

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 116  
5555042

BETWEEN                      KIM LA  
   Applicant  
  
A N D                              ALPHA LABORATORIES (NZ)  
   LIMITED  
   Respondent

Member of Authority:        Anna Fitzgibbon  
  
Representatives:              Gregory Bennett, Advocate for Applicant  
   David Luttig, Advocate for Respondent  
  
Investigation Meeting:        31 March and 1 April 2016 at Auckland  
  
Submissions Received:        2 and 6 April 2016 from Applicant  
   6 April 2016 from Respondent  
  
Date of Determination:        18 April 2016

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**DETERMINATION OF RELATIONS AUTHORITY**

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- A.     The applicant, Ms Kim La’s employment was affected to her disadvantage by the unjustifiable actions of the respondent, Alpha Laboratories (NZ) Limited (Alpha).**
- B.     Ms La was unjustifiably dismissed from her employment by Alpha.**
- C.     In order to settle Ms La’s personal grievance claims, Alpha is to make payment of the following sums to her within 21 days of the date of this determination:**
- (a)     \$2,500 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act), for humiliation,**

**loss of dignity and injury to feelings in respect of her unjustifiable disadvantages;**

- (b) \$15,000 as compensation under s.123(1)(c)(i) of the Act, for humiliation, loss of dignity and injury to feelings in respect of her unjustifiable dismissal;**
- (c) Pursuant to s.128 of the Act, reimbursement of lost salary of the following amounts:**
  - (i) \$13,291.00 gross for the period from 11 April 2015 until 14 June 2015 when Ms La was unable to obtain employment;**
  - (ii) \$3,687.00 gross being the difference of income Ms La would have earned at Alpha if she had remained in employment and income actually earned for 5 weeks from 15 June 2015 until 20 July 2015;**
- (d) Pursuant to s.128(3) of the Act, reimbursement of lost salary of \$9,586.00 gross being the difference of income Ms La would have earned at Alpha and income actually earned by her for a further period of 13 weeks from 20 July 2015 until 19 October 2015.**

**D. Costs are reserved.**

**Application by Alpha to strike-out parts of Ms La's statement of problem**

[1] In a preliminary determination on 5 June 2015<sup>1</sup>, the Authority declined Alpha's application pursuant to clause 12A of Schedule 1 of the Act to dismiss certain paragraphs of Ms La's statement of problem.

[2] On 28 October 2015, the Authority began an investigation meeting into Ms La's claims that she was unjustifiably disadvantaged and subsequently unjustifiably dismissed by Alpha. However, the investigation meeting was discontinued when it became apparent that there were language difficulties which

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<sup>1</sup> [2015] NZERA Auckland 158

required the services of an interpreter proficient in both the Cantonese and Mandarin languages.

[3] The investigation meeting was adjourned and subsequently heard by the Authority on 31 March and 1 April 2016.

### **The investigation meeting**

[4] The investigation meeting took two full days in the Authority. The pleadings, witness statements, and submissions filed on behalf of the parties were of little assistance to the Authority. As a result the investigation by the Authority was unnecessarily long and difficult. The representatives must take most of the responsibility for this in my view.

[5] Ms La provided the Authority with a witness statement. For Alpha, Ms Jean Shim, Managing Director, Ms Sally Xie, an employee and Ms Summer Jin, Operational Manager each filed witness statements.

[6] Each of the witnesses giving evidence before the Authority confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[7] To assist the Authority's investigation, an interpreter proficient in both Cantonese and Mandarin attended the investigation meeting.

[8] As permitted under s.174 of the Act, this determination does not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

### **Employment relationship problem**

#### **Ms La's claims in the Authority**

#### **Warnings**

[9] Ms La was employed by Alpha for approximately 15 years, from 2000 until her dismissal on 10 April 2015. Up until late June 2014, there were no issues with Ms La's performance. However, following her third promotion on 23 June 2014 to a more senior role, Ms La was issued with a first warning regarding her performance on

22 July 2014. On 7 November 2014, a final warning was issued by Alpha in respect of its concerns with her performance.

[10] Ms La says the warnings were not justified and has brought a claim in respect of the final warning of 7 November 2014.

### **Suspension**

[11] Ms La says she was informed on 20 March 2015 that she was to attend a meeting but was not told the purpose of the meeting. At the meeting Ms La was told Alpha was conducting an investigation but was not given details and was not told why.

