

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)**

CIV 491/25

BETWEEN

**MARTHALINA JOANNA
NOOARE TUAINÉ**

Plaintiff

AND

**BANK OF THE COOK
ISLANDS LIMITED**

Defendant

Hearing: 18 – 19 August 2025

Appearances: Mr N George for Plaintiff
Mr B Marshall for Defendant

Judgment: 2 September 2025

JUDGMENT OF GORDON J

[1] On 27 January 2021, the plaintiff, Marthalina Tuaine, a Customer Service Officer (teller) at the Atiu branch of the Bank of the Cook Islands Limited (BCI), was dismissed with immediate effect on the ground that she had stolen a total of \$18,090 from a customer's account on three separate occasions in December 2020 and January 2021. Soon after her dismissal by BCI, three criminal charges were laid against Ms Tuaine for theft as a servant, each relating to one of the thefts.

[2] The amounts allegedly stolen were: \$6,000 on 11 December 2020; \$7,210 on 24 December 2020; and \$4,880 on 6 November 2021.

[3] On 11 November 2022, Ms Tuaine brought this claim under the common law against BCI seeking damages descending from what she contends was a wrongful dismissal. She says she was dismissed without proper notice or cause.

[4] By way of a "New and Final" statement of claim dated 18 March 2025, Ms Tuaine sought damages totalling \$275,640. In oral evidence at trial she relied

instead on what she had said in a subsequent affidavit as regards the amount claimed. She confirmed the amount claimed was \$250,640.

[5] Ms Tuaine brought her claim after a jury found her not guilty of the three charges on 31 August 2022, following a three-day trial. She had earlier pleaded guilty to the charge relating to the 24 December 2020 theft. Shortly before the trial she sought and was granted leave to withdraw her guilty plea. In making that application, for the first time, Ms Tuaine blamed her supervisor, Teremoana Paratainga, for the three withdrawals. That was her defence at the criminal trial. Ms Tuaine repeats that allegation in this proceeding. She says Mrs Paratainga used her (that is Ms Tuaine's) computer with its unique number and her unique identifier log in to make the withdrawals.

[6] Ms Tuaine does not dispute that money was stolen from the customer's account on the three occasions I have referred to, nor the amounts stolen. Her position is that she was not the one who stole the money.

[7] The defendant, BCI, defends the claim. In summary, it says not only did all the evidence in its internal investigation point to Ms Tuaine, but she also admitted making the three withdrawals during a video conference call held on 27 January 2021, as part of the investigation. There was no evidence that supported an alternative conclusion. That entitled the BCI to immediately terminate her employment under the terms of her contract with BCI and under the BCI Staff Manual and Code of Conduct, both of which are incorporated in the contract Ms Tuaine signed at the commencement of her employment.

[8] Then on 28 January 2021, the day after Ms Tuaine's employment was terminated, she signed a letter acknowledging that she had taken the missing funds. She did not complain or otherwise advise BCI of her assertion that Mrs Paratainga had stolen the money.

Witnesses

[9] Ms Tuaine gave evidence in support of her claim. She was cross-examined by counsel for BCI. She did not call any other witnesses.

[10] The BCI filed affidavits from seven witnesses. Mr George, counsel for Ms Tuaine, sought to cross-examine only two:

- a) Sandra Yeats: Ms Yeats has been the Chief Risk Officer at BCI since on or about 28 June 2023 when she joined BCI. She gave evidence regarding Ms Tuaine's employment terms and conditions with BCI, BCI's Staff Manual and Code of Conduct, and records of BCI's investigation into missing funds from the bank account concerned.
- b) Teremoana Paratainga: At the relevant time, Mrs Paratainga was the Atiu Branch Supervisor at BCI. She and Ms Tuaine were the only two employees at that branch. Mrs Paratainga gave evidence of BCI procedures for depositing and withdrawing funds at the Atiu Branch, the discovery of funds allegedly missing from the account concerned, and the investigation by BCI. Mrs Paratainga also gave evidence regarding her interactions with Ms Tuaine during the investigation.

[11] It was agreed that the affidavits of the remaining five witnesses for BCI could be admitted without cross-examination. Those witnesses were:

- a) May Kavana: Ms Kavana is the Customer Service Officer at the Aitutaki Branch of BCI. In January 2021, she went to Atiu for a couple of weeks to cover for Ms Tuaine who was on leave. The discrepancies in the customer's account were uncovered while Ms Kavana was covering for Ms Tuaine.
- b) Jimmi Glassie: At the relevant time, Mr Glassie was the Manager of Branch Network at BCI. His role involved senior management and operational oversight of BCI's outer-Island division, including branches and staff in Atiu. Mr Glassie left that role and BCI in about April 2021. He was part of the investigation into the alleged missing customer funds. He was present as part of a video meeting on 27 January 2021, with the Human Resources (HR) Manager, Mii Mataora, Mrs Paratainga and Ms Tuaine.

