

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 527
3016951

BETWEEN

ROGER HAWKINS
Applicant

AND

SAILORS' CORNER LIMITED
(IN LIQUIDATION), REX
INNES-JONES, RHYS INNES-
JONES, SEAN INNES-JONES,
JEANETTE INNES-JONES
Respondents

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Angela Evans, Counsel for Respondent

Investigation Meeting: 13 -15, 29 March and 01 April 2019 at Auckland

Submissions and Further Information Received: 2 and 3 April 2019 from the Applicant
27 May 2019 from Applicant
4 June 2019 from the Applicant
16 June 2019 from the Respondent
21 June 2019 from the Applicant

Date of Determination: 12 September 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Hawkins was employed by Sailors' Corner Limited (In Liquidation) as a Retail Assistant from 19 August 2016 until June 2017.

[2] Mr Hawkins claimed he was constructively dismissed on 3 June 2017. Sailors' Corner denied that Mr Hawkins' employment ended on 3 June 2017. Instead Sailors' Corner said that it justifiably dismissed him, for serious misconduct, on 13 June 2017.

[3] Sailors' Corner admitted it breached s 65 of the Employment Relations Act 2000 (the Act) by failing to give Mr Hawkins a written employment agreement. Mr Hawkins sought a penalty for that breach.

[4] Mr Hawkins claimed Sailors' Corner failed to provide him with paid rest breaks, and he sought wage arrears for this failure. Sailors' Corner denied depriving Mr Hawkins of paid rest breaks. It said it told him to self-manage how and when he would take his rest breaks, so it believed he had in fact taken paid rest breaks, at times convenient to him.

[5] Mr Hawkins claimed that he was harassed, bullied or otherwise unjustifiably disadvantaged in his employment. Sailors' Corner denied all of these claims.

[6] Mr Hawkins claimed wage arrears for hours he was rostered to work, on 14 May 2017 and 3 June 2017, but did not actually work due to Sailors' Corner's unilateral actions. Sailors' Corner disputed his wage arrears claims on the basis that it was not required to pay him if he did not work.

[7] Mr Hawkins claimed Sailors' Corner breached its good faith obligations to him by not responding to issues he had raised with it, and he sought a penalty for that breach. Sailors' Corner said it did respond to all of his communications, but some of its responses were given verbally instead of in writing.

[8] Mr Hawkins also sought to pursue each of the above claims against all of the individually named members of the Innes-Jones family personally, as well as against Sailors' Corner.

[9] Sailors' Corner accepted sole responsibility for any breaches that may have occurred. It said the named individuals had only interacted with Mr Hawkins in their roles as Sailors' Corner's managers/employees, so should not be held personally liable for any breaches that may have occurred.

Sailors' Corner - in liquidation

[10] Sailors' Corner was a local family owned business trading as a ship chandlery retail store, until it was placed into liquidation on 2 April 2019.

[11] Mr Rex Innes-Jones is the sole director of Sailors' Corner. He has the majority shareholding and one other Innes-Jones family member (who was not involved in these proceedings, and who did not work in the store) owned all of the remaining shares.

[12] After being informed that Sailors' Corner had been placed into liquidation, Mr Hawkins sought and was granted leave from the High Court, under s 248 of the Companies Act 1993, to proceed with these Authority proceedings.¹

Does the Authority have jurisdiction to investigate claims against the named Innes-Jones family members personally?

[13] Rex Innes-Jones, his wife Jeanette Innes-Jones and their two sons Rhys and Sean Innes-Jones all worked in the Sailors' Corner store, in various management positions.

[14] Mr Hawkins' Statement of Problem named the respondent as:

Sailors' Corner Limited.
Rex Innes-Jones, Rhys Innes-Jones, Sean Innes-Jones, Jeanette Innes-Jones.

[15] Mr Hawkins said this made it clear he was pursuing each of his claims against these named individuals personally, as well as against Sailors' Corner.

[16] Mr Hawkins believed that the Authority could investigate claims against the named members of the Innes-Jones family personally because these individuals had worked in management roles. That is not the correct legal position.

[17] The Authority only has jurisdiction to investigate claims involving parties in an employment relationship, subject to the limited exceptions that are set out in the Act. None of those exceptions were identified in Mr Hawkins' Statement of Problem, so they do not apply in this case.

[18] Mr Hawkins' employment relationship was with the legal entity - Sailors' Corner. There was no employment relationship between Mr Hawkins and any of the named individuals.