[12] Ms La was suspended from employment at the meeting on 20 March 2015 while Alpha conducted its investigation. Ms La says the suspension was unjustified and claims a disadvantage in respect of it.

### **Dismissal**

[13] Ms La was dismissed for serious misconduct on 10 April 2015. Ms La says that Alpha's disciplinary process which led to her suspension and subsequent dismissal was seriously flawed. Ms La says there were no grounds for Alpha to conclude that her conduct constituted serious misconduct. Ms La claims that her dismissal was unjustified and she seeks remedies.

### **Good faith**

[14] Ms La further says Alpha breached its obligations to treat her in good faith. Ms La's mother was terminally ill and Alpha was aware of this.

### **Alpha's reply**

[15] Alpha denies Ms La's claims. Alpha says that following a thorough investigation into allegations that Ms La was not able to perform the job to which she had been promoted, it carried out an investigation and issued her with a warning. Following a further investigation into complaints about her performance, a final written warning was issued to Ms La by Alpha on 7 November 2014. Alpha says the investigation and final warning issued were justified in the circumstances.

[16] Alpha also says that in early March 2015, Ms La failed to follow important processes in relation to the training of staff and falsely certified that training had been completed by her when it had not been. These were very serious issues for Alpha especially in the industry within which it operates.

[17] Alpha formed a view, following an investigation, that in all the circumstances, dismissal for serious misconduct was appropriate. Alpha says Ms La was informed of the preliminary decision that her conduct amounted to serious misconduct and was given the opportunity to attend a meeting to discuss it. However, Ms La failed to attend the meeting and on the basis of the information available to it, Alpha confirmed its preliminary decision to terminate Ms La's employment for serious misconduct.

[18] Alpha says the decisions to issue warnings to Ms La and the subsequent decision to terminate her employment were decisions of a fair and reasonable employer in the circumstances.

### **The issues**

[19] The issues for the Authority to determine are:

- (a) Was Ms La unjustifiably disadvantaged by Alpha? If so, what remedies if any, is she entitled to?
- (b) Was Ms La unjustifiably dismissed by Alpha? If so, what remedies if any, is she entitled to?
- (c) Did Ms La contribute to her dismissal?

### **First Issue**

**Was Ms La unjustifiably disadvantaged by Alpha? If so, what remedies if any, is she entitled to?**

#### **Alpha**

[20] Alpha is a New Zealand company specialising in the manufacture and export of nutritional dietary supplements, including soft gel capsules, hard gel capsules, tablets and a number of other products. Alpha manufactures and distributes these oral dose supplements throughout Australia and New Zealand.

[21] Production of Alpha's products is subject to standards set by the Therapeutic Goods Administration (TGA) of Australia, New Zealand Medicines and Medical Devices Safety Authority (MEDSAFE) and the NZ Food Safety Authority (NZFSA)<sup>2</sup>.

[22] Alpha is subject to strict rules in relation to the manufacture of its products and therefore has a number of standard operating procedures (SOPs) which it requires its employees to strictly comply with. Quality control is vitally important and Alpha has its own quality control team.

### **Ms La's employment**

[23] Ms La was first employed by Alpha in approximately 2000, in the role of sorting and packing operator. This position required Ms La to weigh tablets and to sort and remove tablets which were of poor quality.

[24] On 20 May 2005, Ms La was provided with a written employment agreement for a new role as team leader sorting and packing, a role which commenced on 4 July 2005.

### **Promotion to Production Coordinator – May 2008**

[25] In May 2008, Ms La was promoted to the role of production coordinator. The purpose of the position was described as follows:

*This is a senior production support role which involves assisting Senior Production Team Leaders and Production Manager with administrative, compliance, leadership, continuous improvement and team development tasks assuring that we continue to manufacture Alpha Laboratory's products in conformance [sic] with product specifications, standard operating procedures and GMP principles.*

[26] A position description including accountabilities and responsibilities was signed by Alpha and Ms La in May 2008.

### **Promotion to Production Senior Team Leader – May/June 2014**

[27] In late May 2014, Ms La received a further promotion. This promotion was to the role of Production Senior Team Leader reporting to the Operational Manager who was Mr Daniel Tan at that time. Following Mr Tan's departure from Alpha,

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<sup>2</sup>

www.alphalabs.co.nz

Ms Summer Jin was appointed to the position of Operational Manager from approximately February/March 2015.

