

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 89  
5446549

BETWEEN            TONY WEBER  
                                 Applicant

AND                    MITRE 10 RETAIL LIMITED  
                                 trading as MITRE 10 MEGA  
                                 PALMERSTON NORTH  
                                 Respondent

Member of Authority:     Michele Ryan

Representatives:           Jenny Murphy, Advocate for Applicant  
                                 Richard Upton, Counsel for Respondent

Investigation Meeting:     5 August 2014 at Palmerston North

Submissions Received:    12 August 2014 and 26 August 2014 from Applicant  
                                 22 August 2014 from Respondent

Determination:             9 September 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Tony Weber says he was unjustifiably dismissed by Mitre 10 Retail Limited t/a Mitre 10 Mega (Mitre 10) from its Palmerston North store on 18 November 2013. He says the dismissal was both substantively and procedurally unfair. In addition he claims that he was unjustifiably disadvantaged by a final written warning he received two months before he was dismissed.

[2]     Mitre 10 says Mr Weber's dismissal was justified following an investigation into a customer's complaint about his conduct. It says the decision to dismiss Mr Weber was one that a fair and reasonable employer could make in all the circumstances.

### Summary of relevant events

[3] Mr Weber commenced his employment with Mitre 10 on 18 March 2010. In January 2012 he was promoted to a first tier management role as a Trainee Supervisor working in the Garden department. Mr Weber's employment appears to have been relatively incident free until 2013 when, over a period of 8 months, four separate complaints from either staff or customers were made about his behaviour.

[4] The first of the complaints arose in April 2013 and involved an allegation of sexual harassment towards a staff member. Following an employment investigation Mr Weber (and his advocate) were advised that, although Mitre 10 considered there was substance to the complaint, there was insufficient conclusive evidence to support disciplinary action against Mr Weber.

[5] Mr Weber was given a letter in accordance with Mitre 10's 'Policies and Procedures' document that provides an employee may be given a letter setting out expectations "*to ensure the team member understands what is expected of them in regards to performance standards...*". Mr Weber was asked to address his self-awareness as regards appropriate behaviour. Amongst other things he was to consider how his behaviour may impact on others; to modify language so as to present a professional manner, and to use an "*asking*" style as opposed to "*telling*". He was further encouraged to practise listening skills to ensure he heard the correct message.<sup>1</sup>

[6] The first customer complaint was received on 27 August 2013. The author of the complaint said she had observed Mr Weber shout at and harass a female staff member (Ms Nukanuka) and his behaviour was described as bullying and abusive. The customer advised Mitre 10 that she regarded his conduct as "*a very bad look for your customers*".

[7] Mr Weber's direct manager, Shaun Carrick undertook an investigation into the complaint. On 19 September 2013 Mr Weber was told he would receive a final written warning. That finding was confirmed in a letter given to him on 26 September 2013.

[8] Mr Weber says that he objected to the final written warning on two occasions but was prevented from challenging it.

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<sup>1</sup> Letter dated 1 May 2013

[9] Immediately prior to receipt of the final written warning, a third complaint was furnished to Mitre 10 by a male staff member of the Garden department. It appears to have been initiated in response to a further verbal altercation between Mr Weber and Ms Nukanuka, although the matters raised were not limited to that subject alone. One of the concerns was stated in the following way: “[Mr Weber] continues to use the Outdoor Garden area as a ‘pick up joint’ for ladies, spending a lot of time talking to them and giving them his phone number”.

[10] Mitre 10 commenced an inquiry and conducted interviews with several employees from the Garden department although it did not specifically investigate the allegation about Mr Weber’s interactions with female customers. Notes taken during interviews indicate there was some friction amongst staff and particularly so between the writer of the complaint and Mr Weber. Mitre 10 found there were “*behavioural issues within the team that was causing the team to be dysfunctional and not aligned to the company values*”. No disciplinary action was taken against Mr Weber, but he and other team members attended a team meeting on 9 October 2013. On 15 October 2013 Mitre 10 then distributed individualised letters to each of the Garden department staff setting out expectations of acceptable workplace behaviours.

[11] Although there is a dispute as to the precise date, the incident leading to Mr Weber’s dismissal occurred on or about 8 October 2013. General Manager, Bevan Brabyn says when he became aware of a customer complaint no contact details had been left and he was unable to follow the matter up.

