

**Note: This determination
includes an order prohibiting
publication of some evidence**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 321
3036251

BETWEEN	HAYDEN MUNRO Applicant
AND	AV WORLD (2016) LIMITED First Respondent
AND	PAUL HALLIWELL Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Claire Mansell, counsel for the Applicant Paul Wicks QC, counsel for the Respondent
Investigation Meeting:	7 and 8 February 2019
Written submissions:	15 February and 1 March 2019 from the Applicant and 22 February 2019 from the Respondent
Determination:	31 May 2019

DETERMINATION OF THE AUTHORITY

- A. The employment of Hayden Munro by AV World (2016) Limited (AVW) did not end by constructive dismissal. Actions of AVW did unjustifiably disadvantage Mr Munro before his employment ended.**
- B. In settlement of Mr Munro's personal grievance for those unjustified actions, and by no later than 28 days from the date of this determination, AVW must pay him \$14,000 as compensation for humiliation, loss of dignity and injury to his feelings.**

C. The claim for a penalty against Mr Halliwell for aiding and abetting breaches of Mr Munro's terms of employment is declined.

D. AVW's counterclaim for damages is declined.

E. Costs are reserved, with a timetable set for memoranda to be lodged if an Authority determination of costs is needed.

Employment Relationship Problem

[1] AV World (2016) Limited (AVW) employed Hayden Munro as assistant manager of its retail store in Auckland on 10 September 2016. Mr Munro resigned on 2 July 2018. In an application to the Authority Mr Munro said his resignation was caused by unjustified actions by AVW's director Paul Halliwell so was really a constructive dismissal. He said those actions included sexual harassment, bullying and threats and not allowing him to get advice about an employment agreement he was asked to sign. Mr Munro sought remedies for lost wages and distress he said resulted from how his employment at AVW ended. He also sought a penalty against Mr Halliwell for aiding and abetting breaches of his employment agreement.

[2] AVW and Mr Halliwell denied Mr Munro's allegations. In reply the company also alleged Mr Munro had wrongfully got or kept money for some electronic goods. It sought orders against him for what was said to be the value of those goods.

Order prohibiting publication of some names and evidence

[3] An order was made at the outset of the investigation meeting prohibiting publication of the names of AVW customers and one other person referred to in the evidence provided for the Authority investigation. This included the names of two customers involved in altercations with Mr Halliwell at AVW's store. In this determination a customer involved in an argument in the store in September 2017 is referred to as Mr A. Another customer involved in an incident in the store in December 2017 is referred to as Mr B.

The Authority's investigation

[4] Mr Munro, Mr Halliwell and six other witnesses lodged witness statements for the Authority investigation. Although no order prohibiting publication of the names of those six other witnesses has been made, it was not necessary to include their full names in this determination. Instead initials are used. They were:

- Ms LM, the wife of Mr Munro;
- Mr MH, a long time friend of Mr Munro, who had worked with him both at a previous workplace and at AVW, and who had also resigned from employment there and raised a personal grievance;
- Ms SC, AVW's office manager and ex-wife of Mr Halliwell, with whom she had two children; and
- Three AVW employees: Mr WM, Mr AV and Mr OY.

[5] At the investigation meeting each witness, under oath or affirmation, gave further oral evidence by answering questions from me and the parties' representatives. The representatives also later provided written closing submissions on the issues for determination.

[6] 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.

The issues

[7] The issues requiring resolution were:

- (i) Was Mr Munro subjected to unjustified disadvantages by:
 - (a) Being subjected to sexual harassment in his employment; and/or
 - (b) Being subjected to bullying and threats; and/or
 - (c) Not being allowed to seek independent legal advice in respect of a variation to his employment agreement?
- (ii) Had AVW breached duties to Mr Munro and, if so, were those breaches sufficiently serious so that it was reasonably foreseeable he would resign, making the end of his employment really a constructive dismissal?

- (iii) If AVW's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded to Mr Munro, considering:
 - (a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (iv) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Munro that contributed to the situation that gave rise to his grievance?
- (v) Did Mr Halliwell aid and abet breaches of Mr Munro's terms of employment and, if so, should he be ordered to pay a penalty (under s 134(2)) of the Act)?
- (vi) Was Mr M liable to pay AVW an award of damages in respect of taking and selling (for his own benefit) six X-box video gaming consoles and/or wrongfully getting and keeping a \$750 'cash back' payment through a television promotion?
- (vii) Should either party contribute to the costs of representation of the other party?