[28] Ms La's new position was described in the job description as a "senior production team leader" role involving leading the production team to effectively complete the day-to-day activities for production of products.

[29] Ms Jean Shim is Alpha's Managing Director. Ms Shim says she was happy with Ms La's performance and that was why she had been promoted during the course of her employment.

### **Production Senior Team Leader role**

[30] The new employment agreement for the role of Production Senior Team Leader was signed by Mr Lian Seng Buen, for Alpha, and by Ms La on 27 May 2014. The employment agreement stipulated that it was to come into force on 23 June 2014. The salary was \$72,000 gross per annum.

[31] Ms La undertook the duties of the Production Senior Team Leader from the date she signed the employment agreement on 27 May 2014 until it came into force on 23 June 2014.

[32] The accountabilities for the role included overseeing health and safety issues, managing the day-to-day execution of shop floor production activities which required Ms La to have a customer focus and to be available if necessary to cover shifts between working hours, to ensure that the production of products was carried out smoothly and in accordance with Alpha's SOPs.

[33] Ms La worked long hours, 6 days a week in the role.

[34] Ms La did not receive training in the new position. Ms Shim says that Ms La had been with Alpha for a long time and did not need training.

### **First warning - 22 July 2014**

[35] At almost exactly the same time as Ms La's new employment agreement was to come into force on 23 June 2014, Ms Shim was made aware of concerns about Ms La's performance by the Quality Manager, Mr Rowland Ong. His concerns

related to Ms La's management of the production team. Ms Shim asked Mr Ong to investigate his concerns.

[36] Mr Ong held a meeting with Ms La on 26 June 2014. On 22 July 2014, Ms La was issued with a "FIRST Warning Notification". Ms Shim did not attend the meeting but made the decision that a warning should be issued despite Mr Ong conducting the investigation and disciplinary process.

[37] The notification set out various criticisms of Ms La's performance in the new role. However, Alpha's expectations for Ms La were vague and general. The "warning" concluded by stating:

*We trust you appreciate the importance of the issues and concerns raised. We welcome and appreciate your support and commitment to ensure we have a culture of uncompromised adherence to our SOP and requirements of cGMP requirements.*

[38] Ms La took no steps in relation to this warning and has not brought a claim that it constitutes a personal grievance. However, it is relevant to the events leading up to the final written warning issued to Ms La and to her subsequent dismissal.

#### **Final written warning – 7 November 2014**

[39] Ms Shim says that she was concerned by Ms La's management and she and Alpha's other director, Mr Buen, had an informal meeting with her in August 2014 at Alpha's offices to discuss their concerns. As the meeting was an informal meeting, Ms La was not given details of the purpose of the meeting.

[40] Ms La explained to Ms Shim and Mr Buen that she was struggling with managing her whole area and so it was decided that Ms La would be offered a new role, that of Production Administrator, and that Ms La's scope of supervision would be decreased. There was no alteration to Ms La's salary.

#### **New Position – Production Administrator**

[41] The position description which was provided to Ms La states that the purpose of the position is that it is a:

*... front-line administrator role which involves leading the production teams at Bowden Road to effectively complete the day-to-day activities for production of products within specification and meeting schedules"*

[42] Key tasks and responsibilities included: to ensure that employees had relevant training in environment and health and safety; to oversee security of the site; asset protection and material protection; manage manufacturing costs; ensure that all production staff are provided with:

*... initial and on-going training in SOP's, GMP principles and ensure all GMP documentation including manufacturing instructions are completed accurately and are a true reflection of operations ... .*

[43] The change to the job description was signed by Ms Shim and Ms La on 15 August and 8 August 2014 respectively.

[44] The alteration to Ms La's job took place less than six weeks after she had been promoted to the role of Production Senior Team Leader.

### **Performance Concerns**

[45] On 3 October 2014, Ms La was provided with a letter signed by the Administration Manager, Ms Jessie Ler. Ms Ler had become concerned about Ms La's performance, had approached Ms Shim about it and was authorised by Ms Shim to undertake an investigation.