[12] A week to 10 days later Mr Brabyn was informed by the service desk that a customer, (Mrs P<sup>2</sup>) had asked for him, and had left a phone number by which he could contact her, which he subsequently did by phone later that day.

[13] Mrs P outlined the conversation she had with Mr Weber on (or about) 8 October 2013. She complained that Mr Weber had asked for her address at least twice and had inquired about her age. She informed Mr Brabyn that she regarded Mr Weber as “*coming on to her*” and said she had been made to feel very uncomfortable.

[14] Mr Brabyn says he actively sought information from Mrs P to ascertain whether she had any connections with Mitre 10 staff, including Mr Weber, to

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<sup>2</sup> The complainant did not provide evidence to the Authority. Her complaint is central to the facts of this determination but I consider it unnecessary to publish her full name and have referred to her as Mrs P.

eliminate the possibility of a hidden agenda or fabrication. His evidence is that by the conclusion of the phone call he believed the complaint to be genuine and potentially serious. He asked Mrs P to put her concerns in writing and this was received by Mitre 10 approximately two weeks later on or about 6 November 2013.

[15] Mrs P's written complaint began by stating that on 8 October 2013 she was attended by a staff member of Mitre 10 but was interrupted when Mr Weber introduced himself and took control of the discussion. She says the staff member excused herself and Mr Weber:

*"...continued to give advice. He asked about my garden – said he'd love to see it – then asked where I lived. I did not feel comfortable and didn't disclose my address. Tony then asked "How old are you?". Astonished and feeling very uncomfortable I firmly told him that this was not something he should be asking. He ignored me and said "go on – tell me". He then stepped close to my face and said, in a low voice – "go on – tell me – whisper it in my ear". I sidestepped him. He made a vague comment about gardening requirements and left.*

*On Thursday October 10th I returned to Mitre 10 to make some purchases. I avoided Tony and went to the Garden Centre to "hide". The staff, there, asked if they could assist me. I explained my situation and asked if they could find someone other than Tony, in another department. They called another assistant to help me. Tony was calling out to me. I was relieved to have another staff member help me. However, the staff were alarmed by what was happening and advised that the problem could be resolved if I were to call or write to Management should I wish to do so. They were very kind and also concerned. I definitely felt overwhelmed and intimidated by these incidents and after long and deep consideration decided to contact you and advise you of the situation.*

*I feel sure this is not an isolated incident and that there may be others who have experienced similar situations. I sincerely hope that this unacceptable behaviour is seriously dealt with.*

*This person has a very serious personal problem and his preditorial (sic) behaviour is damaging the reputation of Mitre 10. Until now I have always enjoyed a great shopping experience at Mitre 10. It would be unfortunate to feel the need to – and have to shop elsewhere."*

[16] On 12 November 2013 a copy of Mrs P's complaint together with a letter inviting him to a disciplinary meeting was given to Mr Weber. The letter advised that the matter was serious and may result in dismissal. Mr Weber was encouraged to bring a support person of his choice to the meeting.

[17] A meeting was held on 13 November 2013 and lasted almost two hours. Mr Brabyn and Mr Guy participated on behalf of Mitre 10. Mr Weber attended without representation.

[18] At the meeting Mr Weber said Mrs P was seeking advice on irrigation for her garden. He said Mrs P had rejected his suggestions and was “*one of those customers that can be hard to deal with*”; had difficulty understanding the complexity of the problem, and had indicated she had no one to help her. He accepted that he then asked for her address and that she had asked why he wanted to know<sup>3</sup>. He says he told her he lived on Napier Rd and that if he was passing nearby her place he could pop around and explain what she needed and how to do it. He told Mr Brabyn and Mr Guy that he had assisted other customers in a similar way and that this type of service should be offered by Mitre 10. He says after he had provided his explanation he again asked Mrs P for her address but that she declined to provide it and the conversation concluded. He stated “*I know I get into trouble for this stuff but never get remembered for the good stuff I do*”. He later said “*It won’t stop me, I need to be more careful*”. Mr Weber denied that he asked Mrs P her age and said “*all I offered was to pop in and help, give advice.*”

[19] Mr Brabyn asked if Mr Weber recalled Mrs P telling him that he should not be asking for her address. He accepted that she had questioned why he was asking but repeated his response that he had explained himself to her. Mr Weber maintained that he was “*going the extra mile*”.