The standard of proof and assessing the credibility of evidence given

[8] The Authority resolves such issues on the balance of probability, based on an assessment of the evidence as to what was more likely than not to have happened. This assessment considers what the witnesses said about various interactions and any documentary evidence that may shed light on relevant events and what the witnesses recall about them.

[9] Where other witnesses or documents do not compellingly corroborate an alleged point of fact, the evidence may amount to no more than a "he said, he said" contest. If the party with the onus to prove a particular allegation has not done so to the necessary probability, no finding can be reliably made and their case on that point will fail.

[10] In this case those documents included not only formal correspondence once a dispute developed between Mr Munro and AVW but also earlier text messages he and Mr Halliwell exchanged during the employment relationship and transcripts of some recordings Mr Munro made, of his conversations with SC and WM. All that material

has proved important for findings of fact on some important points that differ from how both Mr Munro and Mr Halliwell later came to describe what had happened.

[11] As noted in AVW's closing submissions, the credibility and reliability of Mr Munro's evidence was undermined by some of that material. However, for reasons touched on later in this determination, there was also reason to doubt the reliability of Mr Halliwell's account in support of his own allegations about certain things Mr Munro had or had not done.

[12] In respect of Mr Munro's personal grievance application, AVW's actions had to be assessed against the statutory test of justification. This concerned whether what Mr Halliwell had done (as director of AVW and Mr Munro's manager), and how he had done that, was what a fair and reasonable employer could have done in all the circumstances at the time.¹

[13] The phrase "in all the circumstances" requires consideration of the context of the particular workplace and the background of the interactions between Mr Halliwell and Mr Munro. For example, what may have been acceptable use of language in one employment relationship or workplace may fall below the standard reasonably tolerated in another.

[14] Essentially this case arose from tensions that developed between Mr Munro and Mr Halliwell over Mr Munro's pay and his views about how Mr Halliwell ran the business. While both men had often got on well, those tensions had resulted in two significant arguments between them in the store in 2018 – one on 27 March and another on 19 May. The subsequent dispute about the employment relationship escalated into a range of allegations by both parties that, viewed objectively, sought to damage the reputation of the other.

[15] From Mr Munro this approach was evident in one discussion he had, and secretly recorded, with Mr WM. Mr Munro referred to the collateral effect of his case on AVW staff and Mr Halliwell's family and said: "That's the unfortunate side of it but hey, if he f**king wants to do the dance then I'm ready to dance". A similar approach was evident in Mr Halliwell's allegations about Mr Munro not having his permission to sell X-box consoles owned by AVW.

¹ Employment Relations Act 2000, s 103A.

The harassment allegations

[16] Mr Munro claimed he was subject to five instances of unwelcome or offensive behaviour by Mr Halliwell that amounted to a form of sexual harassment defined in the Act in this way:²

- (i) the use of language (whether written or spoken) of a sexual nature; or
- (ii) the use of visual material of a sexual nature; or
- (iii) physical behaviour of a sexual nature,—
directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.

[17] Three questions arise in determining whether the alleged behaviour could be found to be sexual harassment. Firstly, was Mr Munro subjected directly or indirectly to language (written or spoken), visual material or physical behaviour of a sexual nature? This factual question is answered on an objective test of what would be apparent to a reasonable person. The behaviour may be found to be of a sexual nature even if that were not the intention of the alleged harasser.³ Whether behaviour or material is "of a sexual nature" may be influenced by the context in which the language is used or the material displayed.

[18] Secondly, if Mr Munro was subjected to language, material or behaviour of a sexual nature, did he find that behaviour unwelcome or offensive? This is a question about his subjective state of mind, not what someone else might feel about it or whether the person complained against knew it was unwelcome or offensive.

[19] Thirdly, did the nature or repetition of the behaviour have a detrimental effect on Mr Munro's employment, job performance or job satisfaction? This question considers both Mr Munro's subjective, reported experience and what would objectively be apparent to others as reasonably resulting from the behaviour complained about.

[20] Those three questions, to the extent applicable, have been considered in respect of the following five instances of alleged unwelcome or offensive behaviour.

² Employment Relations Act 2000, s 108(1)(b).

³ *Lenart v Massey University* [1997] ERNZ 253 at 271.