[46] Ms Ler's letter set out a number of allegations for investigation, including an allegation that Ms La had falsified an induction record. The allegation was that two new operators had started at Alpha, training was not completed but the induction form signed by Ms La indicated the induction had been completed. Other allegations included:

- *Failure to ensure production daily checks for your absence.*
- *CQ10AL26512, SG7602, on 23 September 2014 – lack of accountability to take actions on time which results in significance financial loss.*
- *Lack of accountability to follow up actions timely for low yield, gelatine shortage and rework.*
- *Failure to follow instructions for sorting area work management to meet the planning schedule requirement and business performance requirement.*
- *Failure to follow instructions for packing area KPI to meet the planning schedule requirement and business performance requirement.*
- *Failure to follow instructions from supervisor.*

[47] Ms La was invited to an investigation meeting on 14 October 2014 and was informed that the outcome of the investigation may result in disciplinary action

including a warning or dismissal. Ms La was invited to bring a support person with her.

[48] The meeting occurred on 17 October 2014. Ms Ler conducted the meeting with Ms La. Ms Shim did not attend. The minutes of the meeting record that a report had been provided to Ms Ler by Ms Jin concerning allegations which Ms La was to respond to. The report was never provided to Ms La.

[49] On 7 November 2014, Ms Ler wrote to Ms La seeking a meeting on 10 November 2014 to discuss the outcome of the investigation. However, on the same date, a final warning notice was issued.

[50] It is clear that there was no meeting to discuss the final warning with Ms La. Rather, following the meeting on 17 October 2014, a decision was made to issue a final warning to Ms La. Despite the letter to Ms La on 7 November 2014 inviting her to a meeting to discuss the outcome of the investigation, this did not occur. Rather a final warning was issued on 7 November 2014, prior to the meeting to discuss the outcome of the investigation.

#### **Raising personal grievance – 10 November 2014**

[51] Following receipt of the final warning, Ms La sought advice from Abbey Employment Law Specialists. On 10 November 2014, Abbey Employment Law Specialists wrote to Alpha raising a personal grievance claim in relation to the final written warning and sought the provision of a number of documents. It appears all the documents sought were not provided by Alpha. The personal grievance was not pursued further at that time, it was pursued following Ms La's dismissal on 10 April 2015.

#### **Events leading up to dismissal**

#### **New Zealand Medicines and Medical Devices Safety Authority (MEDSAFE) audit**

[52] MEDSAFE is a business unit of the Ministry of Health. It's role is to ensure that medicines and medical devices are acceptably safe. It is responsible for the regulation of medicines and medical devices in New Zealand<sup>3</sup>.

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<sup>3</sup> [www.medsafe.govt.nz](http://www.medsafe.govt.nz)

[53] On Monday, 9 February 2015, Mr Steven Adkins, from Alpha's Audit Control team, sent an email to staff including Ms La and Ms Jin about the audit of Alpha by MEDSAFE which was to take place between Monday, 23 March 2015 and Friday, 27 March 2015.

[54] Mr Adkins' email requested the assistance of all staff during the audit and in the weeks leading up to it and asked that the focus ensure "a successful outcome with minimal follow up and that issues identified previously are not identified again".

[55] Ms Jin had just started in her role as Operational Manager at Alpha and was Ms La's direct manager. This was the first MEDSAFE audit that Ms Jin had participated in. Ms Jin told the Authority that the audit was of critical importance to Alpha and if Alpha failed the audit its licence would be suspended.

### **Alpha's SOP training requirements**

[56] Ms Jin said that she was very concerned about the SOP training requirements and asked Ms Shim for some further resource leading up to the MEDSAFE audit. On 4 March 2015 at 2.40pm, Ms Shim emailed Ms Jin to inform her that two staff members could assist with the training log update for 4 hours later that day.

[57] At 5.09pm on 4 March 2015, Ms Jin sent an email to Ms La setting out her understanding of what was required regarding training and updating the SOP management system. The email stated:

*In my understanding we need to do:*

- 1. Update staff correct position on their training manual- this is to match with HR staff registration*
- 2. Update staff SOP matrix by checking their current position and responsibility and write down missing log for each staff*
- 3. Send log list to kay to print out the missing Personal Training Log*
- 4. Check with Manual Training log that you filed, sign staff on the personal training log that they have been done.*
- 5. Get staff to sign on the personal training log*
- 6. Update SOP management system*
- 7. Review each staff training matrix, list all training not been done*

8. *Organise training with staff, sign up log, update on SOP management system.*

*Would you advise me how far you away of update SOP management system? And what is your current plan to achieve 100% update before auditing?*

*Point 1-7 need to be done tomorrow! I will need to see the hardcopy of updated SOP management matrix for Bowden road*

*This is critical matter in our quality control. Please make your plan and let me know any help you need, I can assist you to achieve the target.*

[58] Ms Jin then spoke with Ms La about the training log update and received an answer which worried her.