[20] At the end of the meeting Mr Weber was suspended from his duties, having had an opportunity to comment on the matter. The parties agreed to meet the following day so that Mr Brabyn could deliver an outcome.

[21] On Thursday 14 November 2013 Mr Weber advised Mr Brabyn that he was unable to obtain representation. The parties made alternative arrangements to meet on Monday 18 November. Mr Brabyn says Mr Weber did not explicitly undertake to bring his advocate but given that the meeting of 14 November was postponed due to his advocate’s unavailability he assumed Mr Weber’s agreement to meet the following Monday was at a date and time suitable for his advocate.

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<sup>3</sup> Mr Weber’s first brief of evidence is in moderate contrast to the statement recorded at the meeting. His brief of evidence states that Mrs Weber “*demanding to know why I wanted to know...said something like ‘you shouldn’t be asking me such a question’*”.

[22] Over the weekend, a sales team member, Ruth Hood provided Mr Guy with an unsolicited letter dated 16 November 2013. The statement was provided to Mr Weber on Monday morning. Ms Hood's statement referred to her observation of Mr Weber's interaction with Mrs P as follows:

*"...the way that Tony was serving her was, how to use the water timer and how it needed pressure to work properly, and may need another tap plumbed in.*

*...*

*At the time I could hear him through the aisle and could see him part of the time, he acted polite and was a gentleman at all times".*

[23] Ms Hood's statement also set out her discussion with Mrs P when she returned to Mitre 10 two days later:

*"The lady said she was uncomfortable with Tony, I ask why, her reply was, he's coming on to me, he was getting too close, and sniffing her perfume...."*

[24] The parties met as agreed on 18 November 2013 at 3pm. Mr Weber attended without representation. Early on in the meeting he was asked on at least three occasions whether he wished to adjourn and obtain representation. On each instance he replied *"he just wanted to get on with it"* or words to that effect.

[25] Ms Hood's letter was only briefly discussed and Mr Brabyn *"set it to one-side"*.

[26] The parties revisited Mr Weber's version of his conversation with Mrs P and Mr Weber confirmed his previous account. He maintained his view that Mrs P was neither upset nor uncomfortable with his requests for her address although he confirmed that she had asked him why he wanted to know. Mr Brabyn stated that he had reflected on why Mrs P would be untruthful but that he could find no explanation in circumstances where she had been consistent in both her verbal and written complaints. He advised that despite Mr Weber's denial that he had acted inappropriately, he had to consider on the balance of probabilities whether or not the incident occurred.

[27] Mr Brabyn set out the various complaints made over the previous 8 months and reminded Mr Weber of the steps Mitre 10 had taken to ensure he understood its expectations with respect to behaviour. Towards the end of the meeting he told Mr Weber he had *"grave concerns that you do not know where to draw the line between appropriate and inappropriate behaviour with staff and customers"*. Mr Brabyn

indicated that he accepted Mrs P's version of events to be correct and that he was considering terminating Mr Weber's employment.

[28] Mr Weber was asked if there was anything he wished to say before Mr Brabyn took a break to make a decision. He responded by stating he wanted "*to adjourn* [the meeting] *and get legal advice*". He then stood up, approached the door, advised that he was leaving, asked for Mr Brabyn's notes and left at 3.43pm. There is no dispute that Mr Weber's departure was sudden and swift.

[29] Mr Weber did not return. At 5.30pm Mr Brabyn formed a decision to dismiss Mr Weber for serious misconduct.

[30] Mr Weber accepts he made no attempt to contact Mr Brabyn after he left the meeting or the following day. He says he was in shock at how the meeting progressed and that his phone line was inoperable that evening due to road works. In or about lunch time the next day Mr Weber received written confirmation of his dismissal.

[31] The following day via his advocate Mr Weber raised a personal grievance for unjustified dismissal and detailed a variety of actions alleged to have unjustifiably disadvantaged him.

### **The law**

[32] Mitre 10 is required to justify its decision to dismiss Mr Weber according to s.103A of the Employment Relations Act 2000 ("the Act"). The test requires that not only must Mitre 10's decision to dismiss Mr Weber be based on reasonable grounds but the way Mitre 10 dismissed Mr Weber must be fair.