- c) Mii Mataora: Ms Mataora was the HR Manager at BCI at the relevant time. Ms Mataora was present during the video meeting on 27 January 2021 with Ms Tuaine along with Mr Glassie, Mrs Paratainga and Ms Tuaine.
- d) Ngairinga Teinaki: Ms Teinaki is a Senior Risk and Compliance Officer at BCI. She joined BCI in 2022. She gave evidence about BCI's security protocols, including the banking system, unique usernames and passwords for each employee, logging of transactions, and BCI's ICT security policy.
- e) Vaine Nooana-Arioka: Ms Nooana-Arioka was the Chief Executive Officer (CEO) at BCI at the relevant time. She ceased as CEO on or about 7 July 2023. She gave evidence of her recollection of the investigation into the complaint of missing funds, and the termination of Ms Tuaine's employment.

Procedural background

[12] When Ms Tuaine brought her claim on 11 November 2022, there were a number of causes of action and the claim was for the sum of \$804,000. There followed amended claims seeking different amounts.

[13] I now briefly mention the procedural background as regards the causes of action. The detail is contained in two judgments of Chief Justice Keane.¹

[14] In his second Judgment the Chief Justice referred to his first Judgment as follows:

[1] On 11 July 2024, I struck out as untenable Ms Tuaine's first three causes of action (malicious prosecution, defamation, negligence). I held her fourth, wrongful dismissal answerable in damages, open at common law, but required more as to tenability.

¹ *Tuaine v Bank of Cook Islands* HC Cook Islands Plt No. 1748/2022, 11 July 2024 [Keane CJ first judgment]; and *Tuaine v Bank of Cook Islands* HC Cook Islands Plt No. 1748/2022, 23 December 2024 [Keane CJ second judgment].

[2] In the Cook Islands, I held, the common law action of wrongful dismissal, answerable in damages, is not subsumed by the Employment Relations Act 2012. It remains open where any dismissal constitutes a breach of any employment contract. Such a breach, I held, remains answerable in damages: (i) for salary foregone during any specified notice period; (ii) for injury to reputation, distress and the like.

[3] I could not then assess the tenability of this cause of action. The terms of any employment contract were not pleaded or in evidence. Nor were any salient features of her pre-termination interviews leading to her dismissal. Nor any letter of dismissal. I asked for more.

[15] The Chief Justice noted in his second Judgment that Ms Tuaine had sought to amend her statement of claim to plead wrongful dismissal answerable in \$55,000 damages. The Chief Justice noted that gave rise to two issues, namely, whether the proposed amended claim was time-barred? And, if not, whether it was so clearly untenable that the application ought to be declined?

[16] The Chief Justice decided that the proposed amended claim was not time-barred and granted Ms Tuaine leave to amend her pleadings but not as she then wished to do so. The Chief Justice directed that she file a further draft statement of claim for him to consider, which was to include certain details as directed.

[17] The Chief Justice concluded by stating:

[20] I emphasise this. In her revised statement of claim Ms Tuaine must identify succinctly why she contends BCI wrongfully dismissed her, in breach of her contract of employment, on the very day on which it dismissed her.

[21] At that date she had just been charged, if indeed she had been, and her trial lay well in the future. The focus now must be on whether, on the day BCI dismissed her without notice, it had any safe basis to conclude she had stolen the deposits attributed to her.

The claim

[18] The Statement of Claim went through further iterations. The “New and Final” Statement of Claim is dated 18 March 2025. There is one cause of action, namely wrongful dismissal, and the plaintiff sought damages as follows:

a)	2 weeks' loss of wages without notice – \$640.00	\$ 640.00
b)	Loss of earnings for the next 30 years	\$75,000.00
c)	Undue mental distress	\$50,000.00
d)	Shame and humiliation	\$150,000.00
	Total claim	\$275,640.00

[19] However, in her affidavit, sworn 9 June 2025, which the complainant confirmed and relied on in her evidence,² she expressed her claim as follows:

I would like to claim damages for breach of contract based on the following grounds:

a)	2 weeks' loss of wages without notice – \$640.00	\$640.00
b)	Dismissed at age 29, with an annual salary of \$15,360 p.a.; potential earnings lost for the next 30 years to reach the retirement age of 60 years, \$460,000, less 50% reality reduction rate, total claim	\$250,000.00
	Total claim:	\$250,640.00

[20] Under cross-examination Ms Tuaine said that the amount she was claiming was as set out in her affidavit rather than the statement of claim. She said that the \$250,000 included her claims for mental distress, hurt and humiliation.

Factual background

[21] The factual background is largely uncontested. Where there is disagreement I will note it and make findings, if necessary, in a later part of this judgment.

Plaintiff's employment

[22] Ms Tuaine commenced her employment with BCI on or about 29 March 2016. That is the date she signed her employment contact with BCI.

² Ms Tuaine stated specifically that she did not rely on any other affidavits she had filed.

[23] The essential terms in Schedule 2 of Ms Tuaine's employment contract were:

- a) Salary: \$8,320 per annum gross.³
- b) Fixed Term: 12 months, subject to renewals.
- c) Annual leave: 10 working days.
- d) Hours: 40 per fortnight.
- e) Termination notice period: 2 weeks.