[59] Ms Jin emailed Ms La at 5.31pm on 4 March 2015, stating:

*Hi Kim,*

*By the phone conversation I don't have the confidence that you understand the training system and updating system. To sign up the position manual training log only shows who has been trained on this job at certain level, further this need to be updated on this person's personal training log, then update in SOP management system. As far as I know Bowden Road has at least a 60% training not being done I mean from practical training to update system. This issue bring me extreme concern and worry to ensure that all training to be done on time.*

*Best*

*Summer*

### **Ms La's mother's illness**

[60] Ms La's mother was critically ill in early February 2015. The illness was terminal. Ms Jin was aware of Ms La's mother's serious illness as Ms La had requested sick leave.

[61] On 5 March 2015, Ms La asked Ms Jin if she could have an hour and a half off between 2.30 and 4pm for a personal matter. Ms Jin was aware that this was to visit her mother.

[62] Ms Jin sent an email back to Ms La asking that she change the time that she wanted off to another time. Her email ended by saying:

*As you understand this is critical matter at moment. Your understanding is highly appropriate! Thanks.*

[63] Ms Jin explained that the audit was critical and Alpha's business required Ms La's presence at work. I find that Ms La was very stressed by her mother's illness and the pressures being placed on her by Ms Jin in respect of the impending audit.

[64] Ms La worked on 6 March 2015, despite her mother being seriously ill. Ms La's father was also ill and unable to assist Ms La's mother. Ms La was contacted by her sister at 3pm that day to say her mother was being taken by ambulance to hospital. Ms La was unable to leave work until 4.30pm. Ms La's mother died at 10.30pm that night.

#### **Meeting staff on 18 March 2015**

[65] Ms La was away from work following her mother's death. Upon her return she wanted to ensure that the training records of employees in the production team were correct. Ms La was aware of the imminent MEDSAFE audit and Ms Jin's instructions to her.

[66] On 18 March 2015 Ms La asked employees to check and sign their training records. Ms La says she did not ask employees to sign that they had received training if they had not in fact received training. Ms La says she asked that employees not date the records so that she could check when training had been done by them and date the records accordingly.

[67] Ms Sally Xie was one of the employees spoken to by Ms La on 18 March 2015. At the investigation meeting, Ms Xie told the Authority she had received SOP training but could not remember when it had occurred. On 18 March 2015, Ms Xie said she and some others were asked by Ms La to sign off the training undertaken and were told not to date the document.

[68] Ms Xie says she was approached later that day by Ms Jin about the earlier discussion with Ms La.

[69] From the SOPs provided to the Authority, it appears Ms Xie had undertaken training some time prior to 18 March 2015 but the date of the training had not been documented on the training log.

**Ms La's suspension from work**

[70] On 19 March 2015, Ms Jin reviewed Ms La's work and became concerned regarding the completion and sign-off by her of SOP personal training documents. Ms Jin informed Ms Shim of the issue. Ms Shim requested Ms Jin to investigate the matter.

[71] On 20 March 2015, Ms La was requested to attend a meeting but was not told what the meeting was about.

[72] At the Authority's investigation meeting, Ms Shim said that Ms La was aware of what the meeting was about and that she was informed of the reasons at the meeting on 20 March 2015. However, the minutes of the meeting, which Ms Shim said accurately recorded the meeting on 20 March, did not give details of Alpha's concerns about Ms La. The minutes of the meeting state:

*Alpha's senior management team were advised that an event had occurred which may possibly constitute serious misconduct on 19 March 2015. No allegation of misconduct was made but further investigation was suggested.*

[73] The minutes record that Ms La requested an explanation of the allegation but was informed by Ms Shim that the company "*could not do so until the investigation was conducted at which time this would be advised and Kim would be given the opportunity to respond*".

[74] Ms La was suspended and required to surrender her access card, mobile phone and laptop for the duration of the investigation.