### **The issues**

[33] The Authority is required to consider and determine whether Mitre 10's actions were what a fair and reasonable employer could have done in the circumstances at the time the unjustified disadvantage and dismissal occurred. Mr Weber via his advocate challenged aspects of each of the investigations and/or outcomes associated with the complaints made between April and November 2013 about Mr Weber. During a telephone conference and at the investigation meeting the issues that require determination were identified as follows:

- (a) was the final written warning (given as a consequence of the first customer's complaint) substantively and/or procedurally unjustified?
- (b) was Mitre 10 fairly able to take into account the final written warning when deciding the outcome of Ms P's complaint?
- (c) was Mitre 10's investigation into Mrs P's allegations sufficient to justify its decision to dismiss?
- (d) if Mr Weber's dismissal was unjustified, did he contribute to the circumstances leading to his dismissal?
- (e) should Mr Weber be awarded remedies?

[34] As permitted by s.174 of the Employment Relations Act, this determination has not set out all the information furnished but states findings of facts and law and expressed conclusions on matters requiring determination.

**Were Mitre 10's actions what a fair and reasonable employer could have done in the circumstances at the time the unjustified disadvantage and dismissal occurred**

***Was the final written warning an unjustified action?***

[35] Mr Weber's advocate says the warning was both procedurally and substantially unjustified and that Mr Weber was prevented from contesting it. Mr Weber says he was later unjustifiably disadvantaged by the final written warning because Mitre 10 later relied on the warning as a relevant factor leading to its decision to dismiss.

[36] Mitre 10 rejects these claims and says Mr Weber did not object to, or raise a personal grievance about, the final written warning until after he was dismissed. It refers to the investigation into Mrs P's complaints and says Mr Weber was advised on at least three occasions that the final written warning would be a consideration when determining an outcome but that at no point did Mr Weber challenge the legitimacy of the final written warning.

[37] Mr Weber's first concern focussed on a discrepancy between the wording used in the first customer complaint, that Mr Weber was "*shouting*" and later "*harassing*" the staff member, compared to the staff member's description that Mr Weber:

*“...told me in a loud voice I need to do this I need to do that. You need to hurry up and do this, hurry up and do that...”*

*“...he then started in a loud voice just hurry up and do it. I yelled back because I had had enough of being talked to like that”*

[38] Mr Weber submits that the two statements are sufficiently different that Mitre 10 could not have reasonably found his behaviour towards the staff member was inappropriate. He maintains his view that he did not shout and questions why the other staff member was also not disciplined given her concession that she “*yelled back*” at him.

[39] I am not persuaded that the statements by the customer and staff member are so inconsistent that Mitre 10 was not able to reach the conclusion that it did. Different people frequently use different words to describe the same behaviour.

[40] The relevant investigation notes record that Mr Weber (a) advised the decision maker that he had later apologised to the staff member, (b) acknowledged he could have done better and that he was disappointed with himself, and (c) agreed the action would not happen again. Those statements seem incongruent with his complaint to the Authority that the allegations made against him in that matter were without substance and Mitre 10’s decision to issue him with a final written warning was unjustified.

[41] I am also unable to accept Mr Weber’s assertion that the decision maker, Mr Carrick, had unfairly predetermined the matter (based on his knowledge of the investigation into sexual harassment) when interviewing Mr Weber. There is insufficient evidence to support that claim.

***Was the final written warning procedurally fair?***

[42] Mitre 10’s ‘Policies and Procedures’ document sets out the process both it and an employee may expect during a ‘Disciplinary Procedure’ and includes the following:

*As part of the investigation:*

*The team member must be given notice of the specific allegations of misconduct and the **potential penalty** that may be applied if the allegation is upheld. (the emphasis is mine)*

...

[43] The letter inviting Mr Weber to a meeting to respond to the first customer complaint stated at the top of the letter, in bold, “Disciplinary Meeting Request”. The content of the letter detailed the substance of the allegation and stated:

*At this disciplinary meeting you will be given an opportunity to respond to the complaint in full and put forward your recollection of events. Depending on your response we will then make a decision as to what further action is required.*

[44] The letter inviting Mr Weber to the disciplinary meeting did not forewarn of the potential for disciplinary action if the allegation was upheld and the omission leaves Mitre 10 open to criticism that it did not follow its own policy.

