IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2019] NZEmpC 190
EMPC 349/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	FRASER MADDIGAN Plaintiff
AND	DIRECTOR-GENERAL OF CONSERVATION Defendant

Hearing:	6-8 August 2019 (Heard at Christchurch)
Appearances:	Plaintiff in person K Radich, counsel for defendant
Judgment:	17 December 2019

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Background

[1] Mr Maddigan has been a ranger for the Department of Conservation (the Department) for nearly 20 years. He was summarily dismissed following a disciplinary process. Mr Maddigan says that his dismissal was substantively unjustified, that the process leading to it was procedurally flawed, and that the defendant breached its duty of good faith to him. The Employment Relations Authority found that his dismissal was unjustified and ordered reimbursement of lost wages and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000

(the Act).[1] These figures were reduced by 50 per cent for contribution. Reinstatement was declined.

[2] Mr Maddigan was unhappy with the Authority's determination as to remedies. His primary focus is reinstatement to his position as ranger working on conservation projects for the Department, a role he plainly feels passionate about. He filed a de novo challenge to the Authority's determination and the proceedings came before the Court on that basis. That means that the Court must assess the evidence afresh and reach its own views on the merits of Mr Maddigan's complaints against the defendant. While I have done so, I have reached broadly similar conclusions to those reached in the Authority.

Background facts

[3] Mr Maddigan was employed as a ranger with the Department in 1997. He was issued with speeding tickets twice while driving in departmental vehicles on 21 February 2015 and 7 January 2016. The Department's Safe Driving policy requires every driver of a departmental vehicle or personal vehicle used for work purposes to report driving infringements to a manager at "the earliest opportunity". Mr Maddigan did not advise a manager about either of these incidents at the time they occurred. His licence was subsequently suspended on the basis of accumulated demerit points on 1 September 2016. The Department's policy requires employees to advise their manager or supervisor "immediately" if their driver's licence has been suspended or cancelled, or has any limits placed on it. Mr Maddigan did not do so. Rather, he advised his manager of the fact some six weeks later (namely 13 October 2016). That was at the time the District Court declined his application for a limited licence. In the intervening period (between 1 September and 14 October 2016), Mr Maddigan drove to and from work and was reimbursed for mileage.

[4] Mr Roberts is the Regional Manager, Southern. He assumed the decision-making role. He wrote to Mr Maddigan by way of letter dated 19 October 2016 setting out an allegation of serious misconduct. The allegation was that Mr Maddigan had

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1 *Maddigan v Director-General of Conservation* [2018] NZERA Christchurch 141.

failed to observe road traffic laws in a departmental vehicle on two occasions (namely 21 February 2015 and 7 January 2016) and had failed to notify a manager immediately of those infringements in accordance with the Department's policy. Mr Roberts advised that this was a serious allegation because of the breach of both road traffic laws and the Department's policy. Mr Roberts went on to note that if it was correct that Mr Maddigan had gained enough demerit points to lose his licence for three months, that would significantly undermine the Department's ability to have trust and confidence in him as a ranger. That was said to be because of the driving requirements of his position and because it would mean that Mr Maddigan had incurred a number of infringements in a relatively short period of time.

[5] Mr Roberts referred to the fact that it was not the first time that Mr Maddigan had lost his licence because of an accumulation of demerit points, having previously done so in late 2009. The letter concluded with an invitation to a meeting on 27 October 2016 to enable Mr Maddigan to provide a response. Mr Maddigan was invited to bring a lawyer or union representative to the meeting. The letter advised that dismissal was a possible outcome.

[6] The meeting occurred as scheduled on 27 October 2016. Mr Maddigan attended the meeting with a Public Service Association delegate. He did not dispute the fact that he had not advised a manager about the two speeding incidents in a departmental vehicle, although he said he thought that he had told his supervisors about the 21 February 2015 driving incident and that he might have told another employee about the 7 January 2016 incident. At the meeting Mr Maddigan advised that he had been charged with driving while suspended and was due to appear in Court on 31 October 2016. He said he had sent a letter to the Court and that he believed the charge would be dropped. He agreed to provide documentation relating to this.

[7] Mr Maddigan told Mr Roberts that he had driven to and from work while suspended. He said that the upcoming Court appearance would be focussed on the validity of the speeding infringement and whether 35 demerit points had validly been imposed. He told Mr Roberts that he had delayed advising the defendant of the licence suspension because of validity issues he perceived with the demerit points which he had been trying to work through. Mr Maddigan said he was on leave most of the time

between when he was suspended and 13 October 2016 and therefore had not been required to drive for work purposes. He accepted that he had signed the Safe Driving policy in 2009/2010 and had been advised that his manager should be alerted if he received any vehicle infringements.

[8] Notes were taken at the meeting by the human resources manager. A copy was provided to Mr Maddigan following the meeting and he made a number of suggested changes to them. It is apparent that no issue was taken in respect of the suggested changes at the time or subsequently. Rather, Mr Roberts said that he took the additional statements into account (provided to him by way of email dated 8 November 2016) when reaching his decision. The additional points can be summarised as follows.

