[¶79-060] Lim v Meadow Mushrooms Limited

(2015) 10 NZELC ¶79-060
Employment Court, [2015] NZEmpC 192.
Hearing: 19 Oct 2015; Judgment: 4 Nov 2015.

Employment law — Constructive dismissal — Remedies — Compensation for humiliation, loss of dignity and injury to feelings — Non de novo challenges — Contents of written determinations by Authority — Employee being suspected of theft of cell phone — Two senior employees being involved in search of his home, his bag and his person — Despite cell phone not being found, employee being subjected to disciplinary investigation after which he was advised that employer considered he had stolen cell phone — Employee resigning — Authority finding that employee had been constructively dismissed — Authority awarding lost wages and also $3,000 for hurt and humiliation — Employee challenging quantum of compensation for hurt and humiliation — Whether Authority had erred in its conclusion as to the appropriate compensation — Whether Authority had complied with its obligation to state relevant findings of fact — If the Authority had erred in its conclusion, what was the appropriate award? — Employment Relations Act 2000, ss 123(1)(c)(i), 174E.

Mr Lim (L) had worked with Meadow Mushrooms Limited (Meadow) for 20 years. On Friday 22 August 2014, one of L's co-workers, Ms Ryde, discovered that her cell phone had gone missing. She informed two senior employees Ms MacLellan and Mr Li that her phone was missing but that it could be traced using locator software installed on her cell phone which was linked to her partner's cell phone. Having received information as to the apparent location of the cell phone, Ms MacLellan and Mr Li drove to Wigram Lodge, an accommodation complex where L lived. They told a security guard there that an employee's cell phone had gone missing and enquired as to whether L was at home. Then Ms Ryde's partner updated Mr Li, stating that the phone was now headed to Riccarton. Mr Li and Ms MacLellan returned to the office where they did a check of employees' addresses which persuaded them that no other employees lived at or near Wigram Lodge.

Advice was subsequently received that the cell phone could be traced moving from Riccarton towards Wigram Lodge. Mr Li rang the security guard and informed him of this. The security guard said he would talk to any resident who returned and that he would walk to the gate to meet anyone entering the site. Ms McLellan and Mr Li then returned to Wigram Lodge. Upon their arrival, they and the security guard saw L coming from the direction of his room. In front of the security guard, Ms MacLellan told L they were looking for a missing phone that had been tracked to Wigram Lodge.

The security guard decided to conduct a search. This was not initiated by Mr Li and Ms MacLellan but they followed the security guard and L up to his room. L's bag, his person and his room were searched. The phone was not found. L was very distressed and said he did not think he could come into work over the weekend. It was agreed he would not have to do so and he was later told not to come in on the following Monday either.

Meadow undertook a disciplinary process which concluded L had stolen the phone. As a result, L chose to resign. He raised an employment relationship problem, alleging he had been constructively dismissed.

Meadow denied there was an unjustified dismissal and said that L had resigned at the end of a disciplinary process during which he was found to have committed serious misconduct.

The Employment Relations Authority (Lim v Meadow Mushrooms Ltd [2015] NZERA Christchurch 89) found in favour of L on the basis that:

- **Meadow had seriously breached its duty of good faith to L when involving the security guard**
- **the disciplinary investigation was procedurally inadequate, and evidence necessary to establish the matter to the high standard necessary for such a serious allegation had not been obtained.**

The Authority awarded lost wages.

Damages of $3,000 for hurt and humiliation were also awarded, the Authority's discussion of it in its determination being limited to the following sentence: "Mr Lim's limited oral evidence about his hurt, humiliation and loss of dignity justifies a modest award of $3,000 compensation." It was this that was the subject of a non de novo challenge to the Employment Court.

L asserted that the Authority had taken insufficient notice of his distress arising from the factors giving rise to his personal grievance, especially the circumstances of the search. He also said that the Authority had failed to explain how the quantum of such compensation had been reached.

Meadow asserted that it could be inferred that the evidence upon which the Authority based its compensation findings were: L's distress at the search; his lack of motivation to keep working at Meadow because his integrity and honesty had been questioned; and L's being in no fit state (because of his devastation at the allegation and the resulting loss of his job of 20 years) to seek further employment.

The Court noted that factors relevant to any claim for humiliation, loss of dignity and injury to feelings must be demonstrated. It said that the Authority had apparently been given only limited information on the topic. The determination did not indicate whether the Authority had evidence of the matters described by Meadow to persuade it to make the award it did. Nor was it clear why a "modest award" was appropriate.

