treatment must be unjustified. The approach is:[1]

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[26] It is true, as Mr Worthy (counsel for Mr Elisara) points out, that Mr Elisara suffered a different fate to employees A and B, who had been involved in securing the Prime Account work, who were subject to investigation, and did not face dismissal. I do not accept the submission made by Mr Waalkens QC, counsel for the company, that the circumstances of these two individuals were not sufficiently alike to satisfy step 1. It is not necessary for each affected individual in a case such as this to hold an identical position. Both of the employees were subject to investigation into the same set of circumstances which were of concern to the company, although they had a somewhat different role to play in it. Mr Elisara was dismissed, one of the other employees resigned before the disciplinary process was concluded, and one medically retired.

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1 *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] ERNZ 767 (CA) at [45].

[27] Step 1 is satisfied. That means that it falls on the company to provide an adequate explanation for the disparity.

[28] Mr Elisara says that he should have been permitted to resign, as one of the other employees had done, rather than be dismissed. Even if that was an available escape route for an employee found to have committed serious misconduct in a regulated industry, the problem for Mr Elisara is that he never made it clear that he wanted the company to consider the possibility. That means that what he is suggesting is that the company should have gone on the front foot and offered to allow him to resign rather than face dismissal, and that the failure to do so amounts to unjustified disparity of treatment. There is, however, nothing to suggest that this is what the company did in respect of any other employee. Nor was the disciplinary process concluded in respect of employee A or employee B. In addition, employee A medically retired. Mr Elisara did not suffer from a medical condition and so that potential option never arose. Step 2 is not satisfied.

[29] For completeness, assuming that the circumstances of a third employee (who was based in the Australian office, did not pick up the unauthorised sign-off and was not disciplined) were sufficiently similar for the purposes of step 1, I am satisfied that there was a basis for the disparity of treatment. Significantly, that employee did not have the sort of oversight responsibilities that Mr Elisara shouldered as CEO. He immediately acknowledged his role in matters, which the company accepted took place within the context of a particularly busy phase of work for him and essentially reflected a one-off lapse in judgment.

[30] I am satisfied, on the evidence before the Court, that the way in which Mr Elisara was treated in terms of disciplinary outcome did not amount to unjustified disparity.

Predetermination?

[31] Mr Hosking says that he alone was the decision-maker. The plaintiff says that it was a group decision, effectively made by a number of Allianz executives, including Messrs Drinnan, Peiris and Allison, along with Mr Hosking.

[32] It is clear that there were a number of people who were interested in the investigation and disciplinary process, as reflected in email communications occurring at the relevant time. Mr Drinnan featured in a number of the communications, including on 12 December 2016, where he emailed several senior executives (including Mr Hosking) with a summary of the review that had been undertaken and advising that "Three Staff members collectively and individually had clear knowledge of Allianz's New Zealand Underwriting Instructions" and "These three staff knowingly breached these instructions"; "We are working with HR to have the staff terminated immediately." The email concluded by saying that the "next steps have all been put in motion."

[33] Unsurprisingly, these communications (which Mr Elisara was not privy to at the time) gave rise to a later concern that the outcome of the process had been settled on, together with an assessment of culpability, in advance of actually hearing from Mr Elisara within the context of the disciplinary, as opposed to the review, process. It is elementary that employers are expected to follow a proper process and to keep an open mind before reaching concluded views as to whether misconduct has in fact occurred and, if so, what disciplinary action (if any) will be taken. The correspondence involving senior executives did not assist the company.

[34] In addition to the email correspondence, Mr Elisara points to other events which he says support a finding of predetermination undermining the justification for his dismissal. Mr Elisara was concerned that his cell phone had been deactivated during the period he was on annual leave in December 2015 and January 2016, while he remained an employee. Deactivation was not, however, established in evidence. While Mr Fearnley said that Mr Elisara had mentioned difficulties opening emails, he made no attempt to ask for assistance in that regard, and Mr Hosking's evidence was that Mr Elisara's cell phone was not deactivated.

[35] Mr Elisara also made the point that documents disclosed to him in the course of preparation for hearing reflected that a senior executive from Australia (Mr Guppy) had transferred to New Zealand shortly before Mr Elisara's dismissal, apparently on the basis that it would be a long-term move, and that he subsequently took up the CEO role.

