

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 404
3023511

BETWEEN

BEVAN MUSSON

Applicant

AND

RIVIERA HARDWARE

HOLDINGS LIMITED T/A

MITRE 10 MEGA

WARKWORTH

Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Peter Grove, agent for the Respondent

Investigation Meeting: 25 September 2018

Determination: 19 December 2018

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Bevan Musson by Riviera Hardware Holdings Limited was unjustified in all the circumstances at the time.**
- B. In settlement of his personal grievance for unjustified dismissal, and by no later than 1 February 2019, RHHL must pay Mr Musson:**
- (i) \$5,120 for lost wages; and**
 - (ii) in a sum reduced by one quarter due to conduct by Mr Musson that contributed to the situation giving rise to his grievance, \$7,500 as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. There is no order for costs. RHHL must reimburse Mr Musson the \$71.56 fee he paid to lodge his application in the Authority.**

Employment Relationship Problem

[1] Riviera Hardware Holdings Limited dismissed Bevan Musson on 27 November 2017 for serious misconduct. Mr Musson had worked for a year as a sales team member in the Mitre 10 Mega store operated by RHHL in Warkworth.

[2] Mr Musson was said to have committed serious misconduct after a manager overheard him making what were described as threats of violence against “another team member” while talking to other employees at the store on 30 September 2017.

[3] After RHHL issued a letter to Mr Musson on 20 October 2017 advising him of a disciplinary inquiry about that allegation, a supervisor who was said to have heard what Mr Musson said on 30 September reported an instance of what he said was Mr Musson using abusive language on 29 September. This led to a second allegation that Mr Musson had used derogatory terms about store managers. RHHL’s investigation concluded the second allegation was not substantiated.

[4] What remained at issue was whether RHHL carried out a full and fair investigation of the first allegation. Mr Musson said the company’s conclusions that he committed serious misconduct and should be dismissed for it were unjustified.

[5] RHHL said comments Mr Musson was overheard making on 30 September 2017 were about another employee who had previously worked at its Warkworth store but had since moved to another store managed by the company. Mr Musson was reported to have said he would punch and knock out that other employee if he came back to work at the store. Another employee reported hearing Mr Musson say that other employee needed a “hiding” and he would be the one to sort him out.

[6] RHHL said those were threats of violence, made loudly within earshot of others, and Mr Musson was “within geographical reach” of carrying out such threats. It said the company was obliged to minimise the risk of violence to members of staff and, after a thorough investigation, it had fairly made its decision to dismiss Mr Musson “given the viciousness and gravity of the threats of violence made at the time”. It also referred to “investigating files notes” after Mr Musson’s dismissal and finding a complaint about another, earlier instance of Mr Musson threatening a current staff member.

The Authority's investigation

[7] Written witness statements were lodged by Mr Musson, First Union organiser Ben Gibson, Mr Musson's former department manager Ray Archer, RHHL human resources advisor Rachel Braham and RHHL's trade general manager Grant McLeod.

[8] Ms Braham had assisted firstly Mr Archer and then Mr McLeod in conducting the disciplinary process. Mr McLeod was the company representative who made the decision to dismiss Mr Musson. Mr McLeod was appointed after the company accepted submissions from Mr Gibson that neither Mr Archer nor another manager could appropriately carry out that role due to their involvement in various discussions that formed part of the information being considered in RHHL's disciplinary inquiry as it unfolded.

[9] Each witness attended the Authority investigation meeting and, under oath or affirmation, answered questions about their statements. Mr Musson and RHHL's human resources manager Peter Grove each had an opportunity to ask additional questions and to provide oral closing submissions on the issues for determination.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[11] Several former or current employees of RHHL are referred to in this determination by their initials only: JP (who is the employee about whom Mr Musson was said to have made threats of violence), RH, BC, JS, CM, AM, and SA. No order prohibiting publication of their names was made but neither was it necessary to use their whole names in this determination. Those individuals did not attend the Authority's investigation meeting or have an opportunity to comment on any part of the evidence that might reflect negatively on them. The parties, of course, know who those people are from the initials used and the information about them referred to in the Authority's investigation.