[45] During the Authority’s investigation meeting I found Mr Weber to be forthright but unlikely to recognise that disciplinary action may be a consequence of a disciplinary meeting without the employer making it overtly clear.

[46] I accept that the practice of the Court (and the Authority) should not be to scrutinize an employer’s actions minutely and pedantically but to assess whether substantial procedural fairness was applied<sup>4</sup>. But even without the force of Mitre 10’s policy and in the absence of considerations as to Mr Weber’s personal style, I consider a fair and reasonable employer is obliged to advise an employee of the potential for disciplinary action if there is any prospect that it may take that action at the conclusion of an investigative process.

[47] Mitre 10’s failure to identify at the beginning of its investigation that a penalty may occur at the conclusion is likely to have contributed to Mr Weber’s unguarded and naïve responses to the allegations during that investigation. I find Mr Weber was unjustifiably disadvantaged by Mitre 10’s action in this way.

***Was Mitre 10 Mega able to fairly take into account the final written warning when deciding the outcome of Ms P’s complaint?***

[48] Having found that Mr Weber was unjustifiably disadvantaged by the final written warning I consider it unnecessary to make a determination as to whether Mr Weber was prevented from challenging it. My observation is that he is more likely to have advised Mr Carrick that he did not accept the warning on 26 September 2013 but I consider it unlikely on the evidence before me that Mitre 10 was put on notice that it needed to address and respond to the final written warning in a way that satisfies the

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<sup>4</sup> *Clarke v Affco NZ Ltd* [2011] NZEmpC 17

legal test to raise a personal grievance<sup>5</sup>. However nothing falls on whether Mr Weber raised a personal grievance at this time given that he did ultimately raise a grievance about the matter within 90 days of that action occurring.

[49] There is no real dispute that Mr Weber did not object to Mitre 10's repeated notification in the course of its investigation into Mrs P's complaint that the final written warning would form part of its decision making at the end of its inquiry. I accept that in these circumstances Mitre 10 may have been unaware that the warning was flawed but I am unable to conclude that the absence of a personal grievance (yet to be raised) allows Mitre 10 to rely on a warning that is procedurally defective in circumstances where a warning can place an employee at a heightened risk of dismissal.<sup>6</sup>

***Did Mitre 10 properly investigate the allegations made in Mrs P's complaint?***

[50] It is clear that the final written warning was a relevant consideration in Mitre 10's decision to dismiss Mr Weber. I was not provided with any information to indicate that Mitre 10 would have dismissed Mr Weber at the conclusion of the investigation into Mrs P's complaint without the existence of final written warning. Having found that the warning was unjustified and hence void, it must follow that the dismissal is also unjustified. But even apart from this factor, I conclude there was a failure in Mitre 10's investigation with respect to Mrs P.

[51] The investigation into Mr Weber's conduct was largely undertaken by Mr Brabyn, with Service Operations Manager, Stefan Guy assisting. Additional specialist in-house HR advice was available and provided throughout the investigation of Mrs P's complaint.

[52] Mr Weber alleges that the length of time between the event and Mrs P's submission of a written complaint (approximately 4 weeks) indicates a level of underhandedness either by her or by other employees of Mitre 10. I have no evidence to support a conspiracy against Mr Weber and have not taken that matter further. Nor do I accept the proposition that Mitre 10 needed to put Mr Weber's account of events

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<sup>5</sup> *Creedy v. Commissions of Police* [2006] 1 ERNZ 517; and *Turner v Talley's Group Ltd* [2013] NZEmpC 31

<sup>6</sup> *Alliance Freezing Co (Southland) Ltd v NZ Amalgamated Engineering IUOW* [1989] ERNZ Sel Cas 575 (CA)

to Mrs P to test the veracity of her complaint. I accept Mr Brabyn's evidence that she had remained consistent with her statements to Mitre 10.

[53] However there is merit to Mr Weber's concerns about Mitre 10's treatment of Ms Hood's statement. It is apparent from the notes taken during the second disciplinary meeting, at a time when Ms Hood's statement was now available, that Mr Weber was "*glad*" Ms Hood had witnessed his discussion with Mrs P. Mr Weber told the Authority that at that point he thought Mitre 10 was yet to interview Ms Hood and that he felt confident he would be exonerated.