[36] All of these things must be seen in context. The context is that a review had been undertaken which Mr Elisara was involved in and which had reached adverse conclusions in respect of the way in which the Prime Account had been managed under his watch. Mr Elisara had made a number of statements during the review which the company (correctly) considered supported its concerns that serious misconduct may have occurred. Mr Elisara was the CEO and dismissal was an obvious possibility in the circumstances. It was reasonable for the company to take steps to ensure that appropriate management structures were in place while the processes involving Mr Elisara were worked through. The interim appointment of an Australian executive to the New Zealand office, who ultimately took over the role left vacant when Mr Elisara departed, does not sufficiently support an allegation of predetermination.

[37] Much was made of the way in which Mr Hosking conducted the disciplinary meeting on 24 January 2017. I am not satisfied, based on the evidence before the Court, that it was conducted in an inappropriate manner, that Mr Elisara was unnecessarily cut off from answering questions or that Mr Hosking did not listen to and consider what he had to say. None of that is reflected in the notes of the meeting which suggest a lengthy discussion and full responses by Mr Elisara. Mr Hosking gave evidence (which was supported by Mr Fearnley) as to how the meeting unfolded. While difficult, the meeting was, more likely than not, conducted in a relatively measured and overall appropriate way.

[38] Having said all of that, I am left with little doubt that senior executives within the Allianz international group did have a clear idea about Mr Elisara's likely future prior to the outcome of the disciplinary process. The pivotal question is not, however, whether some senior executives prematurely considered Mr Elisara's fate sealed. The pivotal question is who actually made the decision and the basis on which they made it. In this regard I am satisfied that it was Mr Hosking who made the decision and that he reached that decision himself, unencumbered by the views of others.

[39] But for Mr Hosking's evidence, supported in material respects by Mr Fearnley's, a different inference would likely have been drawn and the result for

the company would have been adverse. This should sound a warning that senior executives and others are expected to support fair employment processes and leave those who have been charged with undertaking the process and reaching a decision to do that work without inappropriate interference.

Failure to provide relevant information?

[40] It is alleged that the company failed to provide Mr Elisara with access to some key documents before summarily dismissing him and that this failure materially and unfairly affected his ability to respond to the company's concern and amounted to a procedural deficiency. The key documents referred to in support of this aspect of Mr Elisara's claim are:

(a) an email from Mr Drinnan to Messrs Hosking, Pocknee and Price dated 5 December 2016 in which Mr Drinnan mentions "Fraud", to which Mr Hosking replied "looks fine";

(b) Mr Hosking's draft briefing to Mr Peiris of 8 December 2016 referring to Mr Elisara's "knowing" breach of process;

(c) an email from Mr Drinnan to several senior Allianz executives dated 12 December 2016 referring to knowing breaches and human resources being engaged to immediately terminate the employment of those involved;

(d) Mr Peiris's Managing Director's Report to the Board in which he refers to three staff members "knowingly" breaching the Underwriting Instruction; and

(e) an email from a reinsurance administration manager dated 21 October 2016, identifying a potential issue shortly before the earthquake struck.

[41] This documentation is all relevant to the issue of whether the process was flawed, including on the basis of predetermination, and whether Mr Hosking was in fact the decision-maker. Was the company obliged to provide it to Mr Elisara prior to

his dismissal? It is submitted that, if it had been provided, Mr Elisara would have known that there was a plan to act against his employment and that the 24 January meeting was a sham. At the very least, it is said, knowledge of the matters contained within the emails would have encouraged him to rethink whether he wanted to have legal representation. *Vice-Chancellor of Massey University v Wrigley* was cited in support of the submission that the company was required to provide Mr Elisara with the above documentation during the disciplinary process.[2]

[42] *Wrigley* involved a redundancy situation and the nature and extent of the information that ought to have been provided to the employee to enable them to feed into that process. The Court's observation as to what information was required must be read in that context. As the Court pointed out, in most cases information that is "relevant to the continuation of the employees' employment" (which is what the section requires) will include a good deal more than the information the employer relies on for the proposal for change, and that fully informed employees may have ideas of equal or greater merit than those of their employers.[3] It was not a case involving alleged serious misconduct and did not decide that email communications between senior executives expressing views about an affected employee must be provided before any decision as to misconduct is made.

[43] Section 4(1A)(c) provides that the statutory duty of good faith requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of its employees to provide the affected employee with access to information relevant to the continuation of the employee's employment, about the decision; and an opportunity to comment on the information before the decision is made.

[44] I do not accept that the company's failure to proactively provide Mr Elisara with the documentation complained of unfairly compromised his opportunity to respond to its concerns that serious misconduct had occurred, as required under s 103A(3)(c).

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2 *Vice-Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138.
3 At [56].

Opportunity to have legal representation?