(i) comment about rape in a television programme

[21] Mr Munro said he was “disgusted” by a comment Mr Halliwell made about a television show, *13 Reasons Why*, he was watching in May 2018. Available through the online Netflix platform, the series was about the suicide of a teenager. The Office of Film and Literature had classified the show’s second series as “RP18: Rape, suicide themes, drug use and bullying”, describing it as “controversial for its frank and graphic depiction of suicide and sexual violence”.

[22] Mr Munro said he told Mr Halliwell he was not interested in that kind of show. He said Mr Halliwell replied that it was only “good rape” and laughed. Mr Munro said he felt disgusted but did not tell Mr Halliwell that he disapproved of the comment.

[23] Mr Halliwell denied he used that phrase. Another employee, Mr AV, who Mr Munro said was present during the conversation, could remember them talking about another show, *Game of Thrones*, but not *13 Reasons Why* or Mr Halliwell’s alleged comment.

[24] However if the exchange had occurred as alleged, it would not have met the tests for unwelcome or offensive behaviour in this context for two reasons.

[25] Firstly, even if Mr Halliwell had used the phrase as alleged phrase, it would not have been clear enough on the evidence given whether he was solely making an ignorant and inappropriate comment or was expressing a view, albeit clumsily, that the series depicted sexual violence in a way that was not merely gratuitous but showed the severity of its consequences.

[26] Secondly, whatever was said about that particular programme occurred in the context of Mr Munro and Mr Halliwell regularly exchanging frank and informal views about films and television series they watched or liked. In the following example, from texts they exchanged, Mr Munro referred to *The Sinner*, an anthology series about brutal crimes:

Munro: Watching the sinner, intriguing! ...

Halliwell: Cool. What episode. It’s a mindf**k

Munro: About to watch ep 4 twisted s**t

(ii) showing a news video of a man with a large penis

[27] Mr Munro said he was shocked and disgusted when Mr Halliwell tried to show him and his wife a video from an online news story about a man with a large penis. He said this happened when Ms LM visited the store in early January 2018.

[28] Mr Halliwell denied showing Ms LM the video. He said the store computers had the *New Zealand Herald* as a home page. On 7 January 2018 it published an article about a Mexican man claiming to have the largest penis in the world. He said everyone at the store “had a laugh about it”, including Mr Munro.

[29] The *New Zealand Herald* story was sourced through the sensationalist tabloid-style British publication, *The Daily Mail*. It comprised a written article and a video interview.

[30] Mr Munro said he saw the story twice on a computer at the store – once as the text article and then again, when Mr Halliwell began showing him and Ms LM the video story on 7 January.

[31] Mr OY said he was present on one occasion when staff in the store had looked at the article on the computer and everyone had laughed about it, including Mr Munro. However, when asked, Mr OY said he could recall the day Ms LM had visited the store and it was not that day they had looked at the article.

[32] Ms LM visited the store only twice during Mr Munro’s employment. Once was in early January. It was the second time she had met Mr Halliwell. She said she and Mr Munro went up to Mr Halliwell who was sitting at that counter at the front of the store. The video was playing on the point-of-sale computer on the counter and he said “look at this”. She said she looked briefly at the video, felt disgusted and she and Mr Munro moved away to another area of the store.

[33] Accepting Ms LM’s evidence as more likely than not accurately describing what occurred, this incident met the statutory definition for behaviour Mr Munro reasonably found unwelcome or offensive. While Mr Munro may have engaged in or tolerated some level of joking with the other staff on an earlier occasion of seeing the article, the circumstances were different when his wife was visiting the store. Mr Halliwell, having only met Ms LM once before and briefly, had no basis for assuming

she might regard material of that nature as harmless or humorous or that Mr Munro would also do so in those circumstances.

[34] While parts of the pictures accompanying the text article and in the video were pixelated, depiction of the man's genitals was visual material of a sexual nature in that context. It was not of some other nature such as for a medical or health-related purpose. It was of a sexual nature even though, as AVW submitted, the material was available as a news item in "mainstream media". Subjectively, and whatever might have happened if there were only employees in the store at the time, Mr Munro found showing him and his wife that video at that time embarrassing and offensive. The nature of that event could reasonably be taken as affecting his job satisfaction.

(iii) showing Mr Munro photographs of women Mr Halliwell was dating on Tinder

[35] Mr Munro said Mr Halliwell had "regularly" shown him photos of women he was dating through connections made using the mobile application, Tinder. He said this made him feel uncomfortable because Ms SC, Mr Halliwell's ex-wife, also worked at the store. He said Mr Halliwell laughed off his concerns when Mr Munro said he did not want to know about it.