The issues

[12] The issues requiring investigation and determination were:

- (i) Were the concerns of the company about the conduct of Mr Musson sufficiently investigated?
- (ii) Were the decisions that Mr Musson's behaviour was serious misconduct and he should be dismissed for it ones that a fair and reasonable employer could have come to in all the circumstances at the time?
- (iii) If the actions of the company are held not to meet the test of justification, what remedies should be awarded, considering:
 - (a) Lost wages; and
 - (b) Compensation under s123(1)(c)(i) of the Act?
- (iv) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Musson that contributed to the situation giving rise to his grievance?
- (v) Should either party contribute to the costs of representation of the other party?

The test of justification

[13] As Mr Musson had raised a personal grievance about his dismissal and how it was decided, Riviera bore the statutory burden of establishing what it did, and how it did so, was what a fair and reasonable employer could have done in all the circumstances at the time.¹

[14] In assessing whether that test of justification has been met, the Authority does not substitute its own view of whether the employer's actions were too harsh. Rather it considers whether the particular employer's actions met the objective standard of being within the range of responses open to a fair and reasonable employer.

[15] Fairness requires an employer to raise its concerns with the employee, to give that employee a reasonable opportunity to respond and then to genuinely consider any explanation given. If any defects in that process are more than minor and result in the employee being treated unfairly, the decisions made in it are unjustified.

The disciplinary investigation

[16] On 20 October 2017, in a letter prepared for him by Ms Braham, Mr Archer advised Mr Musson of a disciplinary inquiry. Mr Archer had received a verbal

¹ Employment Relations Act 2000, s 103A.

complaint from CM, the store's retail manager, about comments she overheard Mr Musson making to what she described as "a group of staff members at the checkout". Ms Braham had then interviewed CM on 11 October and prepared a statement recording her questions and CM's answers. She said she was in earshot of what he was saying for about 20 seconds as she passed by. CM said Mr Musson was "ranting on" about JP and she heard him say "that if he [JP] came back to work here he would f***ing punch his face in, knock his f***ing lights out". CM said staff members RH, AM and BC also heard what Mr Musson said.

[17] The day after CM was interviewed AM sent an email to another human resources advisor saying he had heard Mr Musson say on 30 September that "the thing [JP] needed was a f***king hiding and he would be the one to sort [JP] out".

[18] On 23 October, three days after advising Mr Musson of a disciplinary investigation, Mr Archer received a report from BC, a supervisor who was one of the three people CM reported as having heard Mr Musson's 30 September comments. BC said he heard Mr Musson make abusive comments on 29 September about JS the store manager. He said this occurred after JS, the store manager, caught Mr Musson breaking a work rule about not having his mobile phone on the store floor. BC said Mr Musson later told him JS was "a f**ken stupid bitch", referred to Mr Archer and a supervisor as "the laziest c***s he has ever met" and described RHHL's managing director as a "f**ken idiot". BC's report did not refer to the events of 30 September.

[19] Mr Musson was sent copies of the statements from CM, AM and BC. Some delay followed while he made arrangements for a union organiser to accompany him to the disciplinary meeting. Meanwhile Mr Archer sent a further letter, dated 8 November and again prepared by Ms Braham, which expanded the allegations of serious misconduct. These included both his comments about JP on 30 September and the derogatory words he was said to have used on 29 September about JS, Mr Archer and RHHL's managing director.

[20] Two initial attempts to conduct a disciplinary meeting were abandoned. The first adjourned after Mr Gibson expressed concerns that it was inappropriate for Mr Archer to conduct the company's inquiry given the allegations now included comments Mr Musson was said to have made about Mr Archer. A second attempt

also adjourned because the company wanted JS to be its decision maker. Mr Gibson objected that JS was not a suitably impartial alternative because she was the subject of some of inappropriate comments Mr Musson was alleged to have made to BC.