[45] The company's Managing Poor Performance policy records that the principles of natural justice and fairness require that "The employee has an opportunity to have a support person present in formal meetings. It is the manager's responsibility to make the employee aware of this when a meeting time is made and at the commencement of each interview." The policy also states that "Where an employee commits serious or gross misconduct, they … must be offered the opportunity to bring a 'support person'." Mr Elisara says that the company breached the policy by failing to give him an opportunity to have a support person at the meetings of 24 and 25 January. That contention requires a closer look at the evidence.

[46] Allianz recommended that Mr Elisara bring a support person and/or representative to the proposed disciplinary meeting in the letters dated 23 December 2016 and 18 January 2017. The 18 January letter carried a rider to it, namely that "If you choose to bring a lawyer then we may ask our lawyer to also be present." Mr Elisara says he had a subsequent conversation with Mr Fearnley, where the comment was reiterated. Mr Fearnley could not recall such a conversation but accepted that it may have occurred. In the event Mr Elisara did not take anyone with him to the meeting. Ms Scampion, the company's lawyer, however, was in attendance although no prior notice of this had been given. Mr Elisara said in evidence that her attendance caught him off guard and that he would not have been unrepresented if he had known that the company was going to have a lawyer there.

[47] It remained unclear why it was considered appropriate in the letter of 18 January 2017 to make the statement about the attendance of lawyers at the meeting. It was even less clear why, having made this statement and having been told that Mr Elisara would not be bringing a lawyer, the company then attended the meeting with its lawyer. And, as Mr Hosking accepted, part of the purpose of Ms Scampion's presence at the meeting was so that she could answer any legal questions that might arise. Mr Elisara says that the company then proceeded to compound the situation by failing to offer to adjourn the meeting to enable him to have a lawyer present.

[48] What was the impact of all of this? It is said on Mr Elisara's behalf that without legal representation he was effectively deprived of the opportunity to change the course of events and potentially obtain an outcome other than summary dismissal in the way that two of the other employees (who were both represented) had been able to do. It is said that the failure to obtain legal representation stemmed from Mr Fearnley's misrepresentation that no Allianz legal representative would be present at the meeting unless Mr Elisara was accompanied by a representative. Thus, he said that it was not open to a fair and reasonable employer to proceed with the 24 January meeting in the circumstances.

[49] I accept that in some cases this sequencing of events would be procedurally problematic. It is, however, necessary to have regard to the particular facts of the case and the interactions that occurred. Mr Elisara was a senior employee with a great deal of business experience. He was far from a shrinking violet. I have no doubt that he would have called a halt to the meeting or questioned the basis on which it was progressing if he had any genuine concerns at the time. Rather, he made a conscious decision from a very early stage of the process that he would front-foot the process himself, without legal representation, and he did not veer from this strategy.

[50] In any event, as the meeting notes reflect, the issue of Ms Scampion's presence *was* raised at the outset of the meeting, with Mr Hosking explaining that she was there as an observer. The meeting notes reflect that she attended as an "observer" and that she said nothing during the meeting. The meeting notes also reflect that Mr Elisara's decision not to have legal representation was raised at the outset of the meeting:

> [Mr Hosking] explains the purpose of the meeting is [to] consider [Mr Elisara's] response and explanation, and that a possible outcome is termination due to the seriousness of the matters raised. [Mr Hosking] confirms that [Mr Elisara] wishes no support person or legal counsel, to which [Mr Elisara] replies "a lawyer won't help me recollect the facts." [Mr Elisara] confirms that he has "no questions at this stage".

I was not drawn to Mr Elisara's evidence that he made the reference to a lawyer being of no assistance to him in recollecting the facts before the meeting occurred.

[51] It was open to Mr Elisara to decide against having a lawyer or support person with him at the meeting, despite the obvious importance of the matters to be discussed

and the potential impact on his ongoing employment. While it was a choice he was entitled to make, having made it and not deviated from that path until after his dismissal, I do not think Mr Elisara can now be heard to complain about unfairness. I have no doubt that had Mr Elisara been wrong-footed by Ms Scampion's surprise appearance at the meeting, and had he wished to obtain legal representation, he would have made that clear and the company would have acceded to an adjournment to facilitate it. The point is that Mr Elisara did have the opportunity for legal representation – he simply chose not to exercise it.

[52] It is common ground that Mr Elisara was not reminded of his right to have a representative or support person at the meeting of 25 January 2017, when the decision to dismiss was conveyed. That amounted to a breach of the company's policy. It was not, however, a breach which resulted in unfairness to Mr Elisara. The meeting was intended to simply convey the final decision to him and I am satisfied that advising him of the ability to have support/representation would have made no material difference.