[24] The contract provided that Ms Tuaine had no right or legitimate expectation of re-appointment if, as in her case, the employment was for a fixed term:

9.0 Non Renewal of Contract

- 9.1 The Employee shall have no right or legitimate expectation of reappointment on the expiry of this Contract (if the employment is for a fixed term). Where the contract will not be renewed BCI shall give the Employee written notice advising the Employee that the contract will not be renewed on expiry. The notice to be given to the Employee shall be at least one month or the notice period set out in Schedule 2 (if the notice period is less than one month).

[25] Clause 1 of the employment contract incorporated the terms of the BCI Staff Manual and Code of Conduct as follows:

1.0 Appointment and responsibilities of the Employee

- 1.1 This Contract is subject to and incorporates the terms of the BCI Staff Manual and Code of Conduct ("BCI Staff Manual") which forms part of the terms of this Contract.

[26] That issue is further addressed in clause 6, which provides as follows:

6.0 Employee's obligations

- 6.1 The Employee shall comply with all terms and conditions set out in the BCI Staff Manual the terms of which are incorporated into and form part of this Contract.

³ By the time her employment ceased, she was earning \$10,457.04 gross.

[27] Clause 11 contains the provision for termination for misconduct as follows:

11.0 Termination for Misconduct

11.1 Notwithstanding anything contained in this Contract, BCI may terminate this Contract summarily and without notice for serious misconduct on the part of the Employee. (For example and circumstances where an Employee may be instantly dismissed without notice refer to the BCI Staff Manual).

[28] Finally, in relation to the employment contract, under the heading General Provisions, clause 13.3 provides as follows:

13.3 This Contract (including, for the avoidance of doubt, the terms and conditions set out in the BCI Staff Manual) constitutes the full and entire agreement between the Employee and BCI, and supersedes all previous negotiations, communications and commitments whether written or oral.

[29] Turning to the Staff Manual the relevant provisions are as follows:

Respect for the property of Our Customers, Colleagues and our Business

At BCI, we do not touch, use, or take what doesn't belong to us. Breaking into, stealing from someone, stealing from BCI, or taking anything from another person without his or her knowledge is an act of disrespect. No one has a right, regardless of circumstances, to take something that belongs to someone else, BCI, or our Customers. Just because someone has more than we do does not give anyone the right to take from them unlawfully. In short "Do not Steal".

Be honest – if you do something wrong, admit it and apologize.

BCI applies a zero tolerance policy to stealing and will apply immediate dismissal followed by a police complaint without fear or favour.

[30] The Staff Manual, in Chapter 7 section 4, also addresses termination and instant dismissal.

In the following circumstances, the Managing Director may instantly dismiss an Employee, in which case the Employee's service will be terminated immediately without any payment of salary in lieu of notice:

1. Where Management, after thorough examination into the circumstances surrounding the case are satisfied that the Employee:
 - (a) ...
 - (b) ...

- (c) Has committed fraud or corruption against the BCI or against any person(s) having dealing with it.

...

Where the Managing Director or line Manager believes that there are grounds for dismissal, the Employee may be suspended immediately for any period deemed necessary to complete proper investigations.

[31] Finally, the Staff Manual provides examples of misconduct which may result in instant dismissal as follows:

Some examples of conduct which may result in instant dismissal:

Theft whether from the Bank, a customer or a fellow team member

...

Bringing the BCI into disrepute.

[32] The Code of Conduct repeats the part of the Staff Manual set out at [29] above.

[33] Ms Tuaine signed a Declaration each year agreeing to be bound by the BCI Code of Conduct. The Declarations included an acknowledgement that a violation of the Code of Conduct may be grounds for immediate dismissal for just cause without notice.

[34] Ms Tuaine worked under the supervision of Mrs Paratainga at the Atiu Branch. They were the only two employees at that Branch. Both Mrs Paratainga and Ms Tuaine worked under the supervision of the Manager of the Branch network for the outer-Islands, Mr Glassie.

BCI's Banking system

[35] BCI's electronic banking system, Ultracs, is able to be accessed by BCI's employees using a unique username and password. Employees use this system to access customer information, including activity on customer accounts and transaction posting.

[36] Each employee also has a unique Operator Terminal number, which they use to access their own computer. An employee's password for their computer is different

from their password for the Ultracs banking system. Ms Tuaine's operator ID for the Ultracs system was 154.

[37] Both Ms Tuaine and Mrs Paratainga had their own laptops. The computers automatically lock after 15 minutes of inactivity.

[38] Every employee has a unique username and password that must be used to access their computers. Ms Tuaine's operator terminal number for her computer was 151.

[39] Under the Staff Manual and the ICT security policy no employee may share their username and password for either their computer or the electronic banking system access with any other employee. It is a serious breach of BCI policy to share passwords with any other person, and all staff receive training on this requirement. Ms Tuaine accepted that she had received such training.