[75] On the same day, a letter was sent to Ms La which confirmed her suspension. The letter is signed by Ms Shim and states:

*I confirm our meeting today to consider the matter of suspension and that you have had the opportunity to provide reasons for not suspending you. Those reasons are set out in the minutes taken by Steven Adkins of which you will be provided with a copy. I have considered those reasons and advice that this letter is notice of your suspension from duties until a formal meeting can be convened.*

*The reason for the suspension is that I am in the process of investigating certain complaints regarding the possible allegation for your misconduct. On the face of it, I consider this possible allegation for misconduct as serious. Depending on my initial fact finding you will be kept informed. If there are sufficient grounds for a disciplinary investigation, you will be informed of the specific nature*

*and detail of these complaints. You are suspended on full pay and are not to enter company premises without prior arrangements with me.*

[76] Ms La was still unaware of what her alleged serious misconduct was.

[77] Ms La was unaware of what the allegation of serious misconduct was prior to being asked to attend a meeting on 20 March 2015. At the meeting on 20 March 2015, she was not provided with details, despite asking for them. Ms La was not provided with the allegations of serious misconduct in the letter of suspension which followed the meeting. Ms La was therefore unable to address or consider properly alleged issues of serious misconduct. This was unfair.

### **Test of justification**

[78] By raising grievances about the final warning received by her on 7 November 2014, and about her suspension on 20 March 2015 and bringing them to the Authority for investigation and determination, Ms La has required the Authority to apply the test of justification under s.103A of the Act.

[79] Under this test, the question of whether these actions were justifiable must be determined, on an objective basis, by considering whether Alpha's actions and how Alpha acted were what a fair and reasonable employer could have done in all the circumstances at the time the actions occurred.

[80] In applying s.103A, the Authority must also consider four particular factors set out in s.103A(3) as well as any others it thinks appropriate. The four particular factors relate primarily to the way in which complaints about an employee are investigated, whether the employee concerned has been properly notified of the complaints and provided with a proper opportunity to respond to them and whether the employer has genuinely considered the employee's responses<sup>4</sup>.

[81] The test in s.103A is to be applied with the proviso that actions must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly<sup>5</sup>.

[82] The final written warning was unjustified. The lack of participation by the decision-maker, Ms Shim, her failure to properly investigate the allegations which led

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<sup>4</sup> Section 103A(3) and (4) of the Act

<sup>5</sup> Section 103A(5) of the Act

to the final warning and her failure to allow Ms La a reasonable opportunity to respond before issuing the warning breached the factors set out in s.103A(3) of the Act. Those factors echo the common law requirements of natural justice and procedural fairness in such a disciplinary process.

[83] Ms La's suspension was also unjustified. Ms La was not informed prior to her suspension of what the allegations of serious misconduct were so that she could address them before any disciplinary action was taken.

[84] The answer to the first issue is "yes", the final warning and the suspension were unjustified. These actions amounted to unjustified disadvantages under the Act.

### **Remedy**

[85] Ms La did not provide the Authority with a great deal of evidence of the impact of the final warning and suspension on her. Ms La did give evidence concerning her mother's serious ill health at the time leading up to her suspension. This would have been a very stressful time for Ms La.

[86] I consider an award of \$2,500 compensation pursuant to s123(1)(c)(i) of the Act appropriate in the circumstances. Accordingly, I order Alpha to pay Ms La \$2,500 in distress compensation in respect of the unjustifiable disadvantages.

### **Second Issue**

**Was Ms La unjustifiably dismissed by Alpha? If so, what remedies if any, is she entitled to?**

#### **Ms Jin's investigation – 23 March 2015**

[87] Following Ms La's suspension on 20 March 2015, at Ms Shim's request, Ms Jin met with some employees and asked them questions regarding the SOP training that they had received. Mr Luttig, for Alpha, prepared the written questionnaire which Ms Jin used when questioning the employees. Completed investigation questionnaires were provided to the Authority for three employees.

[88] Ms La was not aware of the details of Ms Jin's investigation, nor was she provided with the investigation questionnaires. Ms La saw the completed questionnaires for the first time at the Authority's investigation meeting.

[89] On 26 March 2015, Ms La received a letter from Ms Shim requesting that she attend a meeting on 30 March 2015 to discuss an allegation of serious misconduct. This was the first time that Alpha had informed Ms La of its allegation that she had falsified the personal training record of various employees. The letter referred to employees who Ms La was alleged to have instructed to sign SOP forms stating that they had received specific training and achieved the requisite competency.