[9] Mr Maddigan said he thought that his communications with his supervisors and other employees in respect of the two speeding incidents in departmental vehicles were adequate as he had not refreshed his memory as to the exact wording of the policy since he had signed it. He reiterated that in future he would make sure he told management if any such issue arose. Mr Maddigan advised Mr Roberts that the August 2016 suspension was, in his view, invalid because it was based on 35 points, which was incorrect. He advised that they were incorrectly added and that the Police and the New Zealand Transport Agency (the NZTA) had made a mistake by imposing a suspension. He said he had not driven any departmental vehicle in the whole period of his disputed suspension and that suspension was a personal matter that would not affect his ability to work.

[10] Mr Maddigan advised Mr Roberts that he had tried to gain a limited work licence but had been unsuccessful in doing so because the hearing at the District Court had been rushed. In relation to the failure to advise that his licence had been suspended until 13 October 2016, he said this arose out of a mistake by the Police and the NZTA and there did not seem to be any urgent requirement to notify his manager. In future he would provide as much warning as he was able to.

[11] On 28 October 2016 Mr Roberts sent an email to Mr Maddigan attaching the meeting notes, asking for copies of all documentation relating to the traffic matters,

and advising that he wanted the information by 2 November 2016 so that he would be in a position to make a decision on a fully informed basis. Mr Roberts also asked for information on the outcome of the 31 October 2016 Court appearance in relation to driving while suspended. All of this indicated that, at this stage at least, Mr Roberts perceived such information to be relevant to his decision-making process.

[12] Mr Maddigan's representative responded by way of email dated 31 October 2016, reiterating the points from the meeting that the information being considered by the Department could only relate to the current loss of licence. She advised that Mr Maddigan was still disputing the last demerit points and that if they were wiped, the loss of licence would not apply and the driving while suspended charge would be withdrawn. She concluded that if that eventuated, the only issue should be Mr Maddigan not reporting the two incidents in the departmental vehicles to a manager in breach of the Department's policy.

[13] A further email was sent to Mr Roberts on 1 November 2016, advising that Mr Maddigan was obtaining more information from the Police, that the 31 October 2016 Court date had been changed to 21 November 2016, and that the appeal would be heard within the next two weeks. Clearly what was being sought on Mr Maddigan's behalf was deferral of the disciplinary process until issues with his licence had been resolved by the Courts.

[14] In the meantime, Mr Roberts had asked Mr Thompson to undertake further investigations into who Mr Maddigan said he had told about the speeding infringements in the departmental vehicles. Mr Thompson reported his findings to Mr Roberts in an email dated 3 November 2016. Despite the fact that Mr Maddigan's representative had advised that the Court matters were scheduled to be dealt with towards the end of November 2016, and Mr Roberts had not indicated that he regarded them as irrelevant to the decision-making process (rather, he had specifically asked for information in relation to the outcome of the hearing), he emailed Mr Thompson and a human resources adviser saying:

> I'm not really keen on giving [Mr Maddigan] any more time. I believe that I have enough information in front of me. Can we discuss later today?

[15] It appears that a discussion did take place because no steps were taken for a week. Mr Maddigan was, by this time, biking to and from work, having stopped driving his car. He advised Mr Roberts and Mr Thompson of this on 8 November:

> I have been biking around meeting staff for work and working hard on numerous priority DOC Tasks so things are going well – no need for a car ever again and much better for the body and environment as well! As mentioned however, I will do everything I can to make sure my employment is not compromised and that the priority tasks planned continue to be achieved effectively and safely.

[16] On 10 November 2016 (so 11 days before the scheduled Court hearing) Mr Roberts wrote to Mr Maddigan and provided a preliminary conclusion and a view as to outcome. In the letter he detailed the results of Mr Thompson's investigation and Mr Roberts' view that Mr Maddigan had not reported his driving infringements as required. Mr Roberts concluded that Mr Maddigan had been issued with speeding tickets twice while driving a departmental vehicle; that he had failed to advise his manager or supervisor of either incident; that his licence had been suspended for accumulated demerit points which he had failed to advise his manager about at the time; that he had driven to and from work and been reimbursed for mileage while his licence was suspended; and that he had been caught driving while suspended by the Police and was facing Court action in relation to this.

[17] Mr Roberts said that he had had regard to Mr Maddigan's explanations and his driving history over his 20 years with the Department but that his conduct had significantly damaged the trust and confidence Mr Roberts could have in him. The proposed disciplinary outcome was dismissal.

[18] Mr Roberts advised that he proposed to dismiss Mr Maddigan immediately but with one month's pay in lieu of notice being appropriate in light of Mr Maddigan's long service. Mr Roberts invited one final opportunity to provide information by way of email, to be received by 16 November 2016. The information he sought included information referred to in Mr Maddigan's earlier letter of 8 November 2016, relating to the demerit points. He advised that once he had considered any further information he would "make a decision quickly."

[19] Mr Thompson was given the task of delivering the letter to Mr Maddigan, which Mr Thompson decided to do personally, although Mr Maddigan was working out in the field at the time.