[21] RHHL then appointed Mr McLeod as its decision maker for the disciplinary inquiry. Mr McLeod's role was not based at the Warkworth store but he regularly visited it for a monthly trade meeting. He knew Mr Musson only as a staff member he would greet from time to time on the floor during those store visits.

[22] At a disciplinary meeting held on 23 November Mr McLeod asked Mr Musson to explain what happened on 30 September. According to notes Ms Braham made Mr Musson said the background was "a relatively big incident between me and [JP] in the past that never got sorted out". Mr Gibson explained that he understood that there had been "beef" between Mr Musson and JP that was not dealt with properly. Mr Musson said that JP "used to verbally abuse everyone" and he was surprised CM was upset by his comments because JP no longer worked at the store. Mr McLeod did not ask Mr Musson anything more about his background with JP. He said the meeting was to talk about the particular incident, "not something that happened in the past".

[23] Mr Musson said he had only talked to RH about JP because she asked who he was. RH had recently joined the staff at the Warkworth store and that was after JP had transferred to another store. Although not referred to in any of RHHL's meeting notes or any of the witness statements provided for the Authority investigation, RH's question to Mr Musson arose because JP had visited the store that morning. According to Mr Musson's oral evidence he understood JP was not working that day but was on leave and had called into the store on a social visit to other staff he used to work with there.

[24] Mr Musson said he considered what he then said to RH was "a private conversation" but accepted other workers were within hearing distance. However he told Mr McLeod that "[RH] obviously didn't think it was that bad because she didn't give a statement". Neither Mr McLeod nor Ms Braham told Mr Musson that RH had refused to be interviewed or to provide a witness statement about her discussion with him that day. According to Ms Braham's oral evidence in the Authority investigation RH had told her, when asked, that she "did not want to comment and did not want to be involved".

[25] Mr Musson also denied saying JP “needed ... a hiding”. He said he could not recall exactly what he had said but “what I think I said was that someone should give him a hiding, not that I should be one to give him one.” He also denied saying he would punch JP’s face or “knock his ... lights out”.

[26] The third element of Mr Musson’s explanation was that Mr Archer had told team members they could “vent and swear”. He did not accept his comments about JP would be upsetting to other staff. He also noted that, although he was accused of serious misconduct and of bringing the company into disrepute, the company had meanwhile allowed him to remain working in the same department with the same staff in the same store for almost two months after telling him of the disciplinary inquiry.

[27] The meeting also canvassed Mr Musson’s responses to the second allegation arising from BC’s report of comments Mr Musson was said to have made about JS, RA and others on 29 September. Further details of that discussion have not been set out in this determination as Mr McLeod subsequently dismissed those allegations as lacking corroboration.

[28] Mr McLeod adjourned the meeting to 27 November when he then met again with Mr Musson and Mr Gibson to deliver his decision. In the intervening period Mr McLeod made no further inquiries of Mr Archer, BC, RH, CM or AM to test or check any of the explanations Mr Musson had given.

[29] At the reconvened disciplinary meeting Mr McLeod told Mr Musson the second allegation was not being pursued but said he intended dismissing him for threats of violence against another employee, made while talking to a group of team members on 30 September.

[30] Mr Gibson asked Mr McLeod to consider imposing a final written warning rather than dismissal. In doing so he noted Mr Musson had been allowed to keep working during the course of the disciplinary investigation which suggested there was still a level of trust and confidence in him. He also asked Mr McLeod to consider the history between Mr Musson and JP where instances of verbal abuse had been dealt with differently. After considering those requests Mr McLeod confirmed his decision to dismiss Mr Musson. He said he did not consider that “some issues which may or may not have happened in the past” made it acceptable to threaten a team member as

“two wrongs don’t make a right”. At the end of the meeting Mr Musson was asked to return his keys and dismissed.

Failure to conduct a full and fair investigation

[31] Against that background the evidence of all five witnesses in the Authority investigation revealed failings of RHHL to conduct a sufficiently full and fair investigation of its concerns about Mr Musson before reaching its decision that he had committed serious misconduct. The three key failures were either the decisions or oversights made in not interviewing RH, BC and Mr Archer, who were each likely to have relevant information that needed to be gathered and assessed as part of a fair process.