[19] Sailors' Corner has accepted vicarious liability for acts/omissions its managers took on its behalf, so if any breaches did occur then it is Sailors' Corner that is to be held legally responsible, not the named individuals in their personal capacity.

¹ *Hawkins v Sailors' Corner & Ors*, High Court 24 May 2019 CIV-2019-404-000739.

[20] Accordingly, the Authority does not have jurisdiction to investigate Mr Hawkins' claims against Rex, Jeanette, Rhys and Sean Innes-Jones, so the claims he had made against each of them personally do not succeed.

Issues to be determined

[21] The following issues are to be determined:

- (a) Should a penalty be imposed on Sailors' Corner for its failure to provide Mr Hawkins with a written employment agreement?
- (b) Did Sailors' Corner fail to provide Mr Hawkins with paid rest breaks?
- (c) If so, what is the remedy for that?
- (d) Did Sailors' Corner breach its good faith obligations to Mr Hawkins?
- (e) If so, should a penalty be imposed on it for any breaches of good faith that have occurred?
- (f) Is Mr Hawkins owed wage arrears?
- (g) Did Sailors' Corner harass/bully or otherwise unjustifiably disadvantage Mr Hawkins in his employment?
- (h) If so, what if any remedies should he be awarded?
- (i) What date was Mr Hawkins dismissed?
- (j) Was Mr Hawkins' dismissal justified?
- (k) If not, what if any remedies should be awarded?
- (l) Should any remedies Mr Hawkins is awarded be reduced on the grounds of contribution?
- (m) Should interest be awarded?
- (n) What, if any, costs should be awarded?

Should a penalty be imposed on Sailors' Corner for its failure to provide Mr Hawkins with a written employment agreement?

[22] The root cause of many of the problems that occurred between the parties can be attributed to Sailors' Corner's failure to provide Mr Hawkins with a written employment agreement.

[23] A penalty should be imposed on Sailors' Corner for its breach of s 65 of the Act. The parties have been given an opportunity to provide the Authority with information relevant to its assessment of penalties.

Did Sailors' Corner provide Mr Hawkins with paid rest breaks?

[24] At the material time, section 69ZD of the Act required employers to give employees paid rest breaks, to ensure employees had a reasonable opportunity for rest, refreshment and the ability to attend to personal matters during their work day. The duration of rest breaks depends on the employee's work period.

[25] Rest breaks could be made subject to reasonable and necessary restrictions, having regard to the nature of the employees' work, or to arrangements the parties mutually agreed upon. No specific rest break arrangements were agreed between Mr Hawkins and Sailors' Corner.

[26] If the timing and duration of rest breaks is not agreed, then the employer can specify reasonable times and durations of the rest breaks, provided employees had been given a reasonable opportunity to negotiate over rest break requirements. Sailors' Corner did not negotiate over rest breaks with Mr Hawkins.

[27] Sailors' Corner failed to adequately advise Mr Hawkins about how he was entitled to exercise his statutory right to take paid rest breaks during his work days. That omission meant Mr Hawkins did not take paid rest breaks, because he believed he was not allowed to.

[28] Sailors' Corner's explanation that it had told Mr Hawkins to self manage his rest breaks and that it believed Mr Hawkins he had been doing so is not accepted. Mr Hawkins set out in a December 2016 email suggestions about how rest breaks could be managed. That would not have been necessary if he had been given the rest break advice Sailors' Corner claimed to have given him.

[29] Sailors' Corner did not allow staff to come and go from the shop floor as and when they pleased. Staff had to ask permission from their manager if they wanted to leave the shop floor during their rostered shift.

[30] Examples of that included when an employee wanted to leave the shop floor to use a bathroom situated across the road, to purchase food or coffee, or to take their lunch break. An employee could not just walk off the shop premises at their own discretion - their manager had to have agreed to that.

[31] The requirement for employees to seek and obtain a manager's permission to leave the shop floor meant that Mr Hawkins would not have taken his paid rest breaks, without first discussing that with a manager. However there was no evidence that Mr Hawkins had:

- (a) Ever asked a manager if/when he could take a paid rest break;
- (b) Ever been instructed by managers to take a paid rest break;
- (c) Actually taken a paid rest break;
- (d) Voluntarily chosen to forgo his statutory right to take paid rest breaks.