[20] Some discussion ensued when Mr Thompson handed Mr Maddigan the letter. It is clear that Mr Maddigan was confused about what the focus of Mr Roberts' concerns was. That is reflected in an email Mr Thompson sent to Mr Roberts later the same day, in which Mr Thompson advised that:

> After discussion the only comment I made to [Mr Maddigan] about the content of the letter was that if he was focussing on the two speeding offences, then he may be focused on the wrong issue – and I reiterated that he should read the letter carefully.

[21] Later that day Mr Thompson reported to Mr Roberts that Mr Maddigan had approached him, expressing the view that the proposed action was "completely unreasonable" and that he would "do whatever it takes to be a good employee". Mr Thompson advised Mr Roberts that "I believe we have heard this before!" Mr Roberts had yet to make a final decision by this stage.

[22] Mr Maddigan's representative responded to Mr Roberts' letter of preliminary decision on 16 November 2016. In addition to advising her view that the conduct was not serious and dismissal could not be justified, she stated that it would be prudent to allow the legal action about demerit points to take place before reaching any further conclusion. Later the same day Mr Roberts was advised that the suspension had been lifted with immediate effect and that the process was for the Court to advise the NZTA of that fact to enable the agency to process removal of the demerit points. This, she said, might take a day or two.

[23] On 18 November 2016 Mr Roberts proceeded to dismiss Mr Maddigan on the basis of the findings in the letter of 10 November 2016. He asked Mr Thompson to deliver the dismissal letter to Mr Maddigan who was working in the field. Mr Thompson rang Mr Maddigan in advance and advised him that he would be arriving and that he was going to give him a letter. Mr Maddigan asked him not to do so. He asked Mr Thompson to give him the letter in the office later that day but Mr Thompson declined the request.

[24] Mr Thompson drove out to the remote area Mr Maddigan was in, taking another manager with him. He gave evidence that the purpose of taking the other manager with him was to provide support to both him and Mr Maddigan, although he was unable to clarify (when asked by the Court) what support the manager was in a position to provide to Mr Maddigan; the manager (when asked by the Court) said that she had not seen it as her role to support him. Rather, she was there as an observer in case things became heated.

Analysis

[25] Was what the defendant did and how it did it what a fair and reasonable employer could have done in all the circumstances at the time the action occurred?[2] The answer to this question in this case engages a number of considerations, including the matters set out in s 103A(3)(a)–(d), namely whether, having regard to the resources available, the defendant sufficiently investigated the issues, raised its concerns with Mr Maddigan, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to making the decision to dismiss him.

[26] Defects in the process which were minor and which did not result in Mr Maddigan being treated unfairly do not suffice to render the dismissal unjustifiable.[3] On the other hand, it is well established that procedural defects which do not fall within this two-limbed characterisation will likely lead to an action being found to be unjustifiable. In this case issues also arise as to the substantive justification for the decision and whether the defendant complied with its good faith obligations; and, if not, whether a penalty is appropriate.

[27] The first point is that the defendant is a government department with in-house human resource capability and access to legal advice and support. All of this means that it could be expected to follow a robust process.

[28] A close review of the evidence reflects a mismatch of understandings as to the key concern from Mr Roberts' perspective. Mr Maddigan was focussed on the two

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2 Section 103A.
3 Section 103A(5).

speeding tickets and the suspension of his licence; he evidently believed that once that issue had been resolved by the Court process, Mr Roberts' concerns would largely fall away. All of that should have been clear to Mr Roberts. He was, as the Authority Member pointed out,[4] well aware of Mr Maddigan's unique personality and way of thinking. Mr Roberts' approach ought to have been adjusted to ensure that there was sufficient clarity about the nature and scope of his concerns to enable Mr Maddigan to engage effectively in the process. As things developed, the fact of suspension (and the potential impact on Mr Maddigan's ability to do his work) was overtaken by more serious concerns, including driving to and from work while suspended. This was not made sufficiently clear to Mr Maddigan to enable him to adjust his focus.

[29] I also agree with the Authority's conclusion that it was too late in the particular circumstances to fairly raise expanded concerns for the first time in a letter advising preliminary conclusions and dismissal as the proposed disciplinary outcome based on those preliminary conclusions.[5] All of this meant that Mr Maddigan was not given a fair opportunity to clearly understand the particular concerns Mr Roberts had as they evolved, and to provide an explanation in response.

[30] There were further difficulties with the way in which the process unfolded. I am not satisfied, having regard to the evidence in context, that Mr Roberts approached the process with a sufficiently open mind. This is reflected in the following parts of the chronology of events, including the timeframes within which things occurred.

[31] A confidential agreement was entered into around six months before Mr Maddigan's dismissal. There were then discussions about where Mr Maddigan would work and the type of work he would perform. Those discussions were protracted and plainly difficult for those concerned, including Mr Thompson and Mr Roberts.

[32] Mr Thompson emailed Mr Roberts on 4 July 2016 attaching the most recent correspondence from Mr Maddigan in respect of the negotiations. Mr Thompson said:

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4 At [50].
5 At [56].