[36] Mr Halliwell said he had used Tinder during February and March 2018. He said he showed Mr Munro photos of only one woman and that was at Mr Munro's request. He said the woman had visited the store before their date and Mr Munro later suggested Mr Halliwell send a photo of how she looked that night.

[37] Mr Halliwell did send Mr Munro three pictures on the evening of 31 March 2018 – two of his date and one 'selfie' of them standing together. He followed the pictures with a text reading: "And the fun begins mwahaha". Mr Munro replied: "Hahaha have fun!"

[38] The evidence did not establish that Mr Halliwell's communications about his Tinder dates were as extensive or as repeated as Mr Munro suggested. Neither did the evidence of the one confirmed instance, at the time and in the context that it occurred, establish Mr Munro was really offended by the behaviour.

(iv) telling Mr Munro inappropriate stories about his sex life

[39] Mr Munro also said Mr Halliwell had told him “stories about his sex life” that made him uncomfortable and included “unnecessary detail” that shocked and disgusted him. Mr Halliwell emphatically denied this allegation and the one specific example Mr Munro had referred to in his evidence.

[40] There was no independent or corroborating evidence that made either man’s account on this point more likely than the others. No finding could reliably be made that Mr Munro’s allegation was correct.

(v) touching, or asking to touch, Mr Munro’s stomach

[41] Mr Munro alleged that around January 2018 Mr Halliwell had asked various staff members if he could touch their stomachs. He said Mr Halliwell said he “had some medical condition” and wished to compare his stomach with other people. Mr Halliwell denied the account.

[42] Mr AV, Mr OY and Mr WM each denied they had been asked such a question by Mr Halliwell or were aware of him asking anyone else. Mr MH said Mr Halliwell had asked him and had also told Mr Munro to tell Mr MH to agree to Mr Halliwell’s request.

[43] No firm conclusion could be reached on that limited and conflicting evidence. However, even if Mr Halliwell had made that request, Mr Munro’s own account did not suggest that behaviour would have met the statutory definition of being physical behaviour of a sexual nature. It was for some supposed health-related anxiety.

The bullying and threats allegations

[44] Mr Munro’s allegations of bullying or threatening behaviour by Mr Halliwell related directly to two arguments they had in the store in 2018 – one on 27 March and one on 19 May.

[45] His evidence was to the effect that he had become fearful of angry and volatile behaviour by Mr Halliwell because of two earlier incidents with customers.

[46] In September 2017 Mr Halliwell had sworn at Mr A and twice ordered him out of the store because of a disagreement over whether some audio equipment was

working correctly. Mr A made a video recording of their second encounter and complained to the Police about what Mr Halliwell said to him. Mr A later posted a review of AVW on a social media site claiming Mr Halliwell had wanted to fight him. The review was removed after AVW's lawyers wrote to Mr A.

[47] The second incident occurred on 29 December 2017. During an argument in the store Mr Halliwell hit Mr B on the mouth. He said this occurred after Mr B had sworn at him and Mr Halliwell thought Mr B was about to punch him. Mr B had visited the store three times that day over problems getting an audio product working. Mr B dealt with Mr Munro on the first two visits and spoke to Mr Halliwell on the third visit.

[48] Mr Halliwell said he had then tried to call the Police because he thought what he had done "was bad" but Mr B asked him not to involve the Police. Mr Halliwell also offered to pay Mr B some money to compensate for his actions but this was declined.

[49] Later that day Mr Munro visited Mr B's home and helped him connect the audio equipment. He then sent Mr Halliwell a text saying that Mr B was "happy to let bygones be bygones" and would even be in to the store to upgrade other audio equipment.

[50] When Mr Halliwell sent a "thank you" reply, Mr Munro responded: "No wuzz Rocky". His apparently light-hearted reference to the *Rocky* movies, starring Sylvester Stallone as a boxer, undermined Mr Munro's later suggestion that Mr Halliwell's behaviour genuinely made him feel fearful for his own safety. Two days later they exchanged these New Year greeting messages by text:

Munro: Happy New Year mate. Thank you for a wonderful year. It has been great getting to know ya. You are a good bloke and I rate ya mate.

Halliwell: You too you have a heart of gold and a mind as sharp as a toblerone. It's been an honour to work with you.