[32] This meant that Sailors' Corner ought to have known that Mr Hawkins was not actually taking his statutory rest breaks. Sailors' Corner, as the employer, was obliged to ensure that Mr Hawkins was receiving his statutory entitlements, so it should have addressed his failure to ask managers for permission to take rest breaks with him.

[33] Sailors' Corner was therefore at fault for not taking appropriate steps to ensure that Mr Hawkins was in fact self-managing his paid rest breaks in the way it believed it had instructed him to.

[34] Mr Hawkins' claim that Sailors' Corner breached s 69ZD of the Act, because it failed to give him paid rest breaks, succeeds.

What is the remedy for the failure to provide paid rest breaks?

[35] The Authority does not have jurisdiction to award an employee wages for an employer's breach of the statutory rest break requirements, so Mr Hawkins' wage arrears claim does not succeed.

[36] The only remedy provided by the Act for a breach of an employer's s 69ZD rest break obligations, is the imposition of a penalty under s 69ZF of the Act.

[37] Mr Hawkins was denied the benefit of a minimum statutory entitlement and he has not been compensated for that. It is therefore appropriate to impose a penalty on Sailors' Corner for its breach of s 69ZD of the Act.

[38] The parties have been invited to provide the Authority with information relevant to its assessment of a penalty for this breach.

Is Mr Hawkins owed wage arrears?

[39] Mr Hawkins' wage arrears claims for 7 December 2016 and 31 January 2018 were resolved by the parties prior to the investigation meeting.

[40] Mr Hawkins' two outstanding wage arrears claims related to:

- (a) The 2 hours and 40 or so minutes left on his rostered shift on 3 June 2017, that he did not work after he was trespassed from his workplace; and
- (b) A shift on Sunday 14 May 2017 that he had agreed to work for another employee, but which Sailors' Corner had cancelled.

[41] Mr Hawkins is not owed wages for the two hours and 40 odd minutes that were left on his rostered shift on 3 June 2019, because his employment ended when he was issued with the trespass order around 2.45pm that day.²

[42] Mr Hawkins is not owed wages for 14 May 2017 because he did not actually work that day. Sailors' Corner was not required to pay Mr Hawkins for days or hours he had not worked.

[43] Sailors' Corner had too many staff who were originally rostered to work on 14 May 2017. It therefore told Mr Hawkins on the evening of Thursday 11 May 2017 that he was not required to work the Sunday 14th May shift he had taken on for his colleague, because that work was already being covered by other staff, who had originally been rostered to work that day.

[44] While Sailors' Corner's cancellation of the 14 May shift inconvenienced Mr Hawkins, because he had already made personal plans around the fact he would be working

² See paragraphs [153]-[154].

that day, this inconvenience did not entitle him to be paid for hours he did not actually work or for a shift he had not originally been rostered to work.

[45] Mr Hawkins' wage arrears claims do not succeed.

Was Mr Hawkins harassed/bullied or otherwise unjustifiably disadvantaged in his employment?

Dress code (no jeans policy)

[46] Considerable disharmony arose from Sailors' Corner's instruction to Mr Hawkins that he could not wear jeans to work.

[47] Mr Hawkins made his unhappiness regarding the dress code decisions managers had made well known within the workplace. He also exhibited his dissatisfaction by becoming confrontational and antagonistic towards management about dress code issues.

[48] Mr Hawkins believed the dress code was introduced and implemented as a way for Sailors' Corner to bully and harass him. The evidence did not support his view about that.

[49] Sailors' Corner had a longstanding unwritten dress code that prevented employees from wearing jeans to work. It existed, and was enforced, before Mr Hawkins started work.

[50] The dress code policy was not introduced to target Mr Hawkins personally. However the unsatisfactory manner in which the dress code was communicated to Mr Hawkins led him to conclude it was. Sailors' Corner's poor communication of dress code obligations meant it must bear most of the responsibility for the dress code problems that occurred.

[51] There was no written dress code until Mr Hawkins asked for one. The written policy prevented "*blue jeans*", so Mr Hawkins dyed the blue jeans he had been told not to wear black, and he wore the newly dyed black (originally blue) jeans to work.

[52] Sailors' Corner responded by instructing Mr Hawkins that "*all jeans*" were prohibited. Mr Hawkins then presented two pairs of pants he believed were compliant with the dress code to Rex Innes-Jones for approval to wear. Permission was denied on the basis that Mr Hawkins' alternative pants looked like jeans because they had "*rivets like jeans*".