> Hi [Mr Roberts]
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> Gosh and gosh. This is just a repeat of his previous messages. It seems like [Mr Maddigan] has heard nothing of what we have been talking about to him over the last three to six months. It is also clear that he takes no responsibility for his actions. …
>
> I am not sure we are going to ever reach a resolution here.
>
> Can we not just reassign him to the role we have outlined and if he does not like it then he can resign?
>
> I know you have said that if he doesn't accept then he will just be based at Rangiora permanently but that doesn't seem fair on [another employee] or the Department. As [Mr Maddigan's] employer we do have the right to determine his work don't we?

[33] Email correspondence between Mr Thompson and Mr Roberts, outlining concerns about the way in which Mr Maddigan was reintegrating into the workplace, followed. This included an email exchange between Mr Thompson and Mr Roberts setting out a proposed response to him, with which Mr Roberts expressed agreement. Mr Roberts said:

> Hi [Mr Thompson]
>
> This is more than reasonable.
>
> [Mr Maddigan] needs to be aware that if he acts like this again it will be treated as a disciplinary matter and that needs to be recorded.
>
> I will check to see if this is a breach of the mediated agreement

[34] Later the same evening Mr Roberts emailed Mr Thompson again, suggesting that if Mr Maddigan had breached the settlement agreement through his actions, "that might be a *short cut* into a formal process."[6]

[35] Six days later Mr Thompson wrote to Mr Maddigan raising concerns about his whereabouts during the work day. Mr Maddigan sent a lengthy reply. Mr Thompson's response was:

> OK, I will accept your explanation for now [Mr Maddigan]. This type of behaviour is not to occur again and I need you to be honest with me at all times. This is what trust is built on. Leaving your place of work without prior approval, working from home or from the Moorhouse office is a performance issue and this is how I will treat this if there is a next time. …

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6 Emphasis added.

[36] It is evident from the email chain that Mr Thompson promptly brought Mr Roberts in on the issue. Mr Roberts reiterated to Mr Thompson that: "[Mr Maddigan] needs to understand that he was not completely honest with you and that was unacceptable." Mr Thompson responded that he would reinforce this point with Mr Maddigan and thanked Mr Roberts for his help on the matter.

[37] Emails the following month between Mr Thompson and Mr Roberts reflect ongoing issues with Mr Maddigan, with Mr Roberts asking Mr Thompson to confirm whether Mr Maddigan had been instructed "that what he is/has been doing is not acceptable", and Mr Thompson expressing doubts (in an email of 12 September 2016) as to "how strong a misconduct case would be in this instance if [redacted in original] won't provide evidence."

[38] Seventeen days later (on 29 September 2016) Mr Thompson emailed a person who had been out in the field with Mr Maddigan and who had fallen and been injured. Mr Thompson noted that the track had been slippery and asked: "Are there any other potential causes e.g. how are your boots and was [Mr Maddigan] walking too close to you (pushing you to the outside of the track)?"

[39] Ten days later (on 10 October 2016) Mr Maddigan's supervisor at the time emailed Mr Thompson with a number of concerns about Mr Maddigan's reintegration to the office. He said that: "I am re thinking my role, as dealing with him is [soul] destroying, and I'd rather be working flipping burgers!"

[40] Four days later (on 14 October 2016) Mr Maddigan advised Mr Thompson that he had been disqualified from driving for three months because of accumulated demerit points which had arisen from five driving offences that included speeding and using a cell phone while driving, and that two of the five offences had occurred in a departmental vehicle in December 2015 and January 2016.

[41] Five days later Mr Roberts wrote to Mr Maddigan raising allegations of serious misconduct. The allegations were that he had failed to observe road traffic laws in a departmental vehicle on two occasions and had failed to notify a manager immediately of those infringements as provided for in the Safe Driving policy.

[42] On 3 November 2016 Mr Roberts expressed the view that he was "not really keen on giving [Mr Maddigan] any more time" to provide information (although Mr Maddigan was, at that stage, awaiting the outcome of the Court case, as Mr Roberts knew). Mr Roberts said that he believed he "had enough information" in front of him. In the event, he deferred making any final decision for a brief period, apparently after taking advice.

[43] Seven days later Mr Thompson emailed Mr Roberts advising of a conversation he had had with Mr Maddigan in which he (Mr Maddigan) had told him that he would "do whatever it takes to be a good employee", to which Mr Thompson noted for Mr Robert's benefit: "I believe we have heard this before!".

[44] Mr Roberts advised Mr Maddigan that he was being dismissed by way of letter dated 18 November 2016.

[45] Shortly afterwards Mr Thompson received an email request from a staff member. The relevant part of the exchange went as follows:

> Mr Thompson: … sorry, also just dismissed someone today which has been a bit of a process.
>
> Staff member: Bugger! Can I ask who?
>
> Mr Thompson: No it's all good actually – Fraser Maddigan.