[40] When a customer makes either a deposit into or withdrawal from their account they are required to complete a slip or voucher. This is a hardcopy document. The transaction is then entered by the BCI employee into the electronic banking system and the customer's physical bankbook is updated. At the Atiu Branch all deposit and withdrawal slips were packaged together at the end of each day and put on the plane to Rarotonga once a week. Ms Tuaine was usually responsible for this job.

[41] In Atiu both Ms Tuaine and Mrs Paratainga had their own till. They each held their own key. The tills were reconciled with the electronic banking system at the end of each day.

January 2021 – Ms Tuaine on leave – funds missing

[42] BCI held the Teenui Meeting House Project account. Basically, it was a fundraising account. Deposits were made into the account, but nothing was ever withdrawn. On 18 January 2021, Ms Kavana, another Customer Service Officer, was working to cover for Ms Tuaine, while the latter was on leave, when a customer sought to make a deposit into the Teenui Meeting House Project account. It was at that time Ms Kavana identified three discrepancies between BCI's electronic system records

and the customer's bank book records. Those discrepancies related to three large withdrawals made from the account between December 2020 and January 2021. The three withdrawals were not recorded in the customer's banking book. They were:

- a) \$6,000 on 11 December 2020.
- b) \$7,210 on 24 December 2020.
- c) \$4,880 on 12 January 2021.

[43] Ms Kavana asked the customer if there had been withdrawals of those sums. The customer was not aware of any such withdrawals but said she would speak to her husband, one of the trustees of the account, about it. The two of them came back into the Atiu branch and said there had been no such withdrawals.

[44] The BCI computer system showed that Ms Tuaine had processed the three withdrawals. Neither Mrs Paratainga nor BCI's Head Office in Rarotonga could locate the withdrawal slips at that point.

[45] Ms Tuaine returned from leave on 25 January 2021. Mrs Paratainga's evidence was that on that day she asked Ms Tuaine about the withdrawals from the Teenui Meeting House account. Mrs Paratainga said at that stage she did not yet know whether the money was in fact missing or whether the customer had forgotten about the withdrawal, or what had happened. She said that is why she wanted to find the withdrawal slips. She said she thought that Ms Tuaine might have them.

[46] Mrs Paratainga said that when Ms Tuaine came into the Atiu Branch Mrs Paratainga sat down with her and asked her where the withdrawal slips were. She asked her where the two batches of slips were, that were to have been sent to Rarotonga.

[47] Mrs Paratainga said that after a while Ms Tuaine started crying and told her she took the money. Ms Tuaine denies she said that. I will come back to this point.

[48] Mrs Paratainga said Ms Tuaine also told her that she had taken the withdrawal slips and not sent them to Rarotonga. Ms Tuaine also denies saying this. I will also return to this point.

[49] Mrs Paratainga said that she then sent Ms Tuaine home. Ms Tuaine agrees she was sent home, but said in her evidence-in-chief that, in fact, that it was at this point she was dismissed. I will return to this issue.

[50] Mrs Paratainga said that Ms Tuaine then came back into the Atiu Branch with some of the missing withdrawal slips that she said she had taken home instead of putting them on the plane. Mrs Paratainga said she sent the batches over to Rarotonga (it is not clear when she contends to have done this).

[51] The withdrawal slips for two of the transactions, 24 December 2020, and 12 January 2021, were located. It seems they were within the bunch of withdrawal slips that Mrs Paratainga said were brought back into the Atiu Branch by Ms Tuaine. The withdrawal slip for the transaction on 24 December 2020, had the apparent signatures of the three account signatories. Those signatories each denied ever signing them.

[52] Importantly, Ms Tuaine's signature was on the withdrawal slip for 24 December 2020. She acknowledged under cross-examination that it was her signature.

[53] The withdrawal slip for the transaction on 12 January 2021, was unsigned.

[54] The withdrawal slip for 11 December 2021, was never located.

The investigation

[55] On 27 January 2021, Mrs Paratainga sent an email to Mr Glassie telling him that Ms Tuaine had told her she had taken the money. Mr Glassie immediately reported this to the BCI Audit Manager, and the then CEO, Ms Nooana-Arioka. The investigation revealed the following:

- a) The withdrawal slips for 11 December 2020 and 12 January 2021 were missing. (The withdrawal slip for 11 December 2020 was never recovered. The withdrawal slip for the transaction on 12 January 2021 was unsigned).
- b) Ms Tuaine's signature was on the withdrawal slip for 24 December 2020. (As noted, under cross-examination she accepted that was the case. I also note that the charge to which Ms Tuaine initially pleaded guilty related to the transaction on this date).
- c) The BCI electronic system showed that Ms Tuaine's unique operator ID had been used to process all three withdrawals.
- d) Ms Tuaine's unique terminal ID appeared in the electronic system in relation to the three transactions, confirming that they were each processed on Ms Tuaine's computer.
- e) Ms Tuaine was at work each day the withdrawals occurred.
- f) Ms Tuaine had a personal loan with BCI, and nearly half her salary was used to service that loan.
- g) The last questioned transaction was the day before Ms Tuaine had gone on annual leave to Rarotonga.
- h) Ms Tuaine processed virtually all of the daily customer transactions with Mrs Paratainga processing only a few.