[54] The evidence is that Mr Brabyn considered Ms Hood's statement during the meeting of 18 November. Having done so he advised Mr Weber that "*it neither adds nor subtracts from the situation and...I am going to set it to one side*".

[55] It emerged during the Authority's investigation that, prior to the meeting where Ms Hood's statement was tabled, Mr Guy had approached Ms Hood and confirmed with her that she had talked to Mrs P when she had returned to Mitre 10 to complain. His focus of inquiry was about Mrs P level of discomfort. Mr Guy agrees that Ms Hood's statement indicated she had observed Mrs P and Mr Weber interact but says when Ms Hood showed him where she had been standing he says he assumed that she had not been close enough to the pair. It appears on this basis Mr Guy decided not question Ms Hood further.

[56] Mitre 10 submits that Mr Weber did not object to the setting aside of Ms Hood's statement during the meeting. I accept that is the case but I am unable to conclude that it was made clear to Mr Weber that Mitre 10 was disregarding Ms Hood's statement altogether. Mitre 10 did not advise Mr Weber that it had already spoken to Ms Hood and had formed a view that no further inquiry from her was needed.

[57] Mr Brabyn's evidence is that over the course of the investigation into Mrs P's complaint he was particularly concerned by the disparity between Mrs P's version of events and Mr Weber's version but could find no reason to doubt Mrs P's account. As the decision maker Mr Brabyn portrayed his position as needing, in the absence of any other objective information, to decide on the balance of probability which of the two accounts he preferred.

[58] It remains unclear, when it became apparent that Ms Hood had witnessed the conversation between Mrs P and Mr Weber, why Mitre 10 did not seize upon the opportunity to obtain her perspective. Mr Guy conceded that he did not question Ms Hood at all about what she saw or heard. I accept that Ms Hood may not have been able to provide additional information to support either Mr Weber's or Mrs P's account but to discount the only available independent witness without first establishing that she had nothing to contribute was pre-emptive.

[59] I find Mitre 10s' decision not to follow up with Ms Hood in circumstances where there was no alternative means of establishing objectively what had occurred precludes it from asserting it conducted a procedurally fair investigation. I regard the defect in this aspect of its process was not minor. It resulted in Mr Weber being treated unfairly and it follows that his dismissal was unjustifiable.

### **Remedies**

[59] Mr Weber seeks reimbursement of an unspecified amount of wages, including the lost benefit of annual leave, compensation for humiliation, and costs.

[60] Section 123 of the Employment Relations Act provides that where the Authority (or the Court) determines that an employee has a personal grievance, remedies including reimbursement of wages, and compensation for loss of a benefit, as well as loss of dignity and injury to feelings are available. At s.128(2) of the Act, if the Authority determines that an employee has a personal grievance, and there has been remuneration lost because of the grievance, the Authority:

*...must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*

[61] It needs to be noted that s.128(2) is subject to s.124, and provides that, when considering the question of remedies, the Authority must consider the extent to which the actions of the employee contributed towards the situation which gave rise to the personal grievances and, if those actions so require, reduce the remedies that would have otherwise have been awarded.

### *Reimbursement for lost wages*

[62] No wages were lost as a consequence of the final written warning.

[63] Mr Weber has been in receipt of a job seeker's benefit since January 2014. In addition he has secured some casual and part-time work, albeit sporadically. He has been unable to obtain alternative full time employment.

[64] Mr Weber provided a comprehensive list of businesses he approached for work and I am satisfied that he has actively sought to mitigate his loss. Subject to my assessment as to contribution Mr Weber is entitled pursuant to s.128(2) and s.123(1)(c)(ii) to the sum equal to reimbursement of wages for 13 weeks plus 8% of that amount for loss of the expected benefit of annual leave over that period.

#### *Compensation*

[65] Mr Weber did not offer any evidence about the effect the final written warning had on him at the time he received it and I decline to award compensation in these circumstances.

[66] Mr Weber says that following his dismissal he lost his confidence and suffered depression. He says it is rumoured around Palmerston North that he was dismissed for making sexual advances towards customers which is untrue and his reputation has been maligned as a result. He speculates Mitre 10 is the source of his difficulty in finding new employment.