27 March 2018

[51] In March 2018 two staff left AVW's employment. Mr Munro considered this resulted in him having to do extra work to meet the needs of the business. He discussed the situation with Mr Halliwell and said this "quickly became a heated exchange". Mr Halliwell said Mr Munro asked for a \$5,000 pay rise. Both men

accepted they swore at one another during the exchange. Ms SC came out from the store's back office at one stage to calm things down. Mr Halliwell then told Mr Munro that he was closing the store and to go home for the day. Mr Munro said Mr Halliwell had then angrily thrown a padlock for the store's front door on the floor. Mr Halliwell denied doing so. Mr Halliwell said he went through the motions of closing the shop but after Mr Munro left, he continued trading for the remainder of the day.

[52] Early the following morning Mr Munro sent a text Mr Halliwell asking to meet at a nearby café to "discuss a few things". In the resulting conversation Mr Halliwell said he had "taken on board" what Mr Munro said and agreed to a \$5,000 pay rise.

[53] Mr Munro said he accepted the pay rise "as the closest thing to an apology" that he was going to get from Mr Halliwell. Payment of the increase was recorded in a letter dated 26 April 2018. Mr Halliwell said Ms SC wrote the letter that he signed. It included the following passage:

I sincerely hope this will put all issues to rest and we can work harmoniously. I truly appreciate your expertise and hard work. We are happy to have you as part of our team and wish to do so for years to come. Keep up the good work.

[54] During a later conversation with Mr WM on 21 June, which Mr Munro recorded without Mr WM's knowledge, Mr Munro gave this account of getting that 26 April letter from Mr Halliwell:

I said, okay, sweet as and I shook his hand and that was it and I thought, okay, well I've got an extra 5 grand but the reality is, from that point, I thought f**k this ... I'm going to have to get out of here ...

[55] On that evidence and on balance, there was no unjustified disadvantage to Mr Munro from the 27 March incident, his exchanges with Mr Halliwell or its outcome.

19 May 2018

[56] On 19 May Mr Munro and Mr Halliwell had another argument in the store. It concerned who was responsible for confusion over items put aside for a customer. Mr Halliwell had telephoned Mr Munro during his day off when the customer had called to collect some items but they could not be found in the store. When he next returned to work Mr Munro learned from another staff member that Mr Halliwell had told the customer that the difficulty locating the goods was Mr Munro's fault. Mr Munro

believed Mr Halliwell was the person at fault. He confronted Mr Halliwell about what he had told the customer and other staff about who was responsible.

[57] Mr Munro's account of the ensuing argument included him calling Mr Halliwell a liar and Mr Halliwell saying "don't put words in my mouth c**t". Mr Halliwell's account was that Mr Munro had called him "a f**cking prick" and he had responded "you are a c**t".

[58] Mr Halliwell denied Mr Munro's allegation that he had moved aggressively towards him as they argued. After the argument Mr Halliwell collected his bag, went home and had the next two days off work.

[59] While the conduct and communication of both men was less than ideal in a productive employment relationship, what happened did not amount to an unjustified disadvantage to Mr Munro. Even if Mr Halliwell had incorrectly blamed him for the problem locating the customer's goods, Mr Munro had to bear some responsibility for how he then raised his concern about the issue.

The allegation about not allowing access to legal advice

[60] Soon after the 19 May argument Mr Halliwell asked Ms SC to give Mr Munro another copy of his employment agreement and to get him to sign it. Mr Munro had not signed and returned copies of the agreement given to him in 2017.

[61] Mr Halliwell made that request because either SC or WM had reported to him that Mr Munro was talking with staff in the store about taking some kind of action against Mr Halliwell over employment issues.

[62] Ms SC gave Mr Munro a copy of the employment agreement on 22 May and asked him to sign it and to return it to her. On 23 May Ms SC checked with Mr Munro to see if he had signed the agreement. In a conversation he secretly recorded Mr Munro then told Ms SC he had concerns about confrontations with Mr Halliwell and he would be talking to an employment lawyer.

[63] When Ms SC reported this conversation to Mr Halliwell, he took advice from an employment advocate and prepared this letter, given to Mr Munro before he left work that day:

It has come to my attention that you are informing other staff that it is your intention to seek an employment lawyer regarding issues you have with me.

This is very concerning as comments like that undermine the business and my relationships with other staff.

While our working relationship has been strained recently however it's getting to a point where we both need to resolve the issues.