The Court considered the provisions of s 179(4) of the Employment Relations Act 2000 (the Act) which relate to non de novo challenges. It stated the issues of the case as being:

- **Did the Authority err in its conclusion as to the appropriate compensation for humiliation, loss of dignity and injury to feelings?**
- **If so, what was the appropriate award for such compensation?**

In relation to the latter, the Court considered evidence relating to L's response to the physical search of his room, bag and person, and his subsequent feelings about the episode and about Meadow's actions after such a long period of employment with it. Meadow referred to the fact that L had at one stage said "It's not about money for me".

The Court considered the provisions of s 174E of the Act, which took effect in March 2015 and describes the required content of written determinations by the Authority. It noted that s 174E(a)(i) requires the Authority to state relevant findings of fact.

Held: **challenge allowed. Compensation of $12,000 awarded for hurt, humiliation and injury to feelings.**

1. The Authority's obligation to state relevant findings of fact in its determinations is important. It is a codification of the common law duty to provide adequate reasons. One of the important reasons for doing so is to permit an assessment as to the lawfulness of what has been done on appeal. In the employment jurisdiction it can be significant in a non de novo challenge because the Authority's conclusions as to fact and law are central in that process. Other important reasons are to ensure decision-making is not arbitrary, to maintain the principles of open justice, and the related imperative of maintaining public confidence in judicial decision-making: [34].

2. The degree to which reasons for a decision are required depends on the context. In the case of the Authority, the requirement must be balanced against Parliament's intention that the Authority deliver speedy, informal and practical justice: [35].

3. In the case before the Court, relevant findings of fact needed to be stated so that the basis of the findings was apparent to the parties and to the Court. There needed to be at least a brief outline of the oral evidence relied on and brief reasoning as to why a modest award was justified given the employee's claim that an award of $30,000 was appropriate: [37].

4. Compensation must be awarded on the basis of the particular circumstances of the case. The actual consequences have to be assessed. There is a need for moderation and reasonable consistency. The dicta of Judge Inglis in Hall v Dionex (2015) 10 NZELC ¶79-051, [2014] NZEmpC 29 at [87], noting discussion of the stagnant levels of compensation in the Court, ought also to be heeded.

5. The fact that L had said that it was "not about money" did not disentitle L to compensation. It was simply an expression of an understandable opinion that although compensation would be an aspect of vindication for what had occurred, it would never provide total redemption: [47].

6. L showed that he had suffered significant humiliation associated with the search. There may have been a cultural element to the significant shame and ignominy he suffered which was not understood at the time of the search or when the disciplinary process was carried out. However, L's reaction was real.

7. Other factors influencing the assessment include the fact that L could not face his employers after the challenge to his honesty and integrity, which led him to resign, and the fact that he was initially in no fit state to seek further employment and when he did so found it hard to explain what had led to his resignation from Meadow. Underlying these factors was a concern that he would struggle to bring his fiancee to New Zealand.

8. There was no evidence of contributory conduct on the part of L. L stated in the Court that he was not responsible for the removal of the cell phone and this was not challenged in cross-examination.

[*Headnote by the CCH Employment Law Editors*]

G Bennett, advocate for the plaintiff.

T Mackenzie, counsel for the defendant.

Before: Judge Corkill.

Judge Corkill:

Introduction

[1] Mr Lim has brought a non de novo challenge in respect of one of the remedies he was awarded by the Employment Relations Authority (the Authority), in a determination of 3 July 2015.[1] He challenges the sum which was awarded for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). The Authority concluded that on the basis of limited oral evidence which Mr Lim had provided at the investigation meeting that a modest award of $3,000 compensation was justified. Mr Lim had claimed that such compensation should have been fixed in the sum of $30,000.

The determination

[2] Since the determination is at the heart of the challenge, I summarise it in detail.

[3] The relationship problem which Mr Lim raised was that his employer, Meadow Mushrooms Limited (Meadow), had breached obligations it owed to him as an employee when dealing with an issue as to a cell phone which had been removed from the workplace. First, Mr Lim asserted Meadow had breached the duty to maintain his trust and confidence when it effectively suggested to a security guard who worked at the apartments where Mr Lim resided that he may be responsible for removing a cell phone belonging to a co-worker. He also claimed that Meadow colluded with the security guard when he later searched Mr Lim's room, bag and person. A disciplinary investigation was then conducted by Meadow which concluded Mr Lim had stolen the co-worker's cell phone. As a result, Mr Lim chose to resign. When raising his relationship problem, however, he asserted that in fact he had been constructively dismissed.