[67] As submitted for Mitre 10, there is no medical evidence to support Mr Weber's assertion that he is depressed in clinical terms and Mr Weber conceded he has not obtained a formal diagnosis. Nor was I provided with any collaborative evidence of disparaging rumours about why Mr Weber left his employment with Mitre 10.

[68] Nonetheless, I accept that he was affected by the sudden loss of his employment and felt humiliated at the prospect of telling family members of the event. Subject also to my assessment as to contribution I assess that an award of compensation of \$5,000 is appropriate.

#### *Contribution*

[69] I am required to assess what, if any, contribution Mr Weber may have made to the situation that led to his final written warning and to the situation that led to his dismissal.

[70] The evidence of Mr Brabyn is that professional customer service is paramount to Mitre 10 and is expected from its employees. The standards required are set out in Mr Weber's employment agreement and in Mitre 10's 'Vision, Purpose and Values' statement signed by Mr Weber in March 2013. Mitre 10 submits that Mr Weber's dismissal was a consequence of its concern that he had behaved inappropriately towards Mrs P against a backdrop of actions it had taken to have Mr Weber address and modify his behaviour. It says that the final written warning and the two letters setting out Mitre 10's expectation of reasonable behaviour had put Mr Weber on notice about his conduct.

[71] Mr Weber's advocate noted that the letter of expectation dated 15 October 2013 was furnished after the event in relation to Mrs P and I accept it should not be taken into account. I have already found that the final written warning was procedurally unfair. But I do not doubt Mitre 10's finding that Mr Weber behaved inappropriately towards Ms Nukunuku, and that he contributed to the situation that led to that personal grievance. However, I have made no orders for remedies associated with this claim and am therefore unable to reduce a remedy where none has been awarded.

[72] There is no dispute that Mr Weber asked Mrs P on two occasions for her address. It is evident from Mitre 10's investigation and the Authority's, that Mr Weber was either unwilling or unable to appreciate even the possibility that Mrs P may have been uncomfortable with his questioning despite her reaction of surprise to his first inquiry<sup>7</sup>, her demand to know why he wanted to know<sup>8</sup>, and her statement "*you shouldn't be asking me that*"<sup>9</sup>. Mr Weber accepts these facts yet resolutely denies it was presumptive of him to persist with a second request for her address. Mr Weber's failure to register his behaviour as unwelcome despite Mrs P's overt discouragement does not exempt him from a finding of a causal connection between his interaction with Mrs P and the basis for Mitre 10's decision to dismiss, and was blameworthy. In all the circumstances I consider Mr Weber substantially contributed to the situation which led to his dismissal. Remedies otherwise due should be reduced by a third accordingly.

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<sup>7</sup> Mr Weber's first Witness brief, para 48

<sup>8</sup> *ibid*

<sup>9</sup> *ibid*

[73] Having found that Mr Weber's actions contributed to the situation that gave rise to his dismissal I am unwilling to exercise my discretion to award reimbursement of wages beyond three months' wages.<sup>10</sup>

### **Summary of Orders**

[74] For all the reasons set out above, I find that:

- (a) Mr Weber was unjustifiably disadvantaged by the final written warning. There was no loss of wages as a result and insufficient evidence was provided to support a remedy for compensation separate to his dismissal. I decline to make an award for this aspect of his claim.
- (b) Pursuant to sections 123(1)(b) and 128(2) of the Act Mitre 10 Retail Ltd t/a Mitre 10 Mega is ordered to pay Mr Weber the sum of \$5,541.12<sup>11</sup> (gross) as reimbursement of lost wages.
- (c) Pursuant to s123(1)(c)(i) of the Act Mitre 10 Retail Ltd t/a Mitre 10 Mega is ordered to pay Mr Weber the \$3,333.33<sup>12</sup> as compensation for humiliation, loss of dignity and injury to feelings of Mr Weber.

### **Costs**

[75] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority

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<sup>10</sup> *Davis Trading Company Limited v Lewis* [1993] 2 ERNZ 272 at 288

<sup>11</sup> The sum equal to 3 months' wages and holiday pay minus one third.

<sup>12</sup> \$5,000 minus a third = \$3,333.335