This morning I have made a decision to cease trading and have notified the other staff that this will occur in the near future.

I will be shutting the doors in the next few weeks at a time that is yet to be decided. In the next few days all staff including yourself will receive notice of termination.

In the meantime we need to resolve the issues that are seriously concerning me and clearly you too.

You are therefore required to attend a formal meeting with and my representative on Friday 25th May 10am at a location to be determined.

You are encouraged to bring with you a support person or representative.

If this date is not suitable to your representative then we ask for an alternative date [to] be proposed in the next subsequent few days.

However this meeting must not be delayed for an unreasonable period.

[64] Mr Munro responded by letter the next day that he was "unwell due to the stressful nature of this" and needed more time to "get things in order". He asked for the reasons for the proposed meeting to be "disclosed in detail and in writing beforehand" to allow him time to prepare. Mr Halliwell, in another letter drafted by his advocate, replied seeking a medical certificate from Mr Munro setting out the reason for him being unwell.

[65] Mr Munro never returned to the workplace. On 31 May he provided a medical certificate in which his doctor said Mr Munro would be able to return to work when "some health concerns" were resolved.

[66] On 13 June Mr Munro's lawyers raised a personal grievance on his behalf.

[67] On 29 June AVW's advocate (not its subsequent counsel for the Authority investigation) replied at length to the personal grievance letter. Without setting out the details of that reply, its overall tone was aggressive. It also raised as "an enquiry" about the X-Box gaming consoles and the cash back payment for a Panasonic television that subsequently became AVW's counterclaim allegations.

[68] Mr Munro's lawyers responded, giving his resignation on 2 July. They said he had no confidence he would be able to return to a safe working environment and his resignation was a constructive dismissal.

[69] What was apparent from that chain of events was that AVW had not acted as a fair and reasonable employer could have done on 23 May in its reaction to the prospect that Mr Munro was seeking advice about his employment issues. Getting such advice was entirely within his rights.

[70] As Mr Halliwell accepted in his oral evidence that no other staff received any notice that the store would cease trading or were told they would be given notice of termination of their employment. He said closing the business was his "100 per cent intention" on 23 May but that position had changed by the next day after discussing the matter with his parents, who were also shareholders in AVW. However Mr Halliwell did nothing to correct what had, at the very least, so soon become a misleading description given in the 23 May letter. This was a breach of AVW's obligations of good faith and fair treatment to Mr Munro so was an unjustified disadvantage to him.

Was Mr Munro's resignation really a constructive dismissal?

[71] A resignation may be held to amount to a constructive dismissal where a breach of duty by an employer then causes a worker to resign and the breach was serious enough to make it reasonably foreseeable that the worker would resign rather than put up with that situation. In this way what appears to be the worker's act of resigning is deemed in law to really be a dismissal because it was the result of what the employer did.⁴

[72] Evaluating the breach, and its seriousness, is an assessment of fact and degree.⁵ The circumstances of Mr Munro's particular case had to be examined to see if AVW's conduct could fairly and clearly be said to have crossed the line from being inconsiderate conduct, causing him some unhappiness or resentment, to having become such dismissive or repudiatory conduct that he reasonably decided to terminate the employment relationship by resigning.⁶

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IOUW Inc* [1994] 1 ERNZ 168 at 172.

⁵ *Spotless Facility Services NZ Limited v Mackay* [2016] NZEmpC 153 at [71].

⁶ *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases 95 at 104.

[73] From conclusions reached earlier in this determination there were three established breaches of duty by AVW:

- (i) Mr Halliwell's offensive behaviour in showing the Mexican man video in the store on 7 January 2019; and
- (ii) Issuing Mr Munro with the 23 May letter in response to his plans to get advice about his employment rights; and
- (iii) Not correcting the claims made in the 23 May letter that Mr Halliwell intended closing the store and terminating the employment of all staff.

[74] As well as relying on those breaches of duties Mr Munro's closing submissions identified AVW's 29 June response to his personal grievance as a tipping point for his resignation. He submitted the aggressive tenor of the letter was intended to intimidate him. The letter rejected his concerns and attacked his credibility. Rather than suggesting anything more might be done to consider his grievance, AVW said it trusted its letter would be "the end of this matter". In those circumstances Mr Munro submitted it was reasonably foreseeable he would have "no option but to resign".