[32] As explained further below in this determination those three failures were important because the statutory test of justification looks at “all the circumstances at the time the dismissal or action occurred”. An employer is not expected to endlessly or exhaustively inquire into every possibility but the failures in not properly interviewing the three identified employees, allowing Mr Musson to comment on whatever they may have said in such interviews and checking with those employees as part of assessing his explanations about what happened, meant RHHL had not done what a fair and reasonable employer could have done. Rather RHHL, when called upon to do so through the Authority investigation, could not show that it had not closed its mind to “all the circumstances” of what Mr Musson may have done and said before it reached its conclusion that he committed serious misconduct and that the most serious consequence of dismissal should be imposed for it.

No interview of RH

[33] Ms Braham decided not to persist with attempts to get information from RH about what happened in her discussion with Mr Musson on 30 September. None of the reasons Ms Braham gave for that failure to gather information from a key witness in a disciplinary investigation were satisfactory.

[34] Firstly, it was unsatisfactory to simply accept RH saying she did not want to comment or be involved. RH was not being asked to take part in some casual street survey about a consumer product or her opinions. RHHL was conducting a disciplinary inquiry about alleged serious misconduct with potentially serious

consequences for an employee, that is dismissal. The company's actions were to be assessed against the exacting standards of s 103A(3)(a) of the Act that require an employer to sufficiently investigate any allegations against an employee. RH in turn was RHHL's employee with her own good faith obligations to be responsive and communicative in the employee relationship.²

[35] Sometimes those obligations may require an employee to engage in conversations with representatives of her or his employer about directly work-related topics that she or he might find uncomfortable and wish they were not part of, such as questions about what another employee may or may not have said or done. In a matter as serious as a disciplinary investigation, where another employee faces the potentially life-changing and damaging prospect of losing their job, an employee's preference to "not be involved" does not trump the right of an employer to seek honest and frank information from that reluctant employee, the employer's obligation to conduct a full and fair inquiry or the right of an employee under disciplinary investigation to expect their employer will fairly gather all relevant information from other employees who may have it.

[36] Secondly, it was unsatisfactory to suggest, as Ms Braham did, that having two statements from two other workers that corroborated one another was sufficient. Such an approach risks an employer stopping simply at the point where there are two accusers and not seeking out what might be positive or different information from other people. If the matter was serious enough for RHHL to be conducting its inquiry about Mr Musson's conduct, it must have been of sufficient gravity for the company to require RH to tell its investigators what she knew, whether that ultimately proved favourable or unfavourable to Mr Musson. She was the person he was talking to on 30 September and whatever comments he made about JP were triggered by questions she asked. She could reasonably be expected to have some useful recall of what was said that day.

[37] Thirdly, it was unsatisfactory for Ms Braham to suggest she could not press RH any further out of a "duty of care" to her. This appeared to be based on the notion that RH might face "repercussions" from Mr Musson or others if she provided an account of what she said happened or had heard him say. An employer should take

² Employment Relations Act 2000, s 4(1A)(b).

steps to assure anyone providing such information that she or he will be protected from any retaliation from a disgruntled manager or worker. However, even if such an assurance was necessary in this case, RH was not reasonably or fairly excused from fulfilling her good faith duty to participate appropriately in providing whatever information she may have been able to provide that was relevant to RHHL's inquiry. In this particular case Mr Musson tellingly made the point that he had worked for many weeks alongside three other employees (CM, AM and BC) after seeing negative written statements they have provided about him. There was no evidence to suggest they had felt fearful or faced any risk of harm from him.

[38] When called upon to do so in the Authority investigation, RHHL could not show it had done what a fair and reasonable employer could have done in all the circumstances. It could not effectively rebut Mr Musson's assertions, in his oral evidence, to the effect that what he said to RH about JP was not as angry and threatening as reported by others and that she had been "egging him on" to describe how he would defend himself against JP. He said her questions arose from him telling her how JP had physically and verbally abused him when JP worked in the Warkworth store.