[4] Meadow's position was that it denied there was an unjustified dismissal; and said that Mr Lim resigned at the end of the disciplinary process during which he was found to have committed serious misconduct by way of theft of a colleague's cell phone from the workplace. Meadow said it conducted a fair and reasonable process, that it did not breach any of its duties to Mr Lim, and that its decision that he should be dismissed was one which was open to a fair and reasonable employer.

[5] The Authority undertook a detailed review of the facts. It began its summary by recording that one of Mr Lim's co-workers, Ms Barbara Ryde, discovered on Friday, 22 August 2014 that her cell phone had gone missing. Ms Ryde informed two senior employees of Meadow, Ms Sylvia MacLellan, Harvesting Manager, and Mr Tony Li, Harvesting Coordinator, that her phone was missing but that it could be traced using locator software installed on her cell phone which was linked to her partner's cell phone.

[6] Having received information as to the apparent location of the cell phone, Mr Li and Ms MacLellan drove to Wigram Lodge, an accommodation complex where Mr Lim resided. There they spoke to a security guard. They told him that an employee's cell phone had gone missing and enquired as to whether Mr Lim was at home. The Authority found that when attending the security guard, Ms MacLellan and Mr Li were entitled to ask to see Mr Lim. But to also tell him that they were trying to find a missing phone was a breach of the employer's duty of good faith to maintain trust and confidence, because the security guard would have inevitably concluded that Mr Lim was suspected of having unlawfully taken the phone.

[7] Then Ms Ryde's partner updated Mr Li, stating that the phone was now ''headed to Riccarton''. Mr Li and Ms MacLellan left contact details with the security guard and returned to Meadow's office. A check of employees' addresses which was then undertaken persuaded them that no other employees lived at or near Wigram Lodge.

[8] The Authority recorded that advice was subsequently received that the cell phone could be traced moving from Riccarton back towards Wigram Lodge. Mr Li rang the security guard and informed him of this. The guard said he would talk to any resident who returned and that he would walk to the gate to meet anybody entering the site. Then Ms MacLellan and Mr Li returned to Wigram Lodge. Upon their arrival, they and the security guard saw Mr Lim coming from the direction of his room towards the lobby. In front of the security guard Ms MacLellan told Mr Lim they were looking for a missing phone that had been tracked to Wigram Lodge. They declined to disclose who owned the phone.

[9] The Authority found that Meadow was complicit in the security guard's plan to watch out for, and to talk to, anyone returning to Wigram Lodge. It held that when Mr Lim met with Mr Li, Ms MacLellan and the security guard, there was no need for the security guard to be involved in the conversation which followed.

[10] The security guard then decided to conduct a search. Although this was not initiated by Ms MacLellan and Mr Li, they followed the security guard and Mr Lim up to his room. The Authority found that the guard then proceeded to search Mr Lim's bag, his person and his room. Mr Li and Ms MacLellan stayed in the corridor with the door to Mr Lim's room partially open and observed the search. The co-worker's cell phone was not found. The Authority recorded that Mr Lim was very distressed about the search, and told Ms MacLellan and Mr Li he did not think he would be able to come into work over the weekend. It was agreed he would not have to do so. Later he was told not to come in on the following Monday either.

[11] The Authority found that Meadow was complicit in the search of Mr Lim although it was not actually carried out by a representative of the employer. The Authority did not accept that Ms MacLellan and Mr Li were passive bystanders, because they had followed the security guard up to Mr Lim's room and watched the search through a partially open door. Mr Li had also rung the number of the missing cell phone in order to assist in the search. The Authority determined that the complicity was a breach of Meadow's duty of good faith to Mr Lim not to do anything to destroy trust and confidence in one another; but there was also a finding that Mr Lim had not been harassed by Ms MacLellan or Mr Li when the search was carried out as had been contended for by Mr Lim.

[12] As a result of these events, Meadow commenced a disciplinary process alleging that Mr Lim had been involved in workplace theft. The Authority found that there were procedural failings. These included investigating the question of whether another employee or contractor could have been

involved. The Authority also considered that detailed information should have been obtained from the person who had monitored the missing cell phone since Ms MacLellan, the relevant decision-maker, relied only on indirectly obtained information; such information needed to be checked with a detailed understanding as to where Mr Lim had been, and whether he could have been the person involved.