[56] On the afternoon of 27 January 2021, there was a meeting by way of a video call scheduled between Mr Glassie and Ms Tuaine. Ms Nooana-Arioka asked the investigation team to ensure that Ms Tuaine had a support person during the call. However, Ms Nooana-Arioka says that Ms Tuaine chose not to have a support person present. Accordingly, Ms Nooana-Arioka asked Ms Mataora, the Human Resources Manager, to be present as the complaint involved allegations of serious misconduct. Ms Nooana-Arioka says she was concerned that Ms Tuaine had chosen not to have a

support person present; but she was comforted by at least having someone from Human Resources present.

[57] The evidence was that during the video meeting:

- a) Ms Tuaine admitted to taking the funds from the Teenui Meeting House Project. Under cross-examination Ms Tuaine accepted she made that admission, but she said it was not true. She said she was pressured by Mrs Paratainga, who was present during the video meeting, to make the admission.
- b) Ms Tuaine said she did not have any of the money left, and that it went to pay for her account at Super Brown Store, and to buy food, alcohol and smokes for her and her friends. Under cross-examination Ms Tuaine said she could not recall saying that.
- c) When asked why she took the money, Ms Tuaine said “Because of me” and to be “seen by her friends”, which was interpreted to mean that she used the money to fit in with her more popular friends. Under cross-examination Ms Tuaine said she could not recall saying that.
- d) Ms Tuaine was informed that her employment was terminated immediately for serious misconduct. Ms Tuaine accepted under cross-examination she was told that.

[58] Ms Yeats’s evidence was that the conclusion from the investigation was that Ms Tuaine created false withdrawals from the account, and entered them into the banking system. She also created false withdrawal slips for each transaction. She would then take the money out of her till. At the end of each day her till would match what the system said should be in the till. Ms Tuaine would then remove the withdrawal slips from the package that got put on the plane.

[59] Ms Yeats’s evidence was that Ms Tuaine’s withdrawals were not all that sophisticated, and were uncovered within a month of the first withdrawal. Ms Yeats

conceded it probably should have been caught sooner, but some of it occurred over the Christmas period.

After the video call on 27 January 2021

[60] Ms Nooana-Arioka's evidence, based on the internal investigation report was that she concluded Ms Tuaine's confession was clear, uncoerced and consistent with internal BCI system data. Ms Nooana-Arioka said that, Ms Tuaine's admission during the video call, corroborated by system logs and physical records and in alignment with BCI's Zero Tolerance Policy were grounds for Ms Tuaine's employment being terminated effective immediately on 27 January 2021.

[61] Following the termination of Ms Tuaine's employment during the video call on 27 January 2021, the immediate termination was confirmed by a letter of termination dated 27 January 2021.

[62] The contents of that letter read as follows:

This letter serves as confirmation of the termination of your employment with BCI effective immediately, under BCI Staff Manual policy reference Chapter 7:

Section 4 *"Where Management, after thorough examination into the circumstances surrounding the case are satisfied that the Employee:*

...

(c) *Has committed fraud or corruption against the BCI or against any person(s) having dealing with it."*

This termination follows the suspicion of three cash withdrawals not initiated by a customer detected as a result of updating the customer's passbook. These transactions were processed by yourself on Account # 84553 S15 TEENUI MEETING HOUSE PROJECT on the following dates:

12th January 2021 withdrawal \$4,880.00

24th December 2020 withdrawal \$7,210.00

11th December 2020 withdrawal \$6,000.00

In a meeting with you held via workplace video in which Jimmi Glassie – Manager Branch Network and Mii Mataora – Manager Human Resources and Teremoana Paratainga Supervisor Atiu Branch, were present, the following was discussed:

- You confirmed you were aware of the reason for the meeting and admitted that you processed those transactions with the intent to defraud a BCI customer.
- You stated the account number, the amounts of the withdrawals and the dates the withdrawals were made.
- You confirmed that this was the only account that you had conducted fraud against and there weren't any others.
- You confirmed that you have used up all the funds to buy food and drinks for your friends and it was not to purchase your new motor bike which you advise was purchased by your parents.
- Jimmi then stated clearly that your termination of employment was effective immediately and that a formal letter would follow shortly.
- Jimmi also informed you that BCI will report this matter to the Police and for you to prepare for it.

BCI requires unreserved confidence in the integrity of staff in our team. Unfortunately, we do not have this with you in light of actions taken by yourself.

As BCI as a zero tolerance policy with fraud, so do know this incident and any other suspicious transactions we find from here will be reported to the Cook Islands Police.

We will also implement immediately appropriate termination, exit procedures and final pay in full discharge of BCIs financial obligations to you. You will not longer be permitted to access the BCI branch office except as a customer.

Please arrange for the immediate return of BCIs uniform and properties supplied to you.