No interview of BC

[39] BC was identified by CM as one of three other people who heard what Mr Musson said on 30 September. He was also the supervisor who made a remarkably belated statement on 23 October about what he said he had heard Mr Musson say on 29 September. He appeared to have done so only once he became aware of the disciplinary inquiry launched on 20 October.

[40] Despite being a supposed witness to the events of both 29 and 30 September, no formal interview of BC was carried out in the way Ms Braham had done with CM, producing a written statement to be shown to Mr Musson. Instead, according to Ms Braham, another colleague of hers spoke to BC who then reported that BC "did not recall" the 30 September incident. This information does not appear to have been provided to Mr Musson as part of RHHL's inquiry. It was clearly relevant given that, if Mr Musson's comments were as loud and strongly worded as the reports of CM and AM suggested, it was unlikely BC would not recall that incident.

[41] In his report of 23 October BC wrote that Mr Musson's conduct on 29 September was "of a serious enough nature to make a formal complaint as dispatch supervisor". No explanation appeared to have been sought or provided from BC as to why, in his position of responsibility, he would have 'sat' on such a complaint for three weeks if what Mr Musson said was as "vehemently aggressive" and "vicious" as he described.

[42] Mr McLeod ultimately discounted BC's allegations about 29 September due to a lack of corroboration but appeared not to give any weight to the possibility that BC's reported lack of recall about 30 September cast any doubt on the accounts given by CM and AM. Instead he took the view that it was sufficient that CM and AM's account appeared to corroborate one another.

No interview of Mr Archer

[43] The failure to formally interview Mr Archer as part of the disciplinary inquiry was another instance of RHHL not doing enough to look into all the relevant circumstances. The need to do so arose from Mr Musson's account, in the 23 November disciplinary meeting, of the context for whatever he said to RH on 30 September.

[44] While not excusing Mr Musson's conduct in what he said about JP on 30 September, if it were as alleged, it was beyond the range of reasonable responses for a fair employer not to do more, at the time, to consider the effect of prior interactions with JP. This included finding out what the relevant manager, Mr Archer, may have known or been able to cast light on at the time of its inquiry. At the least, properly investigated, the context of prior conflict may have been relevant to the severity of any disciplinary consequence imposed on Mr Musson.

[45] Information from Mr Archer was relevant about two points arising from explanations Mr Musson gave at the 23 November meeting.

[46] Firstly, Mr Musson alleged that Mr Archer had encouraged team members to "vent" and this could include swearing to or about them.

[47] Secondly, Mr Musson tried to explain his attitude to JP as arising from an earlier incident but Mr McLeod did not want to hear from him about "something that

happened in the past”. Mr Musson, in his evidence to the Authority investigation, alleged this included instances where JP had sworn at him, poked him in the eye, punched him and kicked him in the back of the knee on various occasions at the store. He also said Mr Archer had held a meeting with him and JP specifically to address and resolve conflict between them. Mr Musson said he was told JP would get a written warning but he was unhappy because he understood that had not happened.

[48] Mr McLeod was adamant that he had not talked to Mr Archer through the entire disciplinary investigation he conducted. He said he had asked if employee files showed any “official complaints” were made about JP and was told they did not.

[49] Ms Braham’s witness statement said Mr Musson was told in the 23 November meeting that there was no record on his or JP’s files about past issues between them. Her own notes of the meeting recorded no such explanation being given to Mr Musson. She also said she thought Mr Grove, the company’s human resources manager, had asked Mr Archer if any written warning was issued to JP. She said no warning or notes of any meetings with Mr Musson and JP were found but, as precise as she could be, “there was a general acceptance that there been previous issues raised”.

[50] However RHHL was not able to establish that it had made adequate inquiries about those points at the time of conducting its disciplinary inquiry or that, having done so, Mr Musson was then given an opportunity to comment on whatever was revealed. Rather Mr McLeod had shut down any explanations relating to JP’s alleged past conduct on the basis that he only wanted to talk about the 30 September incident and “not something that happened in the past”. RHHL repeated that stance in its statement in reply to Mr Musson’s claim in the Authority by saying that its inquiry was about a threat of violence and “not what was or wasn’t on the historical record”.

