**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

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| | BETWEEN | KASEY POU<br>Applicant |
| | AND | ALLIANCE GROUP LIMITED<br>Respondent |

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| Member of Authority: | James Crichton |
| Representatives: | Mary-Jane Thomas and Sarah McKenzie, Counsel for Applicant<br>Ken Smith, Counsel for Respondent |
| Investigation Meeting: | 10 April 2008 at Invercargill and 1 May 2008 by teleconference |
| Determination: | 11 July 2008 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Ms Pou) alleges that she was unjustifiably dismissed by her employer, the respondent (Alliance). Alliance resists that claim and says that the dismissal was substantively justified and procedurally fair.

[2] Ms Pou was charged with two counts of theft and one of receiving stolen property as a consequence of offending which took place on 31 July and 1 August 2006.

[3] Before those criminal informations came to a hearing in the District Court at Invercargill, Ms Pou was appointed to a position as a quality assurance officer at Alliance's Lorneville meatworks near Invercargill. This appointment was made on 4 December 2006.

[4] Ms Pou was not asked at interview to disclose previous criminal convictions or indeed to disclose any information that would have led Alliance to an understanding of her then pending criminal Court appearance. In fact, in addition to

the *current* criminal informations, Ms Pou had a lengthy list of criminal convictions, although many of them were somewhat historical in nature.

[5] In April 2007, with the *current* criminal offences about to come before the District Court, Ms Pou advised Alliance verbally of the upcoming Court appearance. Ms Pou's first appearance in the District Court was reported in the *Southland Times* on 19 April 2007. Ms Pou pleaded guilty to the three charges and was remanded on bail to appear again on 18 May 2007 for sentence.

[6] As a consequence of the initial appearance in the District Court, Ms Pou felt that there was gossip and rumour spreading about her in the workplace and accordingly she explored the prospect of resigning her position. She says that she was encouraged not to resign, both by her immediate manager and by the works manager. She says that, relying on those representations, she chose to persevere with her position.

[7] Ms Pou came up for sentencing in the District Court at Invercargill on Friday, 18 May 2007 and Ms Pou was sentenced to a term of imprisonment for her offending. She immediately appealed the custodial sentence and was remanded on bail pending the disposition of her appeal.

[8] The Saturday edition of the *Southland Times* for 19 May 2007 carried a report on Ms Pou's sentencing for her offending and it was the publication of this newspaper report which activated Alliance's Ms Elliott to institute a disciplinary investigation in respect of Ms Pou's behaviour.

[9] On 21 May 2007, Ms Elliott advised Ms Pou that she was considering Ms Pou's suspension for *a serious breach of the code of conduct* and a letter was subsequently sent by Alliance to Ms Pou confirming her suspension and indicating that Ms Pou's conviction on two charges of theft and one of receiving *may* impact upon Ms Pou's ongoing suitability to act as a quality assurance officer at Alliance.

[10] A disciplinary meeting was held on 24 May and Ms Pou was dismissed by letter dated 28 May 2007. Alliance advised in its dismissal letter that it had lost the required degree of trust and confidence in Ms Pou by reason of her convictions for dishonesty. A distinction was drawn between the role as a quality assurance officer and an ordinary meatworker position where offences of the type Ms Pou had been convicted of might not be problematic. However, in relation to a quality assurance

officer role, Alliance's position remained that no other quality assurance officer had a criminal conviction for dishonesty and it did not think it appropriate that Ms Pou be an exception to that general rule.

[11] Ms Pou then promptly raised her personal grievance with Alliance.

## Issues

[12] The following issues need to be resolved by the Authority:

a) Could the employer rely on conduct before the employment to dismiss?

b) Did Alliance unreasonably delay its disciplinary investigation?

c) Was Ms Milne biased against Ms Pou?

d) Could Ms Pou rely on Alliance's reassurances?

e) Was the suspension fair?

f) Was the decision to dismiss justified?