[63] The letter of termination of employment was formally issued and signed by both Ms Nooana-Arioka and Ms Tuaine on 28 January 2021. Under cross-examination Ms Tuaine accepted that she understood the contents of the letter and in signing the letter she was acknowledging those contents. But she said she was pressured by Mrs Paratainga to sign it.

Mrs Paratainga

[64] When Mrs Paratainga was cross-examined it was put to her that she had made the three withdrawals from the customer's account, and that she had then blamed Ms Tuaine. She denied that. That was the only issue on which she was cross-examined.

[65] Ms Tuaine made a number of other allegations against Mrs Paratainga in her evidence-in-chief, that were not put to Mrs Paratainga in cross-examination. Accordingly, I do not put any weight on those assertions as they are simply allegations Ms Tuaine makes and are unsupported by any other evidence. They include the following:

- a) Mrs Paratainga demanded that Ms Tuaine give her the details of her password for her computer and her password for the banking system. Ms Tuaine said she did so and continued to provide those details to Mrs Paratainga whenever the BCI system required passwords to be changed.
- b) Ms Tuaine said that she gave Mrs Paratainga those details because if she did not she would lose her job. However, I note that Ms Tuaine acknowledged under cross-examination that in allegedly providing those details to Mrs Paratainga, Ms Tuaine would have breached her employment contract.
- c) Ms Tuaine said she did not report Mrs Paratainga to HR because she was scared she might lose her job. Ms Tuaine accepted, however, that BCI had processes for reporting allegations to management.
- d) Ms Tuaine said that Mrs Paratainga was travelling in and out of Atiu to visit her daughter in New Zealand, because her daughter was in hospital. At the time Mrs Paratainga's husband was not working and she was the one paying for her airfares. Not only was this allegation not put to Mrs Paratainga, I also note that Ms Tuaine said that Mrs Paratainga's travel to New Zealand was in 2019. The first of the thefts occurred on 11 December 2020.

[66] It was also not put to Mrs Paratainga in cross-examination that Ms Tuaine did not confess to her; that Ms Tuaine did not bring in the withdrawal slips after retrieving them from her home; that Mrs Paratainga pressured Ms Tuaine to confess to her and

pressured her to confess during the video call; and that she pressured Ms Tuaine to sign the letter of acknowledgement.

[67] Returning to what was uncovered in the investigation, Mr Glassie says that nothing in his investigation pointed towards Mrs Paratainga being responsible for taking the money and at no stage did Ms Tuaine say that she had been pressured by Mrs Paratainga into either taking or admitting to taking the money. Ms Nooana-Arioka gave evidence to the same effect. As noted, these two witnesses were not cross-examined.

[68] Ms Yeats was cross-examined on this issue. She said:

Q. Ms Yeats, can you tell the Court why there was no investigation carried out into the role of the Plaintiff's boss, Mrs Teremoana Paratainga?

A. Yeah, so I wasn't actually with BCI at the time that this occurred. So from the records that I have reviewed or read, there was never any evidence or reason to investigate anybody else. The evidence that we had available and the confession led to one conclusion only.

Q. And if you were in your position at the time of this event, would you have investigated her?

A. Can I confirm you are referring to, Mrs –

Q. Paratainga.

A. Again the information that I have seen if I was present and with that information, I think it was fairly conclusive, and it was corroborated by Ms Tuaine, in her confession.

[69] Ms Yeats further said:

Q. Place yourself present at the time of these events; would you have done things differently?

A. Because I wasn't on the ground, I can only go from the records that I've read. And the records that I've read suggest that an investigation was conducted; that we had records that showed transactions coming from one terminal and one user. We checked for the vouchers. We had the statement from Teremoana, and then the confession from Marthalina. To me it seemed like the investigation followed a normal process and was thorough enough, and corroborated. So not having been privy to any of the conversations, I think it was satisfactory.

[70] And further:

Q. Can you just explain that. Why wasn't anything done to follow up the plaintiff's allegation that Mrs Paratainga, was responsible for the thefts?

A. Because the previous investigation had not presented any evidence to that effect and, from what I read in the records, nor did the Police investigation.

[71] Ms Yeats said that while Mrs Paratainga was asked to resign it was because the events had "happened under her watch" and there was a failure of supervision.

Ms Tuaine's evidence

[72] I found Ms Tuaine to be an unreliable witness whose evidence was inconsistent on various issues.

[73] For example, by way of affidavit, she said that when she returned from leave she was dismissed by Mrs Paratainga. That was before the video call on 27 January 2021.

[74] However, Ms Tuaine accepted that she gave the following evidence in her criminal trial:

Q. You lost your employment before the Zoom?

A. No, during the Zoom.

[75] Ms Tuaine also acknowledged that when she returned from leave and Mrs Paratainga told her to go home, she was not told that she was dismissed from the Branch. She said Mrs Paratainga just told her to go home.

[76] The evidence is clear, and I find that Ms Tuaine was not dismissed until the video call on 27 January 2025, by which time Mr Glassie had conducted his investigation into BCI's electronic records.