[13] The Authority concluded that the investigation was inadequate so that Meadow could not be satisfied to the high degree of proof that was needed for a serious allegation of theft. The Authority also considered that as Mr Lim was not fluent in English which was his second language, and as he was not a confident or articulate person, allowing him only two days within which to arrange a support person or representative was not reasonable for the purposes of seeking assistance.

[14] In summary, the Authority concluded that the defects in the process were more than minor and resulted in Mr Lim being treated unfairly. Even before conducting any disciplinary process, Meadow had seriously breached its duty of good faith to Mr Lim when involving the security guard. Mr Lim avoided dismissal by being told that if he wished he could tender his resignation, but he only did so after the serious breaches of Meadow's duty of good faith which occurred in the exchanges with the security guard at Wigram Lodge, and after the procedurally unfair disciplinary process. Although Mr Lim had said in the course of the process he was seriously considering resigning, the Authority determined that the resignation was actually a constructive dismissal.

[15] Turning to remedies, the Authority first considered Mr Lim's claim for lost wages. It recorded that Mr Lim had given evidence he was devastated by the allegations and the resulting loss of a job in which he had been employed for 20 years. The Authority accepted that Mr Lim was initially in no fit state to seek further employment, although he had obtained some temporary work in October 2014, within two months of his dismissal. He had adequately mitigated his loss. Lost wages were accordingly awarded in the sum of $4,839.82 gross. Because he was considering leaving, the Authority was not persuaded to award lost remuneration beyond a period of three months from the date of dismissal.

[16] The Authority's consideration of the topic of compensation was expressed in these terms:[2]

> Mr Lim's limited oral evidence about his hurt, humiliation and loss of dignity justifies a modest award of $3,000 compensation.

[17] The final issue related to contribution. The Authority determined that possibly due to Meadow's insufficient investigation, there was no evidence that Mr Lim had engaged in any blameworthy conduct. Consequently there was no reduction of remedies on the grounds of contribution.

The problem

[18] It is trite that factors which are relevant to any claim for humiliation, loss of dignity and injury to feelings must be demonstrated. Adequate evidence must be provided so as to permit the Authority — or the Court — to exercise its discretion on an informed and principled basis.

[19] The problem which arose in the present case is that insufficient attention was given to the provision of such evidence when presenting Mr Lim's case to the Authority. His brief of evidence did not refer to the factors giving rise to the claim for humiliation, loss of dignity and injury to feelings at all; the Authority was left to investigate this issue at the investigation meeting, and it would appear was given only limited information on the topic. It was unfortunate that the Authority was placed in this situation and it is that difficulty which has given rise to the non de novo challenge which is before the Court.

[20] Originally, Mr Lim also challenged the award for lost wages; it was asserted that the Authority should have ordered a payment of remuneration for more than three months. However, at the commencement of the hearing, Mr Lim's advocate, Mr Bennett, informed the Court that the challenge in relation to lost wages was discontinued, since at the relevant time Mr Lim had travelled to Cambodia. It was accepted that a claim for more than three months' lost

remuneration could not be maintained. Accordingly, the challenge was confined to the issue of distress compensation.

[21] The statement of claim filed for Mr Lim asserted that the Authority had taken insufficient notice of Mr Lim's distress arising from the factors giving rise to his personal grievance, especially having regard to the circumstances of the search. It was further asserted that the Authority had failed to explain how the quantum of such compensation had been reached. For Meadow, it was alleged that the Authority exercised its discretion correctly.

Principles relating to a non de novo challenge

[22] Mr Mackenzie, counsel for Meadow, submitted that the Court was seized only of a non de novo challenge which meant that it was necessary to review the relevant finding made by the Authority, a finding which disclosed no discernible error.

[23] It is useful to refer to the relevant principles as to the hearing of a non de novo challenge, which may be summarised as follows:

a) Section 179(4) of the Act provides that if a party making an election is not seeking a hearing de novo, the election must specify:

- the determination, or part of the determination, to which the election relates;
- any error of law or fact alleged by that party;
- any question of law or fact be resolved; the grounds on which the election is made is to be sufficiently particularised so as to give full advice to both the Court and the other party of the issues involved; and
- the relief sought.