[53] I do not consider that the way in which the legal representation issue unfolded amounted to a procedural error which resulted in unfairness to Mr Elisara in the particular circumstances.

No preliminary decision

[54] It is said that the company was obliged to provide Mr Elisara with a preliminary decision that dismissal was considered appropriate to enable him to respond. I understood Mr Elisara to say that this would have given him an opportunity to seek to negotiate an exit on agreed terms. More generally, it was said that this step was required as a matter of fair process because of:

(a) Mr Elisara's seniority;

(b) the potential impact of summary dismissal on him in finding other employment, given the fit and proper person requirements of his insurance licence; and

(c) the fact that he was not legally represented.

[55] No authority was cited in support of the proposition that fairness requires an employer to provide an employee with advice that serious misconduct has occurred and that a preliminary decision has been made that dismissal is the appropriate outcome, then providing the opportunity for the employee to be separately heard on that issue. In *Chief Executive of Unitec Institute of Technology v Henderson* the Court found that while Unitec did not provide a separate opportunity to comment on the proposed disciplinary action, the overall breach was not particularly serious, including because there was no requirement in the organisation's procedure to provide a separate opportunity to comment.[4]

[56] The company had made it very clear from an early stage that the concerns that had been identified were serious and may, if established, lead to dismissal. Mr Elisara was reminded of all of this at the outset of the 24 January 2017 meeting, and confirmed that he understood the gravity of the situation at that time. He was also reminded that the purpose of the meeting was to consider his response and explanation, and that termination was a possible outcome. He could have been under no illusion that dismissal was on the cards if serious misconduct was found to have occurred and he was well aware that his response was being sought to the matters raised in Mr Hosking's correspondence. That correspondence, as I have said, included clear reference to potential disciplinary outcome.

[57] A follow-up meeting was held on 25 January 2017. Mr Hosking advised Mr Elisara that he had decided to terminate his employment with immediate effect. A letter confirming the decision was handed to Mr Elisara and there was a ten-minute break. Following the break, Mr Elisara asked a number of questions which are reflective of how he regarded things at the time. He queried whether it was serious misconduct as opposed to misconduct; he observed that there were other factors which gave Mr Hosking grounds for termination on notice; and said that there had previously been some comments about restructuring the New Zealand office which might support a redundancy. In other words, Mr Elisara was accepting that his employment was to

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4 *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 4 NZELR 418 (EmpC) at [53]—[55].

come to an end but was asking that consideration be given to the basis on which this would occur. Mr Hosking reiterated why he considered that serious misconduct had occurred and said that because of the failings as CEO he had to summarily dismiss Mr Elisara without notice. Mr Fearnley confirmed that redundancy was not an option. Mr Elisara is then recorded as saying that he accepted the decision to terminate but asked that Mr Hosking reconsider paying out the notice period. Mr Hosking agreed to consider the latter point. Consideration was given to Mr Elisara's suggestion of dismissal on notice but the decision was made to summarily dismiss. That decision was open to the company, in the particular circumstances, and was confirmed by letter dated 3 February 2017.

[58] I am satisfied that Mr Elisara had a fair opportunity to comment on dismissal as a disciplinary outcome. I do not accept that his seniority is relevant to the analysis. It would be odd if a fair and reasonable employer was required as a matter of law to provide a preliminary decision to dismiss to a senior employee but not, inferentially, to an employee in a less senior position. It would imply a hierarchical approach to protections afforded to classes of employees which is not reflected in the Act or supported by principle.

[59] The position in respect of an opportunity to comment may have been different if, for example, the company had told Mr Elisara that it *would* give him a separate opportunity to comment and then later failed to do so. And even accepting that an employer may have a broader obligation to give an employee a separate opportunity to comment on a preliminary disciplinary outcome decision (which does not appear to have been closely considered by the Court in *Henderson*), that does not necessarily mean that the failure to do so will result in a finding that the dismissal is unjustified (as *Henderson* itself reflects).

[60] For completeness, I observe that, even if I had found that, in the circumstances of this case, the company was obliged to provide Mr Elisara with a preliminary decision as to disciplinary outcome, I would not have found that the failure to do so caused any unfairness to him. The reality is that the company considered, on reasonable grounds, that Mr Elisara had committed serious misconduct warranting summary dismissal under the terms of his employment agreement and did not consider

that resignation on terms was an acceptable outcome. This was an option that was open to it. The reality is, too, that Mr Elisara effectively made it clear to the company that he accepted that dismissal was inevitable.