[77] I also find there was nothing to stop Ms Tuaine saying, in the course of the video call, that it was not her but it was Mrs Paratainga who had made the three withdrawals. Ms Tuaine's initial evidence was that she had already been dismissed by

the time of the video call. In other words, there was nothing for her to lose. She had already lost her job (on her evidence). She also gave evidence that she was “really angry” when she had been accused by Mrs Paratainga of taking the money. It does not make sense that Ms Tuaine would then take the blame for the withdrawals during the video call if she had not made them.

[78] I also consider that Ms Tuaine’s initial entry of a guilty plea to the withdrawal on 24 December 2020, is consistent with her acknowledgement that she signed the withdrawal slip on that occasion. She accepted that it was her signature on the withdrawal slip. There was no suggestion that anyone else had copied her signature.

[79] When asked why she waited eight months before applying to withdraw her guilty plea, she said:

A. Um, I think I remembered, I didn’t take the money.

[80] I find that answer unconvincing.

[81] The acknowledgements that Ms Tuaine did make under cross-examination also detract from the claim she makes. In addition to acknowledgements I have already mentioned during the course of the section above on the factual background, there is the following.

[82] She accepted that the bank’s customers placed a great deal of trust in her in handling their money, and that trust and integrity are a very important part of the job she had.

[83] She also accepted that if a bank teller was ever found to be stealing from a bank customer, that was a very serious thing and that any bank teller who is stealing from a bank customer should be dismissed.

[84] She accepted that all the documents and records of the BCI electronic system showed that she was the one who processed all three withdrawals.

[85] Ms Tuaine accepted that BCI would have had no way of knowing that the confession that she gave them was (allegedly) not true. She agreed BCI had no way of knowing that, when she said in the video call she took the money. It was put to her that if BCI had no way of knowing, then it was reasonable for them to conclude that she was taking the money. Ms Tuaine responded “Yes, yes.”

[86] There was the further evidence in cross-examination:

Q. You’ve accepted that you’ve told me you confessed to BCI and that BCI had no way of knowing that your confession was false?

A. Yes.

Q. And you’ve confirmed that you never reported any of this behaviour you’re alleging against Ms Paratainga, and BCI had no way of knowing that any of that behavioural part be going on?

A. Yes.

[87] Ms Tuaine accepted that when she entered her guilty plea to the charge that related to the withdrawal on 24 December 2020, she understood what she was pleading guilty to, and she had the benefit of legal advice.

[88] She accepted that she did not say to anyone that it was Mrs Paratainga who had made the three withdrawals until August 2022, which then led to her application for leave to withdraw her guilty plea.

[89] It is not strictly necessary, in fact, to make findings as to whether Mrs Paratainga was not telling the truth when she said: Ms Tuaine confessed to her that she took the money; that after being sent home Ms Tuaine returned with the withdrawal slips, which she had at home; or that she pressured Ms Tuaine to confess during the video call and to sign the letter of acknowledgement.

[90] The relevant question is, what did BCI know at the time Ms Tuaine was dismissed?

[91] However, although it is not necessary for this judgment to make those findings, I record that I do not accept the plaintiff’s evidence on these issues. As I have said, I found her evidence unreliable and unconvincing on a number of issues. I place weight

on that unreliability for the purpose of rejecting her evidence in relation to the issues referred to in [89] above.

[92] Also, as regards Ms Tuaine’s evidence that she could not recall saying during the video meeting what she did with the stolen money, and why she took it (as set out in [57](b) and (c) above), the evidence of Mr Glassie, Ms Mataora and Mrs Paratainga is consistent as to what Ms Tuaine said she did with the money, and why she took it.

The law

[93] Ms Tuaine’s claim for wrongful dismissal is an action under the common law with the foundation being breach of contract. Wrongful dismissal under common law arises either where there has been a dismissal without proper notice, or there has been a summary dismissal without proper cause.⁴

[94] In New Zealand wrongful dismissal was abolished as a cause of action under s 113 of the Employment Relations Act 2000 (NZ), but it survives as a common law action in the Cook Islands.⁵

[95] The history of the common law action of wrongful dismissal in New Zealand is discussed in the following commentary:⁶

Although wrongful dismissal has effectively been abolished it is worth noting that for the great majority of employees, wrongful dismissal suffered from a number of disadvantages as an effective remedy and, as a consequence, was rarely used. Indeed, one of the major reasons for the introduction of the personal grievance procedure was that an action for wrongful dismissal failed to provide an adequate remedy for the majority of employees, and failed to meet modern expectations in the employment relationship. The most significant disadvantage of the common law was that it had little concern with either the substantive justification for a dismissal, or procedural fairness, and as a consequence, did little to provide effective employment security for employees. Justification is, of course, central to the personal grievance procedure. Instead, the common law asked the question: “Was the dismissal wrongful in the sense that the contract was terminated other than in accordance with its terms?”. A dismissal was wrongful only if first, the notice of termination was less than that provided in the contract, and second, if the lack of notice could not be justified on the basis of the employee’s serious

⁴ *Baillie v Kell* (1838) 132 ER 934; and *Edwards v Levy* (1860) 175 ER 974.