b) A non de novo hearing is accordingly in the nature of an appeal and the challenger/plaintiff is required to show that the Authority's determination was wrong.[3]

c) Thus, the challenger has an onus of persuading the Court of the existence of an error of fact and/or law by the Authority in its determination. [4]

d) Making such an election does not dictate the way in which the appeal is to be heard. There may be evidence or further evidence about the matters at issue in the non de novo challenge. It may be become necessary for the Court to make its own decision, as required by s 183 of the Act.[5]

e) To succeed on a non de novo challenge, a plaintiff must establish one or more of the alleged errors which the challenger has pleaded. If the Court is satisfied that the Authority has made one or more errors, so that it is necessary to set aside some or all of the Authority's determination, then it may reconsider the issue involved taking into account any evidence called at the hearing of the challenge.[6]

[24] In light of the foregoing, the issues which I must resolve in this case are:

a) Did the Authority err in its conclusion as to the appropriate compensation for humiliation, loss of dignity and injury to feelings?

b) If so, what is the appropriate award for such compensation?

Issue one: did the Authority err?

[25] As recorded earlier, the Authority recorded that it had received ''limited oral evidence'' about Mr Lim's humiliation, loss of dignity and injury to feelings, and concluded that a ''modest award of $3,000'' for such compensation was justified.[7]

[26] Mr Mackenzie argued that it could be inferred that the evidence on which the Authority based its findings as to compensation was as follows:

a) That Mr Lim was very distressed about the search, so that he could not come to work on the days which followed it.[8]

b) That Mr Lim had no motivation to keep working at Meadow because his integrity and honesty had been questioned.[9]

c) That Mr Lim had given evidence he was devastated by the allegation and the resulting loss of his job of 20 years, so that he was initially in no fit state to seek further employment.[10]

[27] The difficulty is that the determination does not indicate whether the Authority had evidence of these things to persuade it to make the award it did. Nor is it clear why a ''modest award'' was considered appropriate.

[28] The issue I must consider relates to the extent of the reasoning which needed to be given by the Authority when expressing its conclusion as to the appropriate award. This question requires consideration of the effect of s 174E of the Act, which took effect on 6 March 2015 after it was inserted by s 69 of the Employment Relations Amendment Act 2014. That section was one of a suite of sections dealing with oral and written determinations. They replaced the former s 174 which related to the matters which needed to be included in a written determination and those which did not, ''for the purpose of delivering speedy, informal and practical justice to the parties''.[11]

[29] By way of summary of the new provisions, s 174 of the Act now provides that wherever practicable after an investigation meeting, the Authority must give its determination on the matter orally, or give an oral indication of its preliminary findings on the matter. Sections 174A and 174B deal with time limits and other requirements when giving oral determinations; s 174C permits the Authority to reserve its determination of a matter if it is satisfied there are good reasons as to why it is not practicable for it to provide an oral determination or oral indication of its preliminary findings at the conclusion of the investigation meeting; and s 174D provides that the Authority may determine a matter without holding an investigation meeting. Section 174E follows, describing the required content of written determinations. It is this section which requires consideration in the present case.

[30] The explanatory note to the Employment Relations Amendment Bill 2013 which introduced these provisions stated that there could be delays in the provision of determinations, and that this could be stressful and could disadvantage both parties to an employment dispute.[12]

[31] The explanatory note went on to state that the object of the changes was ''. . . to support the Authority's objective of delivering speedy, informal and practical justice''.[13] Although these words appeared in the former s 174, they were not repeated in s 174E. Given the emphasis on strict timeframes for the delivery of oral determinations and oral indications of preliminary findings, as well as time limits for the issuing of written determinations, I consider that the objective of ''speedy, informal and practical justice'' continues to be relevant when considering the scope of determinations given by the Authority. I also note that this phrase continues to apply to those processes of the Authority which are referred to in the Employment Court Regulations 2000: reg 4.

[32] In this case, the provision as to written determinations is relevant. Section 174E states:

> **174E Content of written determinations**
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> (1) A written determination provided by the Authority in accordance with s 174A(2), 174B(2), 174C(3), or 174D(2)—
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> (a) Must—
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> (i) state relevant findings of fact; and
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> (ii) state and explain its findings on relevant issues of law; and
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> (iii) express its conclusions on the matters or issues it considers require determination in order to dispose of the matter; and
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> (iv) specify what orders (if any) it is making; but
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> (b) need not—
>
> (i) set out a record of all or any of the evidence heard or received; or
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> (ii) record or summarise any submissions made by the parties; or
>
> (iii) indicate why it made, or did not make, specific findings as to the credibility of any evidence or person; or
>
> (iv) record the process followed in investigating and determining the matter.