### **Further details of alleged serious misconduct**

[90] On 31 March 2015, Mr Luttig for Alpha emailed Ms La's representative alleging that:

*As training facilitator you have certified (installed) and dated that Sally Xie has achieved the required competency levels:*

- *Instructed – certified and dated 6 February 2015.*
- *Competent – certified and dated 6 February 2015.*
- *Experienced – certified and dated 6 February 2015.*

*This certification and sign off could not have taken place on 6 February 2015 because you were not at work that day.*

*This alleged action described above constitutes fraud and dishonesty which if found to be accurate and true will break down all the trust and confidence between Alpha Laboratories and yourself.*

[91] A request was made for Ms La to attend a meeting on 2 April 2015.

[92] The Authority was provided with copies of email correspondence between the representatives of the parties in respect of a further disciplinary meeting.

[93] Mr Bennett, Ms La's representative, was unable to attend the meeting on the date proposed. An alternative date of 8 April 2015 was proposed but this too was not suitable. Mr Bennett required certain documentation from Alpha before any meeting. Not all the documents were provided. Ms Shim says all relevant documentation had been provided and did not see the necessity to provide all the documents requested on Ms La's behalf.

### **Meeting on 8 April 2015**

[94] Mr Luttig emailed Ms La's representative that if Ms La did not attend the meeting, Alpha would consider proceeding with the meeting in her absence. Ms La did not attend the meeting on 8 April 2015 and the meeting proceeded in her absence.

**Dismissal letter**

[95] On 8 April 2015, Ms Shim wrote to Ms La setting out her findings that:

- You wilfully falsified SOP 085 Personal Training Record for Sally Xie....
- I have considered the written statement made by Sally Xie dated, March 2015 that you have instructed her to sign off in certain Training Records without dating said documents...I find on the balance of probabilities that you have given the instruction as described to Sally Xie. Through these actions you have been deceitful, fraudulent and dishonest towards your employer.

[96] Ms Shim concluded the letter by stating that she was considering terminating Ms La's services on "the serious acts of misconduct". Ms La was offered the opportunity to respond to the "proposed sanction of termination before 12pm on Friday, 10 April 2015..."

[97] Further correspondence ensued between the representatives for both parties. The dismissal for serious misconduct was confirmed by letter dated 8 April 2015, which according to Alpha was a mistake and was in fact dated 10 April 2015.

[98] I find Ms La was unjustifiably dismissed by Alpha on 10 April 2015. The test of justification referred to in paragraph [78] above applies in respect of dismissal.

**No training**

[99] Ms La did not receive any training when promoted to the role of Production Senior Team Leader in June 2014. When Ms La was found not to be performing as expected in the role, her position was altered to that of Production Administrator in August 2014. Again, no training was provided to Ms La.

**MEDSAFE Audit**

[100] Alpha was notified in February 2015 that it was going to be the subject of an audit by MEDSAFE. Ms Jin, who had only just been appointed to the role of Operational Manager, was concerned to ensure that the audit went smoothly. Ms Jin instructed Ms La to ensure the training records were complete.

[101] At the same time as the preparations for the audit, Ms La's mother was critically ill and died.

[102] After Ms Jin discovered what she thought to be incomplete SOP training documents, Ms La was required to attend a meeting on 20 March 2015. Ms La was not given notice of what the meeting was about, was not informed of the allegations which were considered to amount to serious misconduct and was not informed that the outcome of the meeting was possible suspension for serious misconduct. This is not the action of a fair and reasonable employer.

[103] The subsequent “investigation” conducted by Ms Jin was not fair. A very small number of employees were interviewed by her. The questions asked were not her questions but those prepared by Mr Luttig. Ms Shim was the decision maker but failed to properly participate in the investigation.

[104] Following an interview with Ms Sally Xie on 23 March 2015, Ms Jin formed the view that Ms La had requested employees to fill out their training records but not date them. This was the basis for the allegation that Ms La had falsely certified that training had been completed when it had not.

[105] At the Authority’s investigation meeting, Ms Xie said that she had received training approximately 1- 2 months before Ms La asked her to update the training records. Ms Xie said that Ms La asked her to sign off the training she had received but not to date the record. Ms Xie did not ask Ms La why she was not to date the record and neither did the other employees.

[106] I find that Ms La did not “falsely” certify that training had been completed by employees. If she had been questioned at the time, Alpha would have been aware of this. The training records were incomplete. It was not clear whether this was a situation inherited by Ms La when she moved in to the role of Production Administrator. Ms La, in an effort to ensure training records were correct, asked employees to sign off SOP training they had completed. Ms La subsequently entered the dates on the SOP forms. The dates entered were those on which Ms La believed the training had been taken.