⁵ Keane CJ second judgment, above n 1, at [2].

⁶ Gordon Anderson “Alternatives to the Personal Grievance Procedure” in John Hughes, Gordon Anderson and Sherridan Cook (eds) *Personal Grievances (NZ)* (online ed, LexisNexis) at [12.9].

misconduct. If no notice period was specified in the contract, the courts determined what period was reasonable on the facts of the case. The remedies available for wrongful dismissal were also limited. Generally, damages were confined to the amount of remuneration that the employee would have earned if the contractual period of notice had been given, less any amount that the employee had earned, or should have earned during that period. Damages were not available for other loss consequent on the dismissal, or for damages for humiliation, or the like. As most contracts had relatively short notice periods, any action for damages was generally uneconomic. Those cases that were brought were generally brought by employees in relatively well paid positions, who were entitled to lengthy notice periods. As McKay J expressed it in *Ogilvy & Mather (NZ) Ltd v Turner*:

... the common law is unlikely to provide a remedy for dismissal for anyone except highly paid workers. The short periods of notice provided in most contracts, and thus the potentially low level of damages, make an action at common law uneconomic in most cases, even if the individual could afford initially to pursue legal application.

During the 1990s, however, the limited scope of an action for wrongful dismissal broadened in at least some respects. The two most important developments were, first, that the Courts began to place a somewhat greater emphasis on natural justice and procedural fairness in considering dismissals at common law, and second, that the restrictions on damages appeared to become less strict.

[96] In *North Island Wholesale Groceries Ltd v Hewin* the Court addressed what amounted to misconduct justifying peremptory dismissal.⁷

The test of what constitutes misconduct justifying peremptory dismissal has been expressed in various ways. In *Clouston & Co. Ltd v Corry* [1906] AC 22, a New Zealand appeal, Lord James of Hereford said at p 129:

“There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. ... the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts – and is a question of fact.”

Regard must be had to the nature and degree of the alleged misbehaviour and so to its significance in relation to the business of the employer and to the position held by the employee. In making the factual assessment the Court must weigh the questioned conduct and, viewing the matter objectively, its effect on the maintenance of the confidential relationship between them as against the severe consequences of immediate dismissal. If it is to warrant that response the misbehaviour must go to the heart or root of the contract between them. Thus, in *Sinclair v Neighbour* [1967] 2 QB 279 Sellers LJ asked at p 287 “whether that conduct was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which

⁷ *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176 (CA) at 183.

he had been engaged as a manager”. Or as Sachs LJ put it in *Cyril Leonard & Co v Simo Securities Trust Ltd*:

“It has long been the law here that to justify summary dismissal of a servant or the summary determination of a contract for services, the conduct set up by way of defence must, indeed, be grave – as for instance conduct such as would deeply impair the basic confidence that it is essential should exist between the parties; in each case it is a matter of degree whether the act complained of is of the requisite gravity. It may be that such acts can in many cases be properly described as relating to something fundamental to the contract. I would, however, observe that the rule here as to establishing misconduct of the gravity already mentioned is a simple and well understood thing; to introduce different sets of words to define that conduct or to seek to apply different tests with regard to it would do nothing to assist the administration of this branch of the law” ([1971] 3 All ER 1313, 1323).

Analysis

[97] As I have found above, all the evidence obtained by BCI in its investigation into the missing funds pointed towards Ms Tuaine. As well, Ms Tuaine confessed not only to Mrs Paratainga, but during the video call held as part of the investigation, that she made the three withdrawals.

[98] The employment contract Ms Tuaine signed with the BCI, incorporating as it does BCI’s Staff Manual and Code of Conduct contains provisions for summary dismissal in such circumstances. Those documents, in fact, contain examples of when an employee may be dismissed summarily, which are consistent with the events that occurred here.

[99] The dismissal was justified. The employment contract was terminated in accordance with its terms governing serious misconduct.

[100] Ms Tuaine has not identified any term of her employment contract, whether express or implied, that she says has been breached. She appears to rely on the outcome of her jury trial. But as the Chief Justice pointed out,⁸ the trial lay well in the future at the time Ms Tuaine was dismissed.

⁸ See above at [17].

[101] In all the circumstances that have been accepted by Ms Tuaine in her oral evidence, and taking into account my findings, BCI was justified in terminating Ms Tuaine's employment without notice. Ms Tuaine's claim accordingly fails.

Damages

[102] Given there was no breach of Ms Tuaine's employment contract it is not necessary to consider the various heads of damages she claims.

Result

[103] Ms Tuaine has failed to establish her claim. The claim is dismissed.

Costs


[104] I reserve costs.

[105] If BCI seeks costs, it is to file and serve a memorandum of submissions within 15 working days of the date of this judgment.

[106] Ms Tuaine is to file her memorandum of submissions within 15 working days of the date of service of BCI's costs memorandum.

[107] Costs memoranda are to be no more than five pages (excluding annexures).

[108] I will consider costs on the papers.



Gordon J