[53] So the dress code went from an unwritten “*no jeans*” policy, to a written “*no blue jeans policy*”, to an updated written “*no jeans at all*” policy, to a further informal and unwritten “*no pants with rivets or anything that looks like jeans or is in a jeans style*” policy. Each change of the stated dress code policy made Mr Hawkins feel he was being unfairly personally targeted.

[54] Further disputes arose between the parties about:

- (a) Whether or not Sean Innes-Jones had worn ‘jeans/pants’ to work that were like the ‘jeans/pants’ Mr Hawkins had been told he was not allowed to wear; and
- (b) How many times (if at all) Mr Hawkins had continued to wear jeans/pants to work after he had been told they were not permitted. Mr Hawkins said he never had, while Sailors’ Corner said he had done so repeatedly.

[55] Sailors’ Corner’s mishandling of dress code issues amounted to actions that unjustifiably disadvantaged Mr Hawkins in his employment. Sailors’ Corner’s actions, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances.³ In particular Sailors’ Corner:

- (a) Did not make its dress code obligations clear to Mr Hawkins from the outset;
- (b) Appeared to have changed the dress code requirements in response to different jeans/pants that Mr Hawkins wore and/or had presented to it for approval;
- (c) Failed to accurately document or record each incident of alleged improper ‘jeans/pants’ wearing by Mr Hawkins, because he disputed the records that were made;
- (d) Failed to adequately investigate or respond to Mr Hawkins’ complaint that Sean Innes-Jones was allowed to wear ‘jeans/pants’ to work that looked the same as ‘jeans/pants’ that Mr Hawkins had been told he was not allowed to wear to work.

³ Section 103A(2) of the Act.

[56] Although Sailors' Corner's was entitled to set and enforce a dress code, the way it went about doing so was procedurally unjustified, because it did not meet the tests in s 103A(2) or s 103A(3) of the Act.

[57] Sailors' Corner's mishandling of dress code issues that arose disadvantaged Mr Hawkins because it caused confusion and conflict to occur. It also created a perception of disparity of treatment, which caused Mr Hawkins to become argumentative, disparaging and confrontational towards the Innes-Jones family.

[58] Mr Hawkins' unjustified disadvantage grievance claim, related to dress code issues, succeeds.

Alleged reduction in days of work?

[59] There was a dispute between the parties about whether Mr Hawkins was a full time employee who was entitled to a minimum of five days' work each week, or a part-time employee entitled to a minimum two - three days' work a week, although he could be given extra days' work, up to a total of five days a week, during the busy season.

[60] A written employment agreement would have avoided this conflict, so Sailors' Corner is responsible for the problems that arose over this dispute.

[61] Mr Hawkins claimed that Sailors' Corner's failure to give him five days' work every week was an unlawful reduction in his days of work that was designed to make him resign. Sailors' Corner maintained it had always given Mr Hawkins the minimum number of days of work per week that they had agreed on when he had accepted its initial offer of employment.

[62] Sailors' Corner proved on the balance of probability that Mr Hawkins was offered, and accepted employment, as a part-time employee. The parties mutually agreed that Mr Hawkins' days of work would likely vary in accordance with its business needs, but that as a minimum he would be offered two - three days' work each week.

[63] Although in November 2017 Mr Hawkins worked four days a week and in December 2017 he worked five days per week, that simply reflected the parties' agreement that during the busy season he could be offered extra days of work.

[64] It did not create an obligation on Sailors' Corner to offer Mr Hawkins five days' work per week all year, because that was not what was agreed at the outset of their employment relationship. Mr Hawkins was also able to decline these offers of extra days' work if it did not suit him.

[65] Mr Hawkins was a part time employee, who was entitled to a minimum of two - three days' work per week, for the following reasons:

- (a) Before being offered employment Mr Hawkins told Sailors' Corner he wanted part-time, casual work, as the season dictated and that he could be flexible about when it wanted him to work. That was the basis on which he was interviewed;
- (b) Rex Innes-Jones' handwritten notes of his initial interview with Mr Hawkins, during which the offer of employment was made, recorded an offer of part time, not full time, work. This contemporaneous record is the best evidence of what the parties agreed from the outset;
- (c) The interview notes stated "*can offer part time work 2-3 days per week. Dec - busy period - 5 days/week - would be okay to work Sept-Oct-Nov 2-4 days - after Xmas back to part time work, especially over winter - 2-3 days/week*";
- (d) Those are the terms of the offer of employment that Mr Hawkins accepted - part time work of at least 2 days a week increasing during the busy season to the possibility of up to 5 days, then dropping back to two or three days a week in the off season;
- (e) In practice, Mr Hawkins' days of work increased during the busy season, then went back to two - three days at the end of the busy season, which was consistent with what he had been told would happen at the job interview, and with the offer he accepted;
- (f) On 4 January 2017 Mr Hawkins emailed Sailors' Corner stating that he could work any days that suited it, but that he was "*keen to have a couple of days each week (mid-week) from Monday through Friday*" and expressing a preference for work on Mondays and Wednesdays. This indicated that he knew he was not a full time employee;

- (g) The payroll clerk advised that the notation on the payroll system that Mr Hawkins was a “*full time*” employee was an automatic coding error that had unknowingly been incorrectly applied by its software system to all employees (apart from students), including all part time employees. This automated error was corrected once it was discovered. This error did not create full time employment, for an otherwise part time employee;
- (h) The parties acted consistently with there being part-time employment obligations. In January 2017 Mr Hawkins told Sailors’ Corner he was not available on Mondays because he was working elsewhere, but was otherwise available for three - four days a week. A full-time employee cannot just tell their employer that they are no longer available for full-time work because they have accepted an offer of work elsewhere;
- (i) On 2 March 2017 Mr Hawkins emailed Sailors’ Corner to say he could “*do either three or four days a week, as it suits you*” and that he would plan the rest of his workload after the next roster had been released. This showed that Mr Hawkins was not expecting five days’ work each week;
- (j) Mr Hawkins stated in an email to Sailors’ Corner dated 19 April 2017 that “*I am a part time sales clerk*” and “*as a rostered part time worker*”. This demonstrated that Mr Hawkins viewed himself as a part time employee.

[66] Sailors’ Corner met its contractual number of days of work obligations to Mr Hawkins, because he was offered at least two days’ work each week. When Mr Hawkins complained that he had only been rostered for two days’ work, Sailors’ Corner increased his rostered shifts to three days’ work per week.

[67] Mr Hawkins’ claim that Sailors’ Corner unjustifiably disadvantaged, him by unlawfully reducing the number of days of work he was rostered to work each week, does not succeed.

Use of PDA/mobile devices in the workplace

[68] Mr Hawkins claimed that Sailors’ Corner unjustifiably disadvantaged him when it instructed him not to use his PDA and/or mobile phone during his working hours, and/or by requiring him to keep it in the lunchroom during working hours.

[69] Mr Hawkins explained that he used his personal mobile device at work because it was quicker for him to do that than to use the slow computer system or old manual documentation or other processes that Sailors' Corner had in place. Mr Hawkins' position was that he had not done anything wrong because he had only used his mobile device at work to benefit Sailors' Corner.

[70] The evidence did not support Mr Hawkins' subjective views about his use of his personal mobile device during work hours. Although he predominantly appeared to have used it for work purposes, he also on occasion used it for other non-work related purposes.

[71] Mr Hawkins was very reluctant to comply with Sailors' Corner's instructions not to use his personal mobile device at work, because he believed doing so had made him more efficient and had led to better customer service. He therefore viewed the instructions he was given as unreasonable.

[72] What Mr Hawkins did not appear to have appreciated was that Sailors' Corner as his employer was entitled to put in place internal processes regarding delivery of its services for its sales staff to follow. It did not have to seek or obtain Mr Hawkins' permission about how its business was to be conducted, because such decisions were within its management prerogative.

[73] Mr Hawkins was required to comply with Sailors' Corner's reasonable and lawful instructions about how he was to carry out his role, even if he did not personally agree that was the best way to do things.

[74] Mr Hawkins continued to use his personal mobile device at work despite having been instructed by Sailors' Corner not to. Sailors' Corner was understandably concerned about Mr Hawkins communicating with customers/clients/suppliers using his personal email address and not the Sailors' Corner's business email.

[75] Mr Hawkins' work related communications using his personal mobile devices were obviously not available to Sailors' Corner or other staff, meaning there was no readily available record of what communications had occurred with its customers/clients/suppliers. That created obvious issues, particularly when Mr Hawkins was not at work to explain to other staff what private communications he had engaged in, outside of Sailors' Corner's normal business systems.