**Pre-employment conduct**

[13] Ms Pou committed three criminal offences on 31 July and 1 August 2006, was employed by Alliance on 4 December 2006 and then pleaded guilty to the three criminal offences on 18 April 2007 and was dismissed as a consequence of the criminal offending by letter dated 28 May 2007.

[14] A fundamental question for the Authority then must be whether it is available to an employer such as Alliance to dismiss for misconduct a worker such as Ms Pou, who was found to have caused fundamental rifts in the necessary trust and confidence by reason of criminal offending which predates the employment by some months.

[15] Before turning to consider that question, there is further background that needs to be provided. Ms Pou was not asked on interview if she had any previous criminal convictions. Indeed, she was not asked to disclose anything relevant to her extensive criminal history. Alliance freely and quite properly acknowledge that its system broke down on this particular occasion. It said in evidence that, in the normal course of events, all prospective employees are required to disclose in writing the nature and extent of any criminal offending history.

[16] I was also told in evidence that, in a further breach of Alliance's usual practice, Ms Elliott, the manager of the quality assurance officers, was not involved in Ms Pou's selection. Had she been, she herself would have asked Ms Pou questions to establish any criminal offending. This would effectively have provided a backstop to the written disclosure that ought to have been completed at interview.

[17] It follows then that because of two failures of the Alliance recruitment system, Ms Pou was interviewed for and appointed to a position as a quality assurance officer without being asked about her extensive criminal history. It seems likely from what I was told at the investigation meeting that had the employer been aware of Ms Pou's criminal history, it would have declined to appoint her to the quality assurance officer role. A particular reason why it would have made that decision was that its evidence was that there were no other persons in that role at the Lorneville plant who had criminal histories involving dishonesty.

[18] Of course, Ms Pou could have voluntarily disclosed the information about her criminal past or even about her upcoming Court appearances. She did neither of those things and this, in the context of purporting to make a virtue of being *up front* with Alliance when it became apparent that there would be public comment in the newspaper about her offending.

[19] In truth, Ms Pou was not up front at all. She declined to give Alliance information and chose, rather, to rely on the failure of Alliance's own system to obtain the position.

[20] Having said that, it is important to note that there is no general duty on negotiating parties to reveal material facts voluntarily. Nor is there a duty of good faith applying to parties not yet in an employment relationship. It may be ethically unworthy of Ms Pou to fail to disclose her criminal history but it is not illegal: See for instance: *Murray v. Attorney-General* [2002] 1 ERNZ 184.

**The delayed investigation**

[21] Ms Pou advised Alliance in April 2007 that she had an upcoming Court appearance pertaining to her offending on 31 July and 1 August 2006. That first appearance in relation to those offences was reported in the *Southland Times* on

19 April 2007 and the newspaper correctly noted that Ms Pou had pleaded guilty to the three charges and was remanded on bail to appear for sentence on 18 May 2007.

[22] It was available to Alliance to commence its investigation either at the point at which Ms Pou notified of the upcoming hearing or indeed once the publication of the *Southland Times* story referring to the Court appearance, had appeared.

[23] Shortly after those events, but as a consequence of the publication of the newspaper story concerning Ms Pou's first appearance in the District Court, Ms Pou became convinced that there were rumours spreading around the workplace in relation to her and she explored resignation. This necessitated her speaking both with her immediate manager and with the works manager. It was available to Alliance to commence an investigation at this point also.

[24] Finally, on 18 May 2007, Ms Pou appeared for sentencing on the 2006 offending and was sentenced to a term of imprisonment. That appearance in the Court was the subject of a further report in the *Southland Times* the following day, 19 May 2007, and it was that report which triggered the disciplinary investigation by Alliance.

[25] Clearly then, there were a number of points at which Alliance could have commenced a disciplinary investigation after having been put on notice by Ms Pou that there was a potential issue which could have disciplinary consequences. Alliance chose to take no steps until Ms Pou's sentencing appearance which was itself hardly the final chapter in the criminal proceedings because Ms Pou appealed the sentence of imprisonment and was therefore remanded on bail. Ms Pou's appeal was subsequently allowed and the sentence of imprisonment was replaced with a non-custodial sentence.