[33] I make two general observations about this section. The first is that the language used in the old s 174(a) and (b) was repeated in s 174E(a) and (b). Secondly, the requirements of 174E(a) are mandatory, whilst the requirements of s 174E(b) indicate that the factors therein ''need not'' be included, although they may.

[34] For the purposes of this case, it is necessary to focus on s 174E(a)(i), which imposes a mandatory requirement to state relevant findings of fact. This is an important obligation. It is a codification of the common

law duty to provide adequate reasons, a requirement that has been the subject of judicial consideration on many occasions with regard to cases heard by a criminal court,[14] a civil court,[15] or a tribunal.[16] One of the important reasons for doing so is to permit an assessment as to the lawfulness of what has been done on appeal.[17] In this jurisdiction the issue can be significant in those somewhat unusual situations where a determination is subsequently challenged on a non de novo basis, because the Authority's conclusions as to fact and law are central in that process. Other important reasons for maintaining such minimum standards are to ensure that decision-making is not arbitrary, to maintain the principles of open justice, and the related imperative of maintaining public confidence in decision-making of a judicial nature.

[35] The authorities in other courts establish that the extent to which reasons are required depends on the context.[18] Sometimes a few lines will suffice, and on others a more extensive explanation may be required. In the case of the Authority, it is necessary to balance such requirements against Parliament's intention that the Authority is to deliver speedy, informal and practical justice. Findings of fact may be expressed in an economic way, but they do need to be expressed.

[36] It is useful to consider for present purposes the dicta of Judge Couch in *Bayliss Sherr v McDonald*; although the Court in that instance considered the former s 174, the case is nonetheless relevant because very similar language has been adopted in s 174A.[19] At issue was the question of whether the Authority had complied with its duty under s 174 when dealing with an issue of contribution, since no findings of fact were recorded on that topic. Judge Couch held that the Authority did not record relevant findings of fact and that it accordingly ''erred in law in the sense that it [did] not [discharge] its statutory duty''.[20] I agree that a failure to comply with the mandatory provisions as to written determinations under s 174A may amount to a legal error.

[37] In the present case relevant findings of fact needed to be stated so that the basis of the findings which were made were apparent to the parties, and now to the Court; there needed to be at least a brief outline of the oral evidence which was relied on, and brief reasoning as to why a modest award was justified given the employee's claim that an award of $30,000 was appropriate.

[38] Accordingly, I conclude that the challenge as to the remedy awarded under s 123(1)(c)(i) of the Act should be allowed on the basis of the error which has occurred — one which the Authority appears to have been led into.

Issue two: what is the appropriate compensation under s 123(1)(c)(i)?

[39] It is at this point that is appropriate to summarise the evidence which was given by Mr Lim to the Court on the topic of humiliation, loss of dignity and injury to feelings.

[40] Mr Lim said that the circumstances which gave rise to his personal grievance focused on the events which occurred at his residence when he was initially questioned by a security guard in the presence of Ms MacLellan and Mr Li; and when a search was conducted in his room. He said that he followed the security guard to his room and permitted the search of his effects and person, because he thought that ''they'' had the power to do so. However, he agreed to cooperate reluctantly, because of the invasion of his privacy. He hoped that by permitting the search to be undertaken, nothing would be found and his name would thereby be cleared. The search by the security guard involved Mr Lim being patted down and being required to remove his jacket so that his pockets could be checked. The security guard also checked a backpack Mr Lim had been using as well as the contents of his room. This process took at least five minutes.

[41] Mr Lim said that the way in which he was dealt with made him feel like a criminal; he felt ashamed and distressed. The event brought shame to his family; and he felt that he could not talk to family members properly because of what had occurred. He had trouble sleeping and was worried about what people would say about him. Compensation would help to heal the wound, but he could never forget what had occurred. Mr Lim said he also felt helpless when he was being searched, with two representatives of his employer looking on.

[42] Mr Lim also said that he felt that the integrity and honesty which he had demonstrated for Meadow as a longstanding employee meant that when he left he considered that his loyalty to his employer should have been acknowledged. Because of the circumstances, that loyalty was not acknowledged.

[43] Finally, Mr Lim was also aggrieved because he needed income in order to sponsor his fiancée to come to New Zealand; this important objective was compromised, he said, by the termination of his employment.

[44] Mr Mackenzie submitted that any assessment of compensation under s 123(1)(c)(i) had to proceed on the basis that it was related to the personal grievance. He argued that the established grievance was the unjustified dismissal, not the carrying out of the search. He said it could not be argued that in ''settling the grievance'' under the section, compensation should be awarded for the consequences of the search.