[76] Sailors' Corner had good reasons for not wanting staff to use their personal mobile devices to communicate with customers/suppliers, or for not wanting sales staff to be distracted from their work by using their personal mobile devices on the shop floor during work hours.

[77] Mr Hawkins was asked a number of times to not use his personal mobile device at work. When he continued to do so, Sailors' Corner instructed Mr Hawkins to keep his personal mobile device in the lunch room while he was working. That was a reasonable and lawful instruction that did not unjustifiably disadvantage him.

[78] Mr Hawkins was not treated differently from other staff. Anyone who was seen making personal calls during work hours was asked to put their mobile phone away. Mr Hawkins was only asked to leave his mobile device in the lunchroom because he had continued to use it after being repeatedly told not to.

[79] Mr Hawkins' disadvantage grievance claim, regarding the instructions he was given about not using his personal mobile device at work, does not succeed.

Alleged adverse comments allegedly made to Mr Hawkins

[80] Mr Hawkins claimed he was unjustifiably disadvantaged by comments made by Sean, Jeanette and Rex Innes-Jones over the period 11 April to 6 June 2017 that he (Mr Hawkins) said amounted to harassment and/or bullying of him.

[81] The inappropriate comment Rex Innes-Jones admitted he made to Mr Hawkins on 3 June 2017 was a material part of his unjustified dismissal grievance, so it has not been dealt with as a discrete disadvantage grievance. The comment has however been addressed when assessing distress compensation.⁴

[82] The hearsay comments allegedly made on 6 June 2017 by Sean Innes-Jones occurred after Mr Hawkins' employment had ended on 3 June 2017, so the Authority did not have jurisdiction to investigate that as a grievance claim. This allegation was however taken into account, later in this determination, when distress compensation was assessed.⁵

[83] That leaves the comments that were made on:

⁴ See paragraph [189] a.

⁵ See paragraph [189] b.

- (i) 11 or 12 April 2017 by Sean Innes-Jones;
- (ii) 21 April 2017 by Jeanette Innes-Jones; and
- (iii) 10 May 2017 by Rex Innes-Jones.

i) 11 or 12 April 2017 comment by Sean Innes-Jones

[84] Mr Hawkins claimed that Sean Innes-Jones told him (Mr Hawkins) that he was a “*shit stirrer*” during an argument they were having over whether Mr Hawkins had changed the radio channel after being told not to. Sean Innes-Jones denied that allegation but admitted telling Mr Hawkins that he was “*a trouble maker*”.

[85] This allegation is established on the balance of probabilities because it was corroborated by:

- (a) One of Mr Hawkins’ colleagues who said she had overheard it; and
- (b) By a WhatsApp message Mr Hawkins sent that same day to another staff member, who was out of the country at that time, that referred to the comment.

ii) 21 April 2017 comment by Jeanette Innes-Jones

[86] Mr Hawkins claimed that Jeanette Innes-Jones called him a “*shit-stirrer*” on 21 April 2017. Mrs Innes-Jones denied that.

[87] Mrs Innes-Jones told the Authority that on 21 April Mr Hawkins had angrily confronted her using profanities, while arguing that the dress code was “*pathetic*” and “*a stupid management policy*”.

[88] Mrs Innes-Jones said she had explained that the dress code had been in place since the business had begun, but that despite that advice Mr Hawkins kept repeating that it was “*stupid*” and comments to that effect.

[89] Mrs Innes-Jones told the Authority she probably told Mr Hawkins that he had been “*stirring up trouble*” but was confident she had not used the term “*shit-stirrer*,” because that was not a word or a description she would have personally ever used.

[90] Mr Hawkins’ version of this incident has been preferred because the comment attributed to Mrs Innes-Jones was corroborated by:

- (a) Mrs Glenis Holmes, a former Sailors' Corner employee, who attended the investigation meeting reluctantly, under summons. Mrs Holmes told the Authority she had witnessed Mrs Innes-Jones' alleged "*shit stirrer*" comment to Mr Hawkins;
- (b) Mr Hawkins referred to Mrs Innes-Jones' alleged comment to him in a complaint email he sent Rex Innes-Jones on 10 May 2017;
- (c) Mr Hawkins raised Mrs Innes-Jones' alleged comment to him during a conversation he had with Rex Innes-Jones on 31 May 2017.

iii) 10 May 2017 comment by Rex Innes-Jones

[91] Mr Hawkins alleged that Rex Innes-Jones told him on 10 May 2017 "*suddenly you turn up, and we have a lot of [problems].*" Rex Innes-Jones did not recall making that comment.