[51] Mr Archer’s evidence at the Authority investigation confirmed that he had held a meeting with Mr Musson and JP arising from a complaint from Mr Musson. He said, as best he could recall, there was “some good robust conversation” with both men eventually shaking hands and agreeing they had “cleared the air”. He could not recall any discussion of a warning being issued to JP. He did confirm however that no record was made or kept of that meeting.

[52] He also confirmed that he had encouraged his team members “to get everything off their chest if there was a grievance or issue”. He accepted he had told Mr Musson and others it was ok to “vent” and swearing in the work environment was tolerated, provided it could not be overheard by customers. However he firmly rejected the notion that, as Mr Musson contended, Mr Archer had said verbal abuse of other team members was permitted as part of such venting.

Flawed decision about serious misconduct and dismissal

[53] Given the shortcomings in the investigation conducted by Mr McLeod, RHHL could not safely reach its conclusion of serious misconduct by Mr Musson. The defects in RHHL’s process were more than minor. Mr Musson was treated unfairly because relevant information was not gathered, checked or provided to him for further comment or explanation. As a result, RHHL’s actions were unjustified, that is they did not meet the statutory test of what a fair and reasonable employer could have done in all the circumstances at the time.

[54] In turn its decision to dismiss him for serious misconduct was also faulty. Properly investigated, the range of responses reasonably open to a fair employer could not have excluded the prospect of other outcomes, including a warning rather than dismissal. For all the reasons given, Mr Musson was unjustifiably dismissed.

Remedies

Lost wages

[55] Mr Musson sought an order for lost wages from the date of his dismissal until he started a new job. He also sought an order for the difference between his pay with RHHL and lower rates he earned in the two jobs he held from 31 December 2017 and up to the date of the Authority investigation meeting in September 2018.

[56] The Act allows for an order reimbursing remuneration for the lesser amount of what the employee lost or three months’ ordinary time remuneration. The Authority also has a statutory discretion to order an employer to pay lost reimbursement for a longer period.³

³ Employment Relations Act 2000, s 128(2) and (3).

[57] The relatively short period between Mr Musson's dismissal and finding a new job showed he had made reasonable efforts to mitigate his loss of wages as soon as possible. An award for lost remuneration over a six month period was appropriate. This was consistent with the general range of awards and also allowed for the prospect he could have further mitigated some of the differential loss by seeking a better paying job after that period. It also allows for the counterfactual analysis that, had RHHL conducted a fair and full inquiry, there was some prospect he may have been dismissed anyway. It also allows for the contingencies of life that, given evidence he gave about dissatisfaction with the working environment at the store, Mr Musson may have left that job anyway.⁴

[58] For the five weeks Mr Musson was unemployed between 27 November and 31 December 2017, his ordinary pay from RHHL (at the rate of \$18.50 for the 40 hour minimum per week his employment agreement provided) would have been \$3,700.

[59] For the remaining 21 weeks of the six month period of lost remuneration \$220 is allowed for the first week. This covered a \$2.75 hourly difference in Mr Musson's first job after his dismissal. The remaining 20 weeks allow for a \$1.50 hourly deficit in the next job he had from early January 2018. Again taking his ordinary hours as 40 a week, the total is \$1200.

[60] The resulting award for lost wages, combining those three components, totals \$5,120 gross.

Compensation for humiliation, loss of dignity and injury to feelings

[61] Mr Musson sought an order for \$60,000 compensation for emotional stress, financial hurt and humiliation caused by his dismissal and how it happened. It was an amount well beyond what his evidence supported and well beyond the range generally awarded in cases of this type.

[62] In the week before he was advised of a disciplinary inquiry Mr Musson took a week's sick leave recommended by his doctor. His doctor's note recorded Mr Musson had reported experiencing nose bleeds and headaches and feeling tired and "stressed at work". He had described himself as "losing his temper all the time". He

⁴ *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 [73] and [81] (CA).

was assessed as experiencing mild depression. Those notes also referred to Mr Musson as having lost his driving licence after a DIC charge and that his “drinking [was] now under control”. This evidence is not recorded to minimise Mr Musson’s sense of upset over losing his job but to acknowledge other factors may have contributed to or caused the distress he experienced around that time.