[46] It is also notable that while Mr Roberts had asked Mr Thompson to undertake further inquiries of the people Mr Maddigan said he had talked to about his demerit points, Mr Roberts had not received information from one of them at the time he made his decision. That person did not confirm the contents of Mr Thompson's email of 9 November 2016 (as he been asked to do) until 21 November 2016, three days after the decision had been finalised and communicated to Mr Maddigan. There is nothing to suggest that Mr Thompson had taken any steps to follow up on his earlier email in the intervening period, and nor was it clear why – having sought confirmation of his understanding of the position as relevant to his inquiries – Mr Roberts had not done so. That meant that there was at least one outstanding piece of information at the time the process was concluded.

[47] I was not drawn to Mr Roberts' evidence that he was able to put various matters to one side and approach the decision-making process with a sufficiently open mind; nor was I drawn to Mr Thompson's evidence as to the extent to which his feelings for Mr Maddigan impacted on the process that was adopted. Mr Thompson was not the person who had been assigned the decision-making role. However, it is very clear that he was significantly entwined in the process, having multiple communications with Mr Roberts as issues with Mr Maddigan developed and matters unfolded. I infer from the evidence that there were significant frustrations with Mr Maddigan which arose from other issues which were not related to the specific matters which gave rise to the disciplinary process; that it is more likely than not that the licence suspension presented itself as an opportunity to deal with the Maddigan problem; and that the rest followed as night follows day.

[48] The process was unfair; the defects were major rather than minor. Mr Maddigan's dismissal was unjustified.

Substantive justification

[49] Under s 103A, the Court must determine whether a dismissal or an action was justifiable by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. The Court may not substitute its own view for that of the employer. Rather, it must assess the employer's actions against an objective standard.[7]

[50] Mr Maddigan breached the Department's policy by not notifying his manager of the infringements he had incurred; by not advising his manager or supervisor of his suspension. He had received notice of his suspension but drove anyway. He said in cross-examination that if his licence had been lawfully suspended, he should have notified his manager immediately. However, Mr Maddigan's perception of the legalities of the suspension did not displace his obligations to his employer. The fact was that his licence *had* been suspended and he *knew* that was so, although he doubted the legality of the action. A different employer might have reached a different view of

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7 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466 at [25].

appropriate disciplinary outcome, including having regard to Mr Maddigan's longevity in the role. That is not, however, the statutory test. I conclude that a fair and reasonable employer could have formed the view that Mr Maddigan's actions amounted to serious misconduct justifying dismissal in all of the circumstances.

Disparity of treatment

[51] Mr Maddigan claims that his dismissal was unjustified for disparity of treatment. The approach is:[8]

(a) Was there disparity of treatment?

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

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

[52] Before there can be disparity of treatment, there must be a sufficient degree of similarity between cases. The present case fails at this first hurdle. While it appears that a limited number of people have been suspended from driving while employed by the Department, and have not faced dismissal, their circumstances differ materially from those arising in the present case. I am not satisfied, on the basis of the evidence before the Court, that Mr Maddigan was treated in a disparate way.

Breach of good faith

[53] Section 4(1A) of the Act requires parties to an employment relationship to deal with each other in good faith. Amongst other things, the duty of good faith requires parties to be active and constructive in maintaining a productive employment relationship in which they are responsive and communicative.[9] The defendant fell short of meeting the required standards.

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8 *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] ERNZ 767 (CA) at [45]–49.

9 Section 4(1A)(b).

[54] A party who fails to comply with the duty of good faith in s 4(1A) is liable to a penalty if the failure was deliberate, serious and sustained or the failure was intended to undermine the employment relationship. It will be evident from my findings that these criteria are met in this case. I am satisfied that a penalty is appropriate.

[55] The maximum penalty available in this case is $10,000.[10] Section 133A sets out a number of (non-exhaustive) factors to which the Court must have regard in determining appropriate penalty. Having regard to the nature, scope and duration of the breach, its impact on Mr Maddigan, and the quantum of penalty imposed in other broadly analogous cases, I assess an appropriate penalty in the sum of $5,000. It is appropriate that 75 per cent of that sum be paid to Mr Maddigan, given he has had to go to the time and trouble of pursuing the breach; the residual amount is to be paid to the Crown.

Remedies

Were any wages lost as a result of the defendant's breach or was there a failure to mitigate?

[56] I first deal with the claim for reimbursement of lost remuneration. A sum equivalent to 13 weeks' wages is sought. The Court may order a sum which is the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration. The Court may, however, exercise its discretion to order an employer to pay a greater sum.[11]

[57] The sum sought by Mr Maddigan, and ordered by the Authority, is disputed by the Department on the basis that Mr Maddigan has failed to demonstrate any mitigation of loss. Three judgments of the Court are cited in support of this proposition, which I come to below. Before doing so it is convenient to refer to a judgment which did not feature in submissions. *Hamer v Transport Commercial (Auckland) Ltd* concerned the calculation of damages in a breach of contract claim, and contains an extensive discussion of the principles relating to mitigation in

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10 Section 135(2)(a).
11 Section 128.

employment matters.[12] The Court held that there was a common law duty to mitigate loss by attempting to find other employment of a kind the employee could reasonably be expected to accept having regard to their standing, experience and personal history. The question was one of how reasonable the employee's actions were in either seeking or failing to seek alternative employment, or by refusing any alternative employment offer if made. The Court made it clear that whether the same rules applied in respect of personal grievances was unsettled. In the event the issue was left open.[13]

[58] The three judgments referred to below in support of the proposition that Mr Maddigan was under a duty to mitigate his losses, failed to prove that he had done so and accordingly could not be said to have lost any wages requiring reimbursement, arose out of personal grievance claims and do not discuss the principles expressed by the Court in *Hamer*.