[75] The letter from AVW's advocate could fairly be criticised for an abrasive approach inconsistent with the good faith obligations to be active and constructive in addressing the concerns Mr Munro raised in his personal grievance. However, as an assessment of fact and degree, AVW's response was not the cause of Mr Munro's resignation. He had already formed the view some months earlier that he needed to leave his employment with AVW. This was clear from comments he made during one of his secretly recorded telephone conversations with Mr WM.

[76] On 7 June, almost a month before Mr Munro had his lawyers tender his resignation, Mr Munro told Mr WM that he had decided on 26 April (when he got a letter about his pay rise) that he was "going to have to get out of here". Subsequent events, including him receiving the letters of 23 May and 29 June, led to the end of his employment but Mr Munro had made his decision about the future of his employment with AVW much earlier.

[77] In his oral evidence Mr Munro described himself as having "gone through a number of stages in the last nine months" up to April 2018 and said he "thought this is not where I want to be, it was an all over the place environment". While he sometimes found Mr Halliwell to be volatile, he also described him as sometimes

being “overly generous” in providing financial support. On one occasion Mr Halliwell loaned \$10,000 to Mr Munro because he needed to replace his car.

[78] However Mr Munro was also disappointed that discussions Mr Halliwell had initiated about Mr Munro becoming a partner in the business were unlikely to be realised. A valuation of the business identified that buying into it would require a level of funds beyond Mr Munro’s reach.

[79] Against that background Mr Munro had not established that the end of his employment should be regarded as a constructive dismissal. He had, however, established a personal grievance for unjustified disadvantages arising from actions of AVW before his employment ended. He was entitled to an assessment of remedies for those disadvantages.

Remedies

[80] As identified earlier in this determination AVW had breached duties owed to Mr Munro in a way that amounted to unjustified disadvantages. The remedy available for those disadvantages was compensation for humiliation, loss of dignity and injury to his feelings awarded under s 123(1)(c)(i) of the Act.

Offensive behaviour – 7 January 2018

[81] Showing the Mexican man video to Mr Munro and Ms LM in the store was embarrassing and offensive to Mr Munro in the context it occurred. Even if such conduct was part of ribald or risqué humour engaged in by Mr Halliwell and other staff members when no customers were in the store, it was clearly inappropriate and embarrassing to do so when others, including family members, were present. An appropriate award for resulting humiliation, loss of dignity and injury to Mr Munro’s feelings was \$3,000.

Retaliation over seeking employment advice – 23 May 2018

[82] Mr Munro was understandably fearful and anxious about his immediate employment prospects as a result of the letter given to him on 23 May for the express reason that he had said he was seeking advice about his situation from an employment lawyer. His doctor assessed his reaction to that event as making him medically unfit for work and requiring a week’s sick leave. An appropriate award for the distress he experienced as a result of AVW’s actions on 23 May was \$3,000.

Misleading behaviour regarding future of employment – 24 May 2018 onwards

[83] Mr Munro's uncertainty about the future of his employment was compounded by Mr Halliwell not correcting the information given in his 23 May letter about his plans to close the store and to terminate the employment of all AVW staff. Through the following weeks Mr Munro experienced on-going anxiety and sleeplessness.

[84] The abrasive approach taken in AVW's letter of 29 June responding to his personal grievance increased those feelings of distress. He later came to experience some other health issues that were, more likely than not, contributed to by the distress caused regarding his employment.

[85] An appropriate award for the humiliation, loss of dignity and injury to his feelings due to AVW's actions, or inaction, from 24 May onwards was \$8,000.

No reduction for contribution

[86] Having awarded remedies for Mr Munro's grievance, the Authority must consider whether any actions by him contributed to the situation giving rise to his grievance in a way that then required reduction of those remedies.⁷

[87] For reasons given elsewhere in this determination AVW's counterclaim regarding Mr Munro's role in selling X-box consoles did not need to be considered as blameworthy contributory conduct.

[88] Mr Munro had not contributed in any blameworthy way to the three unjustified actions of AVW for which he was awarded remedies. No reduction of those remedies was required.

No penalty against Mr Halliwell personally

[89] Mr Munro sought an order imposing penalties personally on Mr Halliwell for his role in the various events that resulted in Mr Munro's grievance. In this determination AVW has already been found liable for remedies for unjustified actions carried out by Mr Halliwell. There would be an element of double counting if penalties were also imposed on Mr Halliwell for the same events. No orders for such penalties have been made.

⁷ Employment Relations Act 2000, s 124.

The counterclaim: does Mr Munro owe AVW any money?