Permanent non-publication orders appropriate?

[61] Mr Waalkens advanced an application for permanent non-publication orders in respect of the names of the two other employees whose actions were the subject of investigation by Allianz (employee A and employee B), the details of employee A's medical condition, the disciplinary process against employee B, and the terms of the settlement agreements between each of these employees and the defendant. The plaintiff agrees that the publication of this information is not necessary for the Court's judgment in this matter to be properly understood and abides the decision of the Court. The application also extends to the fact of settlement with both employees. The plaintiff raises an issue as to the potential futility of making an order as to the fact of settlement, given that information relating to these matters has already been touched on in a previous interlocutory judgment of the Court and in the Authority determinations.

[62] A case-specific approach to the exercise of the Court's discretion to make non-publication orders is required. The two employees left Allianz under agreed confidential terms. Those terms included confidentiality as to the fact of settlement. An agreement as to confidentiality made between an employee and an employer is not, of course, determinative. The Court must be satisfied that it is appropriate to make the order sought. It is, however, a factor to weigh into the mix. There is minimal, if any, public interest in knowing the identity of either individual, the circumstances of their departure, or personal details as to employee A's medical condition. Nor is there any public interest in knowing that they entered into confidential settlement agreements with the company.

[63] I pause to note more generally that there is a growing awareness of the impact of publication on the future employment prospects of individuals named in employment litigation, whether those individuals are parties, witnesses or simply named as someone involved in the relevant sequence of events. It is now well-known

that it is not uncommon for recruitment agencies and prospective employers to carry out on-line searches on names when sifting through job applications, and it is notoriously well-known that those whose names have appeared in Authority determinations and Court judgments, whether as litigants or witnesses, tend not to fare well on the job market.[5] That, in turn, gives rise to the potential for perverse results in terms of access to justice – employees who exercise their statutory right to pursue a claim may, regardless of the outcome, face reputational ruin in terms of future job prospects.

[64] I return to the present case. Here, the two employees were not parties to the litigation and they were not witnesses. As I have said, the defendant raised an issue with the potential futility of making an order which extended to the fact of settlement. I agree that this is relevant to the exercise of the Court's discretion. That is because the Court is not generally inclined to make orders which would likely be a waste of time. As the plaintiff points out, this was one of the factors underlying the Court's decision to decline an order in *Timmins v Asurequality*.[6]

[65] Prior publication as to the fact of settlement undermines the utility of an order of the scope sought and I am not satisfied that the orders need to extend this far. In the circumstances, there will be a permanent non-publication order in respect of the names of employee A and employee B, the details of the medical information relating to employee A, the disciplinary process against employee B, and the terms of settlement between employees A and B and the defendant. The court file is not to be searched without the leave of a Judge.

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5 See Christina Inglis "Barriers to participation in the Employment Institutions" (15 August 2019) New Zealand Law Society <www.lawsociety.org.nz/practice-resources/practice-areas/employment-law/barriers-to-participation-in-the-employment-institutions>; Peter Franks, Mediator and Research Associate, NZWRI "Barriers to participation: a mediator's perspective" (Barriers to participation: A Symposium, Auckland University of Technology, 13 September 2018) at 5; Susan Hornsby-Geluk "Workers who take employers to court fear hurting future job prospects" (8 August 2018) Stuff <www.stuff.co.nz/business/opinion-analysis/106066962/workers-who-take-employers-to-court-fear-hurting-future-job-prospects>; Robin Arthur "Barriers to participation – What's in the way of resolving workplace problems?" LawTalk (New Zealand, November 2018) at 76.

6 *Timmins v Asurequality Ltd* [2011] NZEmpC 167.

Conclusion

[66] Was the company's approach perfect? No. Might another employer have approached things differently and reached an alternative view? Perhaps. That does not, however, mean that Mr Elisara was unjustifiably dismissed. Having regard to the particular circumstances, the decision that serious misconduct had occurred was open to the company, as was the decision to summarily terminate his employment. Any defects in the process did not result in unfairness to him. Mr Elisara's challenge is dismissed.

[67] A permanent non-publication order is made in the terms set out at [65] above.

[68] It is hoped that in the circumstances, the parties can agree on the issue of costs. If that does not prove possible, I will receive memoranda, with the company filing and serving any memorandum within 28 days of the date of this judgment, any response within a further 14 days, and anything strictly in reply within a further seven days.

Christina Inglis
Chief Judge

Judgment signed at 12.30 pm on 6 September 2019