[59] In *Gorrie Fuel (SI) Ltd v Marlow* it was said that:[14]

> It is well established that, where an employee who has been dismissed has made no attempt to obtain alternative employment, the loss of wages will not be "*as a result of the grievance*" but, rather, as a result of the employee's failure to mitigate his or her own loss.

[60] In *Allen v Transpacific Industries Group Ltd (t/as Medismart Ltd)*, it was observed that:[15]

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

[61] And in *Radius Residential Care Ltd v McLeay* it was held that there is an onus on the employee to prove loss of income and prove that he/she had adequately mitigated his/her loss.[16]

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12 *Hamer v Transport Commercial (Auckland) Ltd* [1998] 1 ERNZ 509 (EmpC) at 519-521.
13 At 520-521.
14 *Gorrie Fuel (SI) Ltd v Marlow* EmpC Christchurch CRC 9/05, 21 November 2005 at [68].
15 *Allen v Transpacific Industries Group Ltd (t/as Medismart Ltd)* (2009) 6 NZELR 530 at [78].
16 *Radius Residential Care Ltd v McLeay* [2010] NZEmpC 149, [2010] ERNZ 371 at [51].

[62] It is well established that in ordinary breach of contract cases a plaintiff is under no duty to mitigate their losses.[17] And no positive duty emerges from the wording of the Act. The key question is not whether a legal duty exists but what the prerequisites for reimbursement are. The asserted duty on employees to mitigate their losses, which has become a well-engrained mantra in this jurisdiction, tends to be used as an unhelpful shorthand which focusses the inquiry on steps taken, or not taken, by an employee rather than what – if anything – might reasonably have been expected in the particular circumstances. To the extent that *Gorrie* can be interpreted as expressing a blanket rule that a failure to take any steps to find alternative work means that an employee has lost no wages as a result of the grievance, and accordingly is entitled to no reimbursement, I respectfully disagree with it.

[63] As the ordinary law makes clear, a plaintiff may only recover the losses s/he would have suffered had s/he taken reasonable steps to mitigate the damage.[18] That seems to me to be the key point in the *Hamer* analysis, and it is one which (in my view) logically applies to determining remedies for lost wages in personal grievance claims (the defendant did not seek to argue that any award of compensation for non-pecuniary loss should be reduced).

[64] I approach the issue of mitigation in this case in the following way. Mr Maddigan suffered at least 13 weeks' lost wages as a result of the defendant's breaches. He did not take steps to find alternative work in that period. Was that reasonable in all of the circumstances? If it was reasonable, he is entitled to recover his losses for that period.

[65] In considering mitigation (and declining any reduction on this basis) the Authority Member placed weight on the fact that Mr Maddigan had been seeking reinstatement.[19] The Court of Appeal made it clear in *Carter Holt Harvey Ltd v Yukich* that an application for reinstatement does not, of itself, alter the position in respect of

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17 Harvey McGregor *McGregor on Damages* (18th ed, Thomson Reuters, London, 2009) at 7-017.
18 John Burrows, Jeremy Finn and Stephen Todd *The Law of Contract in New Zealand* (6th ed, Lexis Nexis, Wellington 2018) at 21.2.4.
19 At [139].

mitigation.[20] The Court went on to emphasise that the efforts made by an employee must be viewed in context. I take this to mean that mitigation is appropriately viewed on a case-by-case basis. Blanket exclusionary or inclusionary rules are unhelpful.

[66] The context in the present case was this. Mr Maddigan has what the Authority Member aptly described as a unique personality. From the outset he was intently focussed on seeking reinstatement and I have no doubt that this intent focus impeded his ability to adjust his thinking sufficiently within the 13-week timeframe to enable him to search for alternative work in a meaningful way. More generally, there is a need to be realistic about the extent to which employees such as Mr Maddigan would be able to commit to a prospective new employer while, at the same time, seriously progressing a claim for reinstatement. Mr Maddigan had been summarily dismissed after a 20-year career with the defendant, in circumstances he struggled to understand and following a process which was flawed. He was negatively impacted by the dismissal, and it would have taken him time to find his feet. I conclude that while it is true that Mr Maddigan was inactive on the job-seeking front in the period following dismissal, this was reasonable in the particular circumstances.[21]

[67] I do not accept the defendant's submission that Mr Maddigan ought not to be entitled to any wages lost as a result of its breaches on the basis that he failed to mitigate those losses. I am satisfied that a sum equivalent to 13 weeks' lost wages is appropriate.