[92] This alleged comment was proven on the balance of probabilities, because Sailors' Corner had in fact blamed Mr Hawkins for an increase in workplace problems with staff that had occurred after Mr Hawkins had started working for it.

iv Outcome of the 'adverse comments' allegations

[93] If Sailors' Corner believed Mr Hawkins had engaged in wrongdoing, (such as trouble making or creating problems with other staff), or his actions had fallen short of expected standards of behaviour, then it should have raised its concerns within a fair and proper process, that met the minimum fairness requirements set out in s 103A(3) of the Act.

[94] Calling an employee adverse names and/or publicly blaming them for workplace problems involving other staff was not what a fair and reasonable employer would have done in all the circumstances, so it does not meet the s 103A(2) justification test in the Act.

[95] Mr Hawkins' claim that adverse comments made to him by members of the Innes-Jones family unjustifiably disadvantaged succeeds.

16 May 2017 lunchroom incident

[96] Mr Hawkins claimed that during a discussion he had with Rex Innes-Jones on 16 May 2017 in the lunchroom, Rex Innes-Jones grabbed his (Mr Hawkins') left arm and moved in front of him (Mr Hawkins) to prevent him from leaving the lunchroom.

[97] Rex Innes-Jones denied touching or blocking Mr Hawkins. Rex Innes-Jones said he was standing in the doorway of the lunchroom when Mr Hawkins physically pushed past him, without asking him to move out of the way.

[98] Unknown to Rex Innes-Jones and Mr Hawkins, Rhys Innes-Jones was standing outside the lunch room recording their exchange. The recording did not corroborate Mr Hawkins' version of events, nor did Rhys Innes-Jones who witnessed the incident.

[99] Mr Hawkins claimed that the recording cut out when he made the comment to Rex Innes-Jones "*that is an assault let go of me*". Rhys Innes-Jones denied that Mr Hawkins had said that and Rhys Innes-Jones also confirmed under oath that he had given the Authority the full unedited recording of this incident.

[100] This allegation was not proven on the balance of probabilities. Mr Hawkins was agitated, angry and frustrated because he had just been told he was not allowed to wear two pairs of pants he had presented for approval, which he believed complied with the dress code.

[101] It is more likely than not that Mr Hawkins deliberately pushed past Rex Innes-Jones, instead of asking him to move out of the way, as a way of Mr Hawkins expressing his anger and frustrations about the dress code decision that had been made, that he had strongly disagreed with.

[102] Mr Hawkins' disadvantage claim, about the lunchroom incident was not proved to the required standard of proof, so it does not succeed.

Accusation of dishonesty/theft

[103] Mr Hawkins claimed that Sailors' Corner accused him of dishonesty and theft. It did not.

[104] Sailors' Corner raised a concern with Mr Hawkins that he had given a discount to a customer that should not have occurred. It was not treated as dishonesty or theft, but rather as a failure to follow the correct discounting procedure, because Mr Hawkins had not obtained management approval for the discount before he had applied it.

[105] Mr Hawkins believed he was entitled to make the decision about whether to discount the item (a watch), and could apply the discount himself, because he had seen other staff do that. Mr Hawkins believed the discount was in line with a sale sign advertising discounts for the same brand as the watch was, and/or that it was necessary to discount in order to price match with competitors so he could get the sale.

[106] Objectively the discount should not have been given without a manager having authorised it. Although Sailors' Corner believed it had told Mr Hawkins that it only allowed managers to give discounts, the Authority did not accept that evidence. Mr Hawkins denied that and there was no other corroborating evidence to establish that such training had occurred.

[107] The Authority accepted Mr Hawkins's evidence that it was not clear to him that other staff (whose practices he had copied) were discounting in their 'management' capacity, instead of in their role as as Shop Assistant.

[108] After hearing evidence regarding discounting practices, the Authority considered the line between who could and could not discount and when discounts could be given, and on what items, was insufficiently clear.

[109] Sailors' Corner's querying of Mr Hawkins about why an on the face of it inappropriate discount had been given did not unjustifiably disadvantage him. From time to time discounts would be discovered that should not have been made. In which case, Sailors' Corner's usual practice was to raise the discounting issue with the staff involved, so Mr Hawkins was not singled out in that regard.