[63] Mr Musson described a general dissatisfaction with his workplace prior to the disciplinary inquiry. He felt it was poorly organised and too much was expected of him. He was annoyed by what he saw as the poor attitude and minimal effort of younger staff who he described as “kids” and “muppets”.

[64] He felt humiliated by his dismissal. He said others in the relatively small town soon learned of it. He was upset by rumours or speculation he heard that wrongly suggested his dismissal was connected with drug use or abusing a customer. There was no reliable evidence RHHL was responsible for any such rumours.

[65] Not all of Mr Musson’s upset could be attributed to RHHL’s actions in dismissing him, or how it had gone about deciding to do so. Allowing only for what was caused by those actions, an award of \$10,000 was an appropriate amount to compensate him for the humiliation, loss of dignity and injury to his feelings.

Reduction of remedies for behaviour contributing to the situation

[66] Having awarded remedies s 124 of the Act required an assessment of whether those amounts should be reduced due to actions of Mr Musson that contributed to the situation giving rise to his grievance. RHHL also sought to have an assessment of any such blameworthy conduct to consider what it said was an instance of another earlier complaint about Mr Musson’s conduct that came to light after his dismissal.

[67] The earlier instance was said to have been discovered on Mr Musson’s personnel file after he was dismissed. It comprised a complaint said to have been written by SA, another employee, about an incident on 21 August. SA said Mr Musson asked him if Mr Archer had spoken to him about “respect and immaturity” at work. He said Mr Musson then swore at him and threatened him that “someone will kick your f**king head in”.

[68] Two reasons weighed against giving this alleged incident any weight in an assessment of contributory conduct. Firstly, according to Ms Braham's evidence, Mr Musson's file had been checked as part of the disciplinary inquiry. If that was so, it was unlikely RHHL would not have identified that complaint at that time and could not have properly investigated it as part of that process, particularly as, if corroborated, it would have been a relevant prior example of Mr Musson making a violent threat. Secondly, Mr Musson was given no opportunity to respond to that complaint at the time it was made. Instead, it seems that it was kept on company records without telling him about it. At the time of the Authority investigation meeting, having since learnt of the complaint, Mr Musson had an explanation of events that differed from that of SA. Neither the allegation nor his rebuttal could be assessed with sufficient certainty.

[69] There were, however, elements of Mr Musson's conduct that did contribute in a blameworthy way to the situation giving rise to his grievance.

[70] Firstly, he accepted that his conversation at work on 30 September occurred in work time and in an area of the store where customers could have overheard it. He ran the risk of being overheard and, on his own account, misunderstood. It was not the right time, the right place or the right way to express whatever concerns he had.

[71] Secondly, if he had genuine concerns about JP coming back to the workplace, even for social visits, he could have raised those through processes provided in store policy, either with his direct manager or a human resources advisor. Instead he was overheard using intemperate language advocating the use of violence (either by him or someone else). Mr Archer's evidence suggested he and other managers had taken a tolerant or realistic attitude to the casual use of swearing in conversations between staff, as long as it was confined to areas where customers would not overhear it. However Mr Musson accepted, in his oral evidence, that he had referred to "someone" giving JP a hiding. His own suggestion of the use of violence to resolve whatever problem he had with JP had contributed to the situation giving rise to his grievance.

[72] A reduction of the remedy awarded as distress compensation was appropriate to mark the extent to which Mr Musson had contributed to his own woes. A reduction of one quarter has been applied. It does not apply to the award for lost wages.

Costs and expenses

[73] Mr Musson represented himself in pursuing his grievance in the Authority. Accordingly there is no order for costs. RHHL must however reimburse him the sum of \$71.56 for the fee paid to lodge his application in the Authority.

Robin Arthur
Member of the Employment Relations Authority