**Did Ms La’s actions constitute serious misconduct?**

[107] In assessing whether a finding of serious misconduct and a consequent outcome of dismissal is fair and reasonable, consideration must be given to whether

Ms La's conduct was such that it "deeply impairs or is destructive of that basic confidence or trust". This will be a matter of degree in the circumstances<sup>6</sup>.

[108] In *Makatoa v. Restaurant Brands (NZ) Ltd*, it was held<sup>7</sup>:

*The mere fact that consequences are very serious does not mean that the act which produced or contributed to those consequences necessarily amounts to serious misconduct. That kind of misconduct will generally involve deliberate action inimical to the employer's interests. It will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.*

[109] Ms La was dealing with her mother's illness at the same time as having to ensure that the training records for her department were in order for the MEDSAFE audit. Ms La was acting on instructions from Ms Jin.

[110] Ms La was found by Alpha to have wilfully falsified Ms Xie's training record and had to have been "deceitful, fraudulent and dishonest". Ms La was dismissed for serious misconduct. These are very serious allegations.

[111] I find there was insufficient evidence to support such a finding. Where a serious charge is made to support a dismissal, the supporting evidence must be "as convincing in its nature as the charge is grave ..."<sup>8</sup>.

[112] Alpha did not have the supporting evidence to find that Ms La had been fraudulent and dishonest. If Alpha had carried out a fair process, Ms La would have been able to explain that she was ensuring the SOP training records were in order for the MEDSAFE audit as requested. There was no deceit or dishonesty, the training had been completed and Ms La sought confirmation from employees of the details of their training so that the records were correct for the audit. Ms La subsequently dated the records. This was not ideal but explicable in view of the MEDSAFE audit, Ms Jin's instructions and Ms La's mother's illness and death.

[113] The answer to the second issue is "yes", Ms La's dismissal was unjustified. Dismissal for serious misconduct was not the action of a fair and reasonable employer in the circumstances.

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<sup>6</sup> *BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA)

<sup>7</sup> *Makatoa v. Restaurant Brands (NZ) Ltd* [1992] 2 ERNZ 311 at para.[319]

<sup>8</sup> Principle affirmed by the Court of Appeal in *Honda New Zealand Limited v New Zealand Boilermakers etc Union* [1991] 1 NZLR 392 (CA) at 394-395

## **Remedies**

### **Compensation under s.123 of the Act**

[114] Ms La had been employed by Alpha for 15 years. During her employment she had been promoted three times. Ms La was a valued employee who worked very hard for Alpha.

[115] Ms La says following her dismissal she could not sleep, her mother had just died and she was left looking after her sick father. Ms La was very worried about money. Ms La was ashamed and could not tell her friends what had happened.

[116] I consider Ms La's hurt and humiliation was severe as a result of her unjustified dismissal. I award \$15,000 compensation under s.123(1)(c) (i) of the Act. I order Alpha to pay Ms La compensation of \$15,000.

### **Reimbursement of lost remuneration under s.128 of the Act**

[117] Ms La seeks lost remuneration for 3 months following her dismissal under s.128(2) of the Act.

[118] Ms La says she attempted to find another job work but was unable to do so until 15 June 2015. Ms La seeks reimbursement of lost remuneration for the period 11 April 2015 until 14 June 2015 of \$13,291.00 gross. I make an award accordingly.

[119] Ms La seeks reimbursement of lost remuneration being the difference of income she would have earned at Alpha and income earned for the 5 week period from 15 June 2015 when she gained employment. The amount sought is \$3,687 gross. I make an award accordingly.

[120] Ms La seeks lost remuneration being the difference in income she would have earned at Alpha and income actually earned by her for a further period of 13 weeks totalling \$9,586.00 gross. The Authority has a discretion to make such an order under s128(3) of the Act. I make an order accordingly.

### **Contribution**

[121] The Authority is bound under s124 of the Act to consider whether Ms La contributed to her dismissal and if so to reduce remedies awarded. I do not accept

Ms La contributed to her dismissal. Accordingly, remedies awarded will not be reduced.

**Costs**

[122] Costs are reserved. Ms La has 14 days from the date of this determination to file a memorandum as to costs. Alpha has 14 days from receipt to file a memorandum in reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**