[26] The questions then that need to be asked are why was there delay in the investigation of the possible disciplinary consequences that might flow from Ms Pou's criminal offending and was there any prejudice to her in consequence of that delay.

[27] Ms Elliott, who was the compliance manager at Alliance's Lorneville plant and as a consequence Ms Pou's manager, gave evidence about the timing of the disciplinary investigation. In essence, her view was that the disciplinary investigation should be deferred until *the full picture was known.* However, as I noted above, the trigger point for the disciplinary investigation commencing was the newspaper story in the *Southland Times* referring to the conviction and the sentence of the Court in

respect to that conviction. Given that Ms Pou appealed the sentence, it would not be true to say that a full picture had emerged by the time that Alliance commenced their investigation.

[28] However, I am not persuaded that there was any particular prejudice to Ms Pou in the delay.

[29] What is evident from Ms Elliott's brief of evidence is that the *Southland Times* story gave her information which she had not previously been privy to; in particular it indicated that Ms Pou had a string of previous convictions none of which had been disclosed to the employer at interview.

[30] Ms Elliott quite frankly admits in her brief that she was *not impressed* by the intelligence that Ms Pou had a list of previous convictions and that she had *not been truthful* in her application for employment.

[31] Those observations, taken together, are revealing. I will return to this aspect later in this determination.

[32] What is important for present purposes is my considered view that there was no unreasonable delay in Alliance's investigation of Ms Pou's conduct. Certainly there was a delay but I do not find that it was, in all the circumstances, an unreasonable one. Furthermore, I accept Ms Elliott's observation at face value that there was no prejudice to Ms Pou in the delay.

*Was Ms Elliott biased against Ms Pou?*

[33] Ms Elliott was the decision-maker in the disciplinary investigation which resulted in Ms Pou's dismissal for cause. The allegation that Ms Elliott did not like Ms Pou and did not get on well with her was the subject of significant evidence at the Authority's investigation meeting. Indeed, there were some witnesses called exclusively for the purpose of attempting to demonstrate or refute that Ms Elliott had a vendetta against Ms Pou and that this was disclosed in a variety of small incidents which happened around about the time that the disciplinary process was first contemplated and then undertaken.

[34] For instance, Ms Pou herself was quite explicit that she *thought (Ms Elliott) didn't like me. I think she is biased against me.*

[35] Despite this, it is intriguing to note that there was no reference at all to bias as an issue in the disciplinary meetings where Ms Pou was represented.

[36] One of the witnesses called to give evidence about Ms Elliott's alleged bias against Ms Pou was Ms Verena Plato who thought that both Ms Pou and Ms Elliott were strong personalities and then went on to advance the view that *strong women often clash*. Ms Plato said that she regarded Ms Pou as a *straight shooter* who said what she thought and this may well have upset Ms Elliott, particularly when Ms Plato noted that Ms Pou had, on more than one occasion *gone over Ms Elliott's head direct to the Works Manager.*

[37] Ms Plato also spoke of having her own run-ins with Ms Elliott and recounted an experience where Ms Elliott threatened to dismiss her in front of a room of co-workers because Ms Plato allegedly refused a lawful instruction.

[38] Duncan Jameson also gave evidence on the "*bias*" theme. He referred to a particular incident where a number of employees including Ms Pou were found smoking at the plant and he was adamant that only Ms Pou was spoken to. Further, he referred to a conversation that he had overheard in which Ms Elliott was alleged to have gloated that *she had sacked the bitch* referring to Ms Pou.

[39] It is important to note that Ms Elliott vehemently denies the two allegations made by Mr Jameson, both the allegation on unequal treatment in relation to the smoking incident and the allegation that she had gloated about Ms Pou's dismissal. Despite those denials, Mr Jameson maintained his view.