Compensation

[68] Mr Maddigan claims compensation of $18,000 for loss of dignity, injury to feelings and humiliation. It was clear that he was deeply upset by the loss of his job, which he dearly loved. He was hurt by the way in which the process unfolded and felt as though he was not being listened to. He misses the ability to contribute to the wellbeing of the environment in a way which he felt was productive. While there was not much by way of discrete direct evidence focussed on the claim for compensation,

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20 *Carter Holt Harvey Ltd v Yukich* [2005] ERNZ 300 (CA) at [38]. The Court of Appeal stated that the employee's obligations in relation to mitigation applied whether or not he was seeking reinstatement.

21 See too *Lewis v Immigration Guru Ltd* [2017] NZEmpC 141, [2017] ERNZ 822 at [42]–[43].

the losses emerge from the evidence as a whole. I am satisfied that Mr Maddigan suffered losses under each of the overlapping heads in s 123(1)(c)(i). I would place the level of loss as a result of the defendant's breaches in band 2.[22]

[69] There are some similarities between the degree of harm suffered in the present case and *Archibald* ($20,000 awarded); *Marx v Southern Cross Campus Board of Trustees* ($25,000 awarded); and *Zhang v Telco Asset Management Ltd* ($22,500 awarded).[23] Each of these cases was assessed as sitting in the middle band in terms of loss ($0-$10,000 (band 1); $10,000-$40,000 (band 2); over $40,000 (band 3)).[24]

[70] The plaintiff seeks $18,000 by way of compensation. That sum sits below the middle of the middle band, and I am satisfied that it is a fair and just award in all of the circumstances, subject to the issue of contribution, which I turn to next.

Contribution

[71] Section 124 of the Act requires the Court, in deciding both the nature and the extent of the remedies to be provided in respect of a personal grievance, to consider the extent to which the actions of the employee contributed towards the situation giving rise to the grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[72] In the present case the Authority reduced remedies by 50 per cent. I note in passing that a review of Authority determinations in which a reduction for contribution has been made over the last two-year period suggests that this is a figure which is applied in over a quarter of the cases. The average reduction for contribution was approximately 32 per cent.

[73] The approach to contribution which emerges from recent judgments of the Court can be summarised as follows:

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22 *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

23 *Waikato District Health Board v Archibald*, above n 22, *Marx v Southern Cross Campus Board of Trustees* [2018] NZEmpC 76, (2018) 16 NZELR 24; *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151.

24 As discussed in *Richora Group Ltd v Cheng* [2018] NZEmpC 113, (2018) 15 NZELR 996 at [67]; see too the recent discussion in *Rayner v Director-General of Health* [2019] NZEmpC 65.

(a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?

(b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?

(c) Third, what is a fair assessment of the extent of the contribution?

(d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[74] Mr Maddigan's actions were blameworthy. He incurred infringements in a departmental vehicle and then failed to tell the appropriate person about them. He lost his licence and drove while on notice that his licence had been suspended. He did not communicate in a satisfactory manner with his employer, whatever rights and wrongs he perceived in the legal situation. There is no doubt that his actions contributed to the situation giving rise to his ultimate dismissal. Mr Maddigan cannot, however, be blamed for other deficiencies in the process which worked significantly against him.

[75] What is a fair assessment of the extent of the contribution? In this part of the exercise I am guided by the full Court's approach in *Xtreme Dining Ltd, (T/A Think Steel) v Dewar*.[25] In terms of quantum, the Court made it clear that a reduction of 50 per cent is to be reserved for exceptional cases, and that care should be taken before imposing a reduction of 25 per cent. That is because even a 25 per cent reduction is of "particular significance."[26] It is revealing that in *Xtreme Dining* the full Court applied a 16.67 per cent reduction ($12,000 to $10,000) in circumstances where the employee was found to have contributed to an unsatisfactory questioning process leading to an unjustified dismissal by giving implausible answers to the employer.[27]

[76] The present case does not fall within the upper range of blameworthy contributory conduct – it is not an exceptional case. Nor does it fall within the mid-

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25 *Xtreme Dining Ltd, (T/A Think Steel) v Dewar* [2016] NZEmpC 136; [2016] ERNZ 628.

26 *Donaldson and Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920 (EmpC) at 929; *Paykel Ltd v Morton* [1994] 1 ERNZ 875 (EmpC) at 886.

27 *Xtreme Dining Ltd, (t/a Think Steel) v Dewar*, above n 25 at [223]–[227]; the reduction was from $12,000 to $10,000.

upper range – significant blameworthy contributory conduct. I regard Mr Maddigan's conduct as justifying a reduction of no more than 20 per cent in the particular circumstances.[28]

[77] Standing back and considering the remedies I am awarding, and the remedies I am declining to award, I propose to restrict the reduction for contribution to the order for compensation under s 123(1)(c)(i).

Reinstatement

[78] As I have said, Mr Maddigan made it very clear that reinstatement is the remedy he particularly seeks. That is the principal reason why he pursued a challenge against the Authority's determination, even though he was otherwise successful in that forum.