[110] Sailors' Corner must bear the responsibility for Mr Hawkins' discounting error, because it had failed to give him adequate training, clear instructions or appropriate oversight regarding its discounting procedures.

[111] While Mr Hawkins gave a discount because he thought it was appropriate to do so, this incident highlighted that he was in need of clearer guidance and training around the applicable discounting procedures. Accordingly, it was not an unjustified action for that to have been raised with him.

[112] Mr Hawkins' unjustified disadvantage claim, related to the discounting issue, does not succeed.

Harassment claim

[113] Mr Hawkins' claim that Sailors' Corner's managers harassed him does not succeed. The evidence did not establish that Mr Hawkins had been harassed or treated differently than other staff.

[114] Mr Hawkins presented as someone who was challenging to manage because he had strong views on what Sailors' Corner should and should not do, and he readily, and sometimes even rudely, expressed that.

[115] The problems appear to have occurred, then escalated, because Sailors' Corner did not have the appropriate employment documentation (and therefore tools) in place to manage the conflicts that arose. That omission caused Mr Hawkins to push back forcefully against Sailors' Corner's attempts to assert its management prerogative or to resolve or manage issues or disputes in a way that he did not agree with.

[116] Examples of that included the dress code, rest breaks, an employee's ability to leave the shop, the use of personal mobile devices on the shop floor during work hours, the use of sales systems and process, job sharing opportunities, discounting procedures, stock location and display, the differing views on whether Mr Hawkins was a part time or full time employee, the procedure for swapping shifts between staff, Sailors' Corner's ability to cancel a swapped shift, the process for reallocating a rostered shift that an employee was no longer available work, and payments for hours the employee was at work but unable to work due to management's actions, such as the shop opening late or closing early.

[117] All of these issues created conflict and disharmony between the parties, because they held different views about these matters, but that in itself did not amount to harassment by Sailors' Corner of Mr Hawkins.

Bullying claim

[118] The WorkSafe definition of bullying is:

Repeated and unreasonable behaviour directed towards a worker or group of workers that can lead to physical or psychological harm.

[119] Mr Hawkins complained verbally and in writing to his employer about being called a “*shit stirrer*”. Because the Authority concluded that Mr Hawkins was told more than once that he was a “*shit stirrer*” the behaviour complained about was “*repeated*” in terms of the WorkSafe definition of bullying.

[120] The “*shit stirrer*” comments were not made in jest, or as part of playful workplace banter. Rather they arose within the context of an increasing fraught and deteriorating relationship. The adverse comments were indicative of the problems, dissatisfaction and frustration the parties were experiencing with each other.

[121] The “*shit stirrer*” comments also met the “*unreasonable*” requirement of WorkSafe’s bullying definition, because reasonable people working within a retail shop environment would not expect managers or their employer to call them a “*shit stirrer*”, particularly in front of other staff.

[122] The final part of the WorkSafe definition is a causation element, in terms of assessing whether the repeated unreasonable conduct “*can lead to physical or psychological harm.*”

[123] That part of the bullying definition was not met in this particular case because the evidence did not establish that the adverse comments made to Mr Hawkins could have potentially caused him physical or psychological harm, because of the wider context within which they were made.

[124] Even though Mr Hawkins denied it, the Authority was satisfied on the balance of probabilities that he had more likely than not used even worse profanity to, and about, management.

[125] For example, it was more likely than not that Mr Hawkins called Sean Innes-Jones “*fucking useless*” on 22 April 2017 and had said that he (Sean) “*didn’t know what the fuck he was doing*”. Mr Hawkins likely described the dress code as “*pathetic*” and “*trivial crap*”

and said it was “*a fucking stupid policy*” in front of Jeanette Innes-Jones on 31 March 2017. He likely told Rex Innes-Jones “*these trousers are fucking black*” on 9 May 2017, during a dispute about whether or not his dyed black jeans breached the dress code. Mr Hawkins also likely called management “*pricks*”, “*liars*” and “*pathetic*”.

[126] Although Mr Hawkins vehemently denied making these comments, the conflict over whether or not these comments were made was resolved in favour of the evidence given by Sailors’ Corner’s witnesses. That credibility finding was based on a careful weighing of the evidence the Authority had seen and heard over the course of its five day investigation meeting.

[127] During the Authority’s investigation, Mr Hawkins exhibited an