[40] In the same category is the evidence of Mr Paul Armstrong who gave evidence that Ms Elliott had *grilled* Ms Pou in front of other workers about a decision that Ms Pou had made.

[41] Mr Armstrong stood by his evidence that this event had happened, and maintained that he would re-employ Ms Pou in the same capacity again because he regarded her as a person with good *work standards.*

[42] Again, Ms Elliott rejects the allegation of inappropriate treatment of Ms Pou and even quarrels with Mr Armstrong's recollection of events. She says the issue was more about Mr Armstrong's decision making than it was about Ms Pou's although the bottom line was that Ms Elliott acknowledges that she emphasised to Ms Pou the need

for a Quality Assurance officer to make decisions about quality issues and not be influenced by production staff who were principally focused on throughput.

[43] Furthermore, another witness for Alliance, Mr Grant Adamson, gave evidence in support of Ms Elliott's recollection of events and in particular indicated that he saw no evidence of Ms Elliott speaking inappropriately to Ms Pou, although he then acknowledged that he left the meeting before Ms Elliott did.

[44] Ms Elliott makes the observation (correctly in my view) that the bias allegations made in support of Ms Pou's claim against Alliance all revolve around events which happened prior to the termination of her employment and which genuinely had nothing to do with the circumstances for which she was dismissed. That statement is demonstrably accurate. However, what Ms Elliott fails to notice is that if there is any truth in the allegation that she *had it in for* Ms Pou, and she demonstrated that before the dismissal, then the fact that she was the decision-maker at dismissal makes the possibility of bias a concern that must be considered.

[45] Of even more importance, in my view, is Ms Elliott's own observations about her feeling when she discovered Ms Pou's criminal history. In her own brief of evidence, as I have already recorded, Ms Elliott notes that she was *not impressed by Kasey's (Ms Pou's) list of previous convictions and the discovery that she had again not been truthful (in relation to her denial that she had previous convictions when applying for the job) and it came as a shock* …. This discovery of Ms Elliott's was as a consequence of the *Southland Times* newspaper story of 19 May 2007 the point at which, by her own admission, Ms Elliott commenced her disciplinary investigation into Ms Pou's alleged wrongdoing.

[46] In my opinion, the fact that Ms Elliott would herself make reference to Ms Pou's criminal background, her failure to disclose it to Alliance and her lack of truthfulness at the point at which an investigation commences all suggest the scent of pre-determination. That, coupled with the earlier issues to which I have already alluded, do suggest an element of unfairness which Alliance as a good and fair employer ought to have dealt with.

[47] Ms Elliott may have been perfectly able to divorce her previous issues with Ms Pou and her clearly expressed personal disappointment at the beginning of the investigation, so as to conduct a robust and fair disciplinary process, but it is difficult

to escape the conclusion that looked at impartially from the outside, there is the possibility of predetermination about the final result.

*Could Ms Pou rely on Alliance's reassurance?*

[48] The very kernel of Ms Pou's claim is her contention that, had Alliance not reassured her that her job was safe on two occasions before the disciplinary process commenced, she would not have felt so aggrieved as to bring her proceedings when she was eventually dismissed. In effect, Ms Pou says that she was reassured that her job was safe on two separate occasions and by two separate groups of Alliance managers when on each occasion that that reassurance was given, Ms Pou says that Alliance knew or ought to have known the essence of the information which they ultimately relied upon to dismiss her.

[49] I must say that I think that this claim of Ms Pou is completely misconceived. First, I am not persuaded that she got the reassurances that she claims to have got and second, whatever observations the employer made were simply in the context of what they knew at the time and/or a function of longstanding Alliance policy to discourage resignation in the heat of the moment.