[79] The law in relation to reinstatement has changed relatively recently to provide for reinstatement as the primary remedy. That, as the Parliamentary material reflects, was prompted by the understanding that saving the employment relationship is generally better for both workers and employers.[29] Mr Maddigan's dismissal took place prior to the most recent law change. That means that reinstatement is not the primary remedy. It is, however, an important one, for obvious reasons.

[80] The Department is strongly opposed to reinstatement. Its objections were primarily focussed on a perceived breakdown in the relationship and an inability to trust Mr Maddigan to work unsupervised. In this regard it was submitted that reinstatement would be neither practicable nor reasonable and should not be ordered. I did not find the evidence relating to concerns about Mr Maddigan working unsupervised in the bush persuasive. Nor was I drawn to evidence that reinstatement would send a negative message to other employees about the capacity of the

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[28] See the recent discussion of the cases in *Zhang v Telco Asset Management Ltd*, above n 23, at [137]–[149]. In that case Judge Corkill found that an appropriate range of contribution in the circumstances would have been 15 to 25 per cent.

[29] (1 February 2018) 727 NZPD 1646.

Department to effectively deal with disciplinary matters.[30] It is the current state of the relationship which was the Department's strongest point.

[81] I have not found this aspect of the case easy – Mr Maddigan had worked for the Department for 20 years. He has struggled to find satisfying alternative work in the field he loves. He is passionate about conservation and 'doing his bit' to protect the environment and it is clear that his talents and enthusiasm are recognised by a number of people who have worked with him over the years. He sees the Department as the ideal place to do this work. He has a young family to support.

[82] While there was a reasonable basis for the Department to raise concerns with Mr Maddigan, the process followed was flawed, including because there was a failure to approach matters with a sufficiently open mind. Ultimately the desired outcome was achieved, namely Mr Maddigan's departure. Reinstatement in these circumstances might seem entirely just and reasonable.

[83] There is, however, a need to stand back and weigh all of the evidence to decide whether reinstatement is an appropriate remedy in any particular case. Parliament has provided that the assessment is to be measured against two factors – whether reinstatement is reasonable and whether it is practicable.[31] The two concepts overlap. I have already found that the defendant had a justifiable basis for its concerns. There were, however, significant problems with the process.

[84] I do not think that it is a stretch to say that where an employer's actions have poisoned the relationship to the point of collapse, the Court can reasonably expect them to go the extra mile to mend the damage, and to work constructively with the employee (and with other affected employees as required) to re-establish a co-operative relationship. In such circumstances, restorative practices in which parties can expect to engage actively, are likely to become an increasingly helpful tool.

[85] There is also a need in cases such as this to unpick assertions that the breakdown in a relationship with a particular manager means reinstatement is neither

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30 In this regard see the observations in *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178 (EmpC).
31 Section 125.

reasonable nor practicable. In the present case Mr Maddigan has a deep distrust of Mr Roberts. The reality is, however, that Mr Roberts is manager of the entire South Island. The two would be unlikely to have the need for anything approaching day-to-day contact.

[86] While I accept that there are some factors which undermine the Department's arguments that reinstatement should not be ordered, I am driven to the conclusion that it would not be practicable even if significant supports were put in place. The disciplinary process took place against the backdrop of an already fragile relationship. The relationship has now completely shattered. Mr Maddigan lacks insight into what he did and why the Department might legitimately be concerned about it. While he said that he would not repeat the behaviours which led to the difficulties in this case, and that he could move on in terms of the relationship issues, I do not have any confidence that he would be able to do so. Past difficulties between Mr Maddigan and other staff in constructively dealing with difficult situations in the workplace tend to support this view. The reality is that Mr Maddigan has arrived at the point where he is deeply distrusting of management and has a level of preoccupation with broader perceived injustices within the Department which would seriously undermine attempts to reintegrate him into the workplace. The strong language he used during the course of the hearing to describe various people's motivations and deficiencies amply reflected this. In saying this, I have not overlooked the fact that Mr Maddigan represented himself and did not have the filtering advantage of a lawyer which some litigants have.

[87] Standing back, I am satisfied that reinstatement is not practicable and it is not ordered.

Conclusion

[88] Mr Maddigan's dismissal was unjustified.

[89] I have considered the overall package of remedies and consider that they reflect an appropriate quantum in the circumstances.

[90] The Department is ordered to pay Mr Maddigan a sum equivalent to 13 weeks' lost wages.

[91] The Department is ordered to pay Mr Maddigan the sum of $18,000 compensation under s 123(1)(c)(i), minus a 20 per cent deduction for contribution.

[92] The Department is ordered to pay a penalty of $5,000 for breach of good faith, 75 per cent of which is to be paid to Mr Maddigan; the remainder to the Crown.

[93] I decline to order reinstatement.

[94] The Authority's determination is set aside as a result of this judgment.

[95] Although Mr Maddigan has not succeeded in his application for reinstatement, he has nevertheless had a measure of success on his challenge. I do not anticipate any issue of costs will arise but if it does, I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 11 am on 17 December 2019