[45] Mr Bennett submitted in response that the search and the dismissal were inextricably linked, and that ''but for'' the circumstances of the search which had significantly affected Mr Lim, he would not have resigned and would not have raised a personal grievance on the ground of unjustified dismissal. He referred to the approach as to causation which was adopted by the High Court in *Ellis v Proceedings Commissioner* when considering circumstances giving rise to a constructive dismissal after sexual harassment of the employee, and said such an analysis should apply in the present case.[21]

[46] Given the requirement under s 103A(2) of the Act to consider ''all the circumstances'', and the specific provision in s 103A(4) of the Act that the Authority should ''consider any other factors it thinks appropriate'', the Authority was permitted to take the view as it did that the circumstances of the search, which amounted to a breach of the duty of good faith, were linked to the circumstances which resulted in the unjustified constructive dismissal. Since the search was an aspect of the established personal grievance, the consequences of that search could be considered when fixing compensation under s 123(1)(c)(i) of the Act.

[47] Mr Mackenzie also made reference to Mr Lim's candid statement to the Court that compensation would not adequately address the consequences he suffered — at one stage stating that ''it's not about money for me''. However, I find that the effect of Mr Lim's evidence was that although compensation would be an aspect of vindication for what had occurred, it would never provide total redemption. That is an understandable opinion which does not disentitle Mr Lim to the award of compensation for which the Act provides.

[48] In applying the phrase ''humiliation, loss of dignity and injury to feelings'' to the present circumstances, the dicta of the High Court in *Director of Proceedings v O'Neill* is of assistance:[22]

> [27] . . . The Act is designed to compensate aggrieved persons who may suffer a mental, emotional or spiritual injuries (to feelings) in an infinite variety of ways.
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> [28] Humiliation may involve loss of dignity and certainly will involve injury to feelings of self worth and self esteem. Humiliation, we would have thought, will always involve a loss of dignity. A loss of dignity would always have involved [an] injury to feelings. That would include a feeling of pride in oneself and general contentment. Yet whilst injury to such feelings may involve humiliation that will not always be the case. Injury or death to others who are loved ones does not usually result in humiliation which is an emotion relative to self-worth and self-esteem, whereas grief is a sense of loss quite unrelated to self worth.
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> [29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) albeit unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

[49] The striking feature of Mr Lim's description of the consequences as to what occurred is the significant humiliation associated with the circumstances of the search, which the Authority concluded was a breach of Meadow's duty of good faith to Mr Lim not to do anything to destroy trust and confidence.[23] There may well have been a cultural element to the significant shame and ignomy associated with this event which was not understood by Ms MacLellan and Mr Li at the time of the search, nor by Ms MacLellan when undertaking the disciplinary process for Meadow. I find that Mr Li's reaction was real and accurately described by him in his evidence.

[50] There were other consequences of the established grievance. The loss of dignity suffered by Mr Lim persuaded him to resign; he could not face his employees after the challenge to his honesty and integrity. Furthermore, as the Authority found, he was initially in no fit state to seek further employment. When he did seek alternative work, he found it difficult to explain what had led to his resignation from Meadow. Underlying these factors was a concern that he would now struggle to bring his fiancée to New Zealand, although ultimately he was able to do so. In my view, these are all factors which must be factored into the assessment.

[51] Turning to quantum, I remind myself that it is necessary to award compensation on the basis of the particular circumstances of the case, and that there is a need for moderation and reasonable consistency: *Telecom New Zealand Limited v Nutter*.[24] In that decision, the Court of Appeal approved a finding made in this Court that $10,000 was appropriate, describing it as "... a meagre award given the humiliating circumstances of, and grounds for, the dismissal and the consequent loss by Mr Nutter of what seems to have been his social network within Telecom and elsewhere."[25] Whilst of course the circumstances in *Nutter* were very different from those in the present case, I do have some regard to this dicta since the case involved significant humiliation following an unjustified dismissal on procedural grounds.

[52] I also observe that from that and other cases it is clear that the more harsh the circumstances of the dismissal, the more likely the prospect of adverse consequences. But it is the actual consequences which must be assessed.