[50] Ms Pou relies on two separate incidents to ground her contention that she was made promises by Alliance. The first of these took place following on from 21 April 2007 on which date Ms Pou forwarded an email to Alliance advising her intention to resign. Ms Pou said she did this because of the rumours circulating around the plant about her initial appearance in the District Court at Invercargill and the newspaper report in April which referred to that event. Ms Pou spoke ultimately on this occasion to Mr Kean the Manager of the Lorneville works and she claims that he talked her out of resigning. Mr Kean frankly acknowledged that he did precisely that but not because of anything specific about Ms Pou's situation but rather because Alliance had a longstanding policy of discouraging employees from resigning in the heat of the moment. Ms Elliott put it neatly in her brief in the following terms:

> *The company's actions on this point were nothing to do with how they viewed the offending (of Ms Pou) or what we proposed to do about it. When any worker seeks to resign for personal reasons at the plant it raises concerns for management. Experience has shown that workers who resign in an emotional state often come to regret their decision and subsequently blame the company for 'forcing them out'. There is a significant risk that a emotional resignation can result in a constructive dismissal claim and a subsequent legal dispute. For that*

> *reason, we generally encourage workers to pause for thought before resigning, rather than resign in the heat of the moment. Kasey (Ms Pou) was encouraged not to resign on the spot but that was not an assurance that 'her job was safe'.*

[51] The second occasion which Ms Pou relies upon is a subsequent meeting between her and amongst others Ms Elliott which took place on 1 May 2007 and Ms Pou contends that she was told in this meeting that the newspaper account of her offending and in particular the publication of her name was punishment enough and therefore she assumed that her job was safe. Ms Elliott's evidence is that no such assurance was made at the meeting, that the meeting was not to consider any matters to do with the criminal offending although on Ms Elliott's evidence of what transpired at the meeting, a discussion did develop about Ms Pou's offending in which Ms Elliott says that, again, Ms Pou lied in that she told Ms Elliott at that meeting that she had no previous convictions.

[52] It is plain to me that no assurances were given to Ms Pou on which she could reasonably rely. I accept that Alliance encouraged her to withdraw her resignation and I accept that the basis of that is a perfectly proper reflection of the realities of the modern workplace. I am absolutely satisfied that Mr Kean did not turn his mind to the circumstances around Ms Pou's offending and indeed I accept his evidence that at the time that he spoke with Ms Pou he had no idea about the extent of her criminal history or indeed any detail beyond the barest summary of the most recent offending. His observations about Ms Pou withdrawing her resignation were simply a function of the company's longstanding policy and had nothing to do with Ms Pou's situation at all.

[53] As to the second event that Ms Pou relies upon, the 1 May meeting at which Ms Elliott was present, I reach a similar conclusion but for different reasons. I am satisfied that no assurance at all was given by Ms Elliott or anybody else from Alliance that Ms Pou's job was safe. The 1 May meeting was called by Ms Elliott to enable certain matters unrelated to the eventual disciplinary outcome, to be dealt with. In the course of the discussion, I accept there was discussion about Ms Pou having been named in the newspaper but I do not accept Ms Pou's contention that Alliance representatives told her that they accepted that that was *punishment enough* or did anything else which would have encouraged a reasonable person to believe that their job was secure.

*Was the suspension fair?*

[54] Ms Pou complains that the suspension imposed on her by Alliance was unfair. She says that the suspension happened when Ms Elliott rang her at 3.40pm on 21 May 2007. Ms Pou did not answer, a message was left and Ms Pou rang back at about 4.05pm when a conversation ensued. Ms Elliott's evidence is that she told Ms Pou during this conversation that she had to investigate the incident as potentially serious misconduct and that *due to the nature of her position* Ms Elliott felt that Ms Pou would have to be suspended while that investigation took place. Ms Elliott's evidence is that she asked Ms Pou for her views on whether she should be suspended and that Ms Pou had nothing to say. Ms Elliott records that Ms Pou was then told she was suspended without pay pending the completion of the investigation.

[55] Ms Pou's evidence is that she was not asked her views about suspension and was simply told that she would be suspended and was asked how she felt about that.