[90] AVW sought an award of damages against Mr Munro in relations to two sets of transactions he conducted while employed at its store. Firstly, it said he had improperly claimed a “cash back” payment from Panasonic and this had damaged AVW’s relationship with Panasonic. Secondly, it said he had taken and sold six X-box video gaming consoles from AVW’s storeroom without the permission or knowledge of Mr Halliwell.

[91] Both allegations related to events that occurred well before Mr Munro raised his personal grievance but were only brought up by AVW in response to his claim. From the outset those allegations were, in reality, part of a ‘litigation strategy’ to attempt to dissuade him from pursuing his grievance. On the evidence available to the Authority investigation, neither allegation was established to the standard necessary for an award of damages.

Cash from Panasonic

[92] In November 2017 an AVW invoice showed Mr Munro had ordered and cancelled a Panasonic TV using his own name and personal email address. Through a cash back promotion being run by Panasonic at that time Mr Munro was able to, and did, claim a payment of \$750 in relation to the order although he never completed the purchase.

[93] AVW raised this issue with Mr Munro for the first time in its letter of 29 June 2018. It later provided an email from a Panasonic representative sent to Mr Halliwell in early July 2018 confirming a payment had been made to Mr Munro in November 2017. Mr Halliwell then offered to pay the amount of \$750 back to Panasonic but the offer was declined.

[94] Mr Munro had a different explanation for what happened. He said Mr Halliwell had told him about the Panasonic promotion and had proposed preparing an invoice for Mr Munro as the customer and reversing it. Mr Munro said Mr Halliwell told him they would go halves in the reward payment. Mr Munro said that while he now regretted doing so, he agreed to the scheme. He received the payment of \$750 from Panasonic on 17 November and withdrew \$380 from his bank account on 21 November. He said he gave that latter amount in cash to Mr Halliwell. He provided

the bank statement showing the amount he said he paid. He also referred to a text he sent to Mr Halliwell on 19 November which included the phrase: “Panadosh is in”.

[95] Mr Halliwell denied that account. He said the reference to “Panadosh” was for “a personal sale” he made of a different Panasonic product to a customer who had dropped a cash payment off to Mr Munro in the store.

[96] As a matter of likelihood, Mr Halliwell’s account was not sufficiently reliable to make the findings and order that AVW had sought in relation to that transaction.

X-box sales

[97] In early 2018 AVW received six X-box consoles from a supplier of projector units to use as a ‘gift with purchase’ for customers who bought the supplier’s projectors. AVW did not sell X-box consoles as a separate retail product.

[98] After Mr Munro had raised his personal grievance Mr Halliwell accused him of having taken and sold those X-box consoles without the knowledge or permission of AVW.

[99] Mr Munro agreed he had sold those consoles privately through his personal Trade Me account but said he did so at the request of Mr Halliwell. He said Mr Halliwell asked him to sell the consoles and split the money. He said Mr Halliwell told him he did not want to use AVW’s account because the supplier knew that account.

[100] Mr Munro provided the details of the six sales he made. He also provided a bank statement showing a withdrawal of \$300 which he said was part of the cash he paid directly to Mr Halliwell for those sales.

[101] There were two reasons to prefer Mr Munro’s account of those arrangements over that of Mr Halliwell.

[102] Firstly, CCTV footage from the store for 17 April 2018 showed Mr Munro packaging an X-Box console for despatch by courier. He did so on a counter in the centre of the store minutes before it was due to open that day. He knew the store had CCTV coverage. It was unlikely he would have carried out that activity in full view if it was being done without Mr Halliwell’s knowledge and permission.

[103] Secondly, the evidence of Mr WM, who was still an AVW employee, confirmed Mr Halliwell had made arrangements for other staff to make sales of other products on their personal TradeMe accounts. While Mr Halliwell said he had only done so for second hand products, that evidence confirmed his practice of making occasional arrangements with staff for sales of products that were made off AVW's books. Whatever the commercial or tax issues that might raise, AVW had not established, as a matter of likelihood, that Mr Halliwell had made no such arrangement with Mr Munro for the sale of those X-box consoles.

Costs

[104] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[105] If they are not able to do so and an Authority determination of costs is needed Mr Munro may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this present determination. From the date of service of that memorandum AVW would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[106] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸ The tariff for a two-day investigation meeting is \$8,000.

Robin Arthur
Member of the Employment Relations Authority

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].