[53] I also have regard to the dicta of Judge Inglis in *Hall v Dionex*, when she reviewed previous awards of this Court in these terms:[26]

> Commentators have recently noted that average compensatory awards made by the Court have remained at stagnant levels for the last 20 years, despite the inflationary effect it might otherwise be expected to have increased them. They further note that while in *NCR (NZ) Corp Ltd v Blowes* the Court of Appeal attempted to set an "upper limit" on compensatory awards of $27,000, consistent with inflation from the award of $20,000 made in *Telecom South v Post Office Union Inc*, if a similar inflationary approach was applied today an upper limit for compensation would be $33,000. By contrast, between July 2013 and July 2014 awards in this Court were said to have ranged from between $3,000 and $20,000 with the average award before taking contribution into account being $9,687.50.[27]

[54] Standing back and assessing all relevant factors as summarised above, I must have regard to the actual consequences which flowed from the established personal grievance. I consider a fair and reasonable amount for compensation for Mr Lim's hurt, humiliation and injury to feelings is $12,000.

[55] Finally, I am required to consider whether there was any contributing behaviour by Mr Lim under s 124 of the Act. As I mentioned earlier, the Authority determined that possibly due to the insufficient investigation there was no evidence Mr Lim had engaged in any blameworthy conduct. In this Court, Mr Lim stated that he was not responsible for the removal of the employee's cell phone, a topic on which he was not challenged in cross-examination. Nor did Meadow call any evidence to dispute this assertion. In those circumstances, I too find that there was no blameworthy conduct which would require a reduction of the remedy I have awarded under s 124 of the Act.

Conclusion

[56] Mr Lim's non de novo challenge succeeds. This decision replaces the determination of the Authority as to the appropriate amount of compensation to be paid by Meadow to Mr Lim under s 123(1)(c)(i) of the Act, which is $12,000.

[57] I reserve costs. I invite the representatives of the parties to attempt to resolve any such issue informally. If necessary, any formal application for costs should be filed and served within 14 days of this decision; any response is to be filed and served within 14 days thereafter.

Footnotes:

1 *Lim v Meadow Mushrooms Ltd* [2015] NZERA Christchurch 89.

2 *Lim v Meadow Mushrooms Ltd,* above n 1 at [67].

3 *Counties Manukau District Health Board v Trembath* [2001] ERNZ 847,at [9]; *Jerram v Franklin Veterinary Services* (1977) Ltd [2001] ERNZ 157 at [8].

4 *Robinson v Pacific Seals New Zealand Ltd,* at [24].

5 *Cliff v Air New Zealand Ltd* [2005] ERNZ 1, at [7].

6 *Robinson v Pacific Seals New Zealand Ltd,* above n 4, at [33].

7 *Lim v Meadow Mushrooms Ltd,* above n 1 at [67].

8 At [18].

9 At [30].

10 At [62].

11 Employment Relations Act 2000, former s 174.

12 Employment Relations Amendment Bill 2013, Explanatory Note at 7.

13 At 7. The Minister of Labour also emphasised this objective when introducing the Bill; (4 June 2013) 690 NZPD at 10710.

14 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [74[–[87].

15 *Thompson v Accident Compensation Cooperation* [2015] NZHC 1640 at [40].

16 *Canam Construction (1955) Ltd v La Hatte* [2010] 1 NZLR 848 (HC) at [47]–[62] and *G v Director of Proceedings* HC Auckland Civ 2009-404-000951, 12 November 2009, at [36].

17 *Lewis v Wilson & Horton Ltd,* above n 14, at [80].

18 *R v Awatere* [1982] 1 NZLR 644 (CA) at 648–9; *R v Jefferies* [1999] 3 NZLR 211 (CA) at [14]; *Gazzard v Accident Compensation Cooperation* HC Wellington Civ 2005-485-2388, 22 May 2006; *Canam Construction (1955) Ltd v LaHatte,* above n 16.

19 *Bayliss Sharr v McDonald* [2006] ERNZ 1058 at [58]–[65].

20 At [64].

21 *Ellis v Proceedings Commissioner* [1997] ERNZ 325 at 329.

22 *Director of Proceedings v O'Neill* (2000) 6 HRNZ 311.

23 *Lim v Meadow Mushrooms Ltd,* above n 1, at [36].

24 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [85].

25 At [93].

26 *Hall v Dionex Pty Ltd* [2014] NZEmpC 29, at [87].

27 Kathryn Beck and Hamish Kynaston, ''Remedies — we've been thinking. . .'' (paper presented to New Zealand Law Society 10th Employment Law Conference, October 2014) at 457, citing *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA) at [40]–[42], and *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA), cited in *Hall v Dionex Pty Ltd* [2014] NZEmpC 29 at [87]. (Some footnotes omitted).