[56] On this point, I am inclined to believe Ms Pou's recollection of events if only because it seems to me an unsatisfactory process for a suspension to be proposed and then confirmed in the same telephone conversation. If there is to be a genuine opportunity for a worker to comment on a prospective suspension then the least I would expect is that the employer representative advance the prospect of suspension, seek comment and then reflect on it before making a final decision. The process used by Ms Elliott smacks of ambush and really would have given Ms Pou little or no opportunity to respond coherently.

**Justification?**

[57] The reason for the investigation into alleged serious misconduct by Ms Pou is set out in Alliance's letter to her dated 21 May 2007. The relevant paragraph of the letter reads as follows:

> *The purpose of the meeting is to investigate an incident of serious misconduct which occurred outside of work. You were convicted on two charges of theft and one of receiving stolen goods. This misconduct may impact on your ongoing suitability as a quality assurance officer at Lorneville plant. There is a high degree of trust and integrity required for this position and the seriousness of your conviction has brought into question your ongoing suitability for this role.*

[58] A disciplinary investigation meeting was held on 23 May 2007 at which Alliance were represented by a number of persons including Ms Elliott, the decision maker and Ms Pou was present along with her then lawyer Mr Craig Smith. By all accounts, Mr Craig Smith emphasised Ms Pou's good work record and Ms Elliott sought to be reassured about whether she could continue to have trust and confidence in Ms Pou given the pre-employment criminal offending.

[59] In the result, after a period of reflection, Alliance followed up its earlier communication of 21 May and the 23 May meeting with a final letter dated 28 May which contained the following key paragraph:

> *Due consideration has been given to your comments, and to those of your lawyer, Craig Smith. The final outcome of my investigation of serious misconduct which occurred outside of work is that the allegation is proven. This conduct has detrimentally impacted on your suitability in the role and I no longer have the required degree of trust and confidence in your performance. Termination of your employment as a quality assurance officer, effective 28 May 2007 is the appropriate outcome.*

[60] The central question then is whether it is available to Alliance to dismiss Ms Pou for criminal offending which took place well before the employment relationship even commenced. The only reason that the matter became an issue at all was because the consequences of that offending were not visited on Ms Pou until after the employment commenced.

[61] Clearly Alliance's decision revolves around the nature of the offences (which were offences of dishonesty) and Alliance's belief that such offences were incompatible with the particular role in the Lorneville plant that Ms Pou occupied.

[62] Further there is the suggestion from Ms Pou that, had Alliance not fundamentally misunderstood the nature of her offending there might not have been the enthusiasm to dismiss. Ms Pou says that her frank admission to Alliance about the offending, and her subsequent provision of a letter from her criminal lawyer worked against her in that Alliance considered they had been misled by that advice, the offending being more serious than they had been led to believe by Ms Pou.

[63] As I indicated at the investigation meeting, I am not attracted by the argument whether Alliance were or were not misled by Ms Pou's earlier advice. Ms Pou was dismissed for particular wrongdoing which was clearly set out in the two letters from

Alliance dated 21 May 2007 and 28 May 2007, and the issue for determination is whether a fair and reasonable employer, having conducted a proper enquiry, would have reached a decision to dismiss for those matters.

[64] However, the reason for the dismissal, simply stated, was Alliance's loss of trust and confidence in Ms Pou as a consequence of the criminal offending which predated the commencement of the employment relationship. That raises a subsidiary issue of whether pre employment conduct can ground a finding of serious misconduct that justifies summary dismissal.

[65] In *Murray and Attorney General* [supra], the Employment Court upheld a determination of the Authority holding that only a termination within the temporal confines of the employment relationship could ground a dismissal but that the "equity and good conscience" jurisdiction of the Court bound it to find the "just and fair" solutions intended by the statute provided those solutions did not do violence to the statute itself or the relevant employment agreement. In consequence, in the particular circumstances of that case, the Court upheld the Authority's determination to find the dismissals justified.

[66] Applying those principles to the present case, the Authority must conclude that Alliance could not dismiss in reliance on pre employment serious misconduct. However, does the equity and good conscience jurisdiction allow the Authority to conclude that despite that, the decision to dismiss is nonetheless justified?

[67] I have reached the conclusion it does not. *Murray* involved a husband and wife employed by the Inland Revenue Department. The Court, and the Authority at first instance, quite properly emphasized the higher standard that ought to apply to Departments of State and the more significant obligations of parties to the employment relationship in dealing with taxpayers and their legitimate expectations about the probity of the entity they deal with.

[68] The present situation involves a Quality Assurance officer in a freezing works. Her obligations involved ensuring that processed meat was not contaminated and met appropriate quality standards before leaving the works. She was charged with and convicted of dishonesty offences, but in my opinion, none of those offences impacted at all on her ability to do her job.

[69] Accordingly, I distinguish *Murray* and determine that Ms Pou has been unjustifiably dismissed because a fair and reasonable employer, after a proper investigation, would not have dismissed in these circumstances, those circumstances being particularly the irrelevance of the offending to the duties required and the lesser standard one would reasonably expect in a meat works to that which would apply in for instance, the Inland Revenue Department.

**Determination**

[70] I am satisfied that Ms Pou has made out her claim of having suffered a personal grievance by reason of an unjustified dismissal for reasons just canvassed. It follows that Ms Pou is entitled to remedies.

[71] Before considering that issue and the question whether her behaviour contributed to the circumstances surrounding her personal grievance, it is appropriate also to reflect on the other issues that have been a feature of this employment relationship problem. It will be recalled that I have already found that the investigation process was tainted by the appearance of bias and that the suspension imposed on Ms Pou was also unlawful. Given those two findings of fault against Alliance, it is appropriate that I hold that Ms Pou has also proved unjustified actions by Alliance causing her disadvantage in those two particulars. Again, Ms Pou having been successful in this second regard, she is entitled to the consideration of remedies.

[72] That brings us to the question of contribution which s.124 of the Act requires me to consider. In my opinion, Ms Pou has been evasive and unethical in her behaviour towards Alliance in failing to provide frank, straightforward answers to Alliance when matters were put to her. As a matter of law, Ms Pou cannot be criticised for failing to disclose at interview matters that she was not asked to disclose, but after interview, it is appropriate to require that employees truthfully answer their employer's questions. This plainly did not happen on a number of occasions in contact between Ms Pou and Alliance from the beginning of April 2007 through to her eventual dismissal. I think those blemishes are serious and they do not reflect well on Ms Pou.

[73] I assess Ms Pou's contribution at 50%. In reaching this conclusion I have found great assistance from the judgement of the Court of Appeal in *Salt v. Fell [2008] NZCA 128* although I note the contributing behaviour I refer to here is not post

employment. Whatever the statutory enactment relied upon (S 123 or S 124) I have sought to apply the principle from that case that Ms Pou should not be seen to benefit from her own wrong.

[74] That said, Ms Pou is entitled to remedies for the wrong done to her and the remedies awarded hereunder reflect the 50% contribution.

[75] I direct that Alliance is to pay to Ms Pou in respect to her two personal grievances the total sum of $2,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 as compensation for hurt, humiliation and injury to feelings. The award is at the lower end of the continuum because I accept Alliance's submission that Ms Pou has failed to show much evidence of her suffering.

[76] Ms Pou claims that she has lost wages totalling $11,700 gross being the sum that she would have earned from the date she was suspended without pay on 21 May 2007 down to the date of hearing, 10 April 2008. However, the logic of this claim is, in my judgement, flawed; Ms Pou's employment agreement provided for employment of 28 weeks and I accept that she had only three weeks guaranteed employment beyond the point at which she ceased being paid. On this basis, she is entitled to an absolute amount of $2,700 but less the 50% contribution, the amount she is to be paid by Alliance is $1,350 gross.

**Costs**

[77] Costs are reserved.

James Crichton
Member of the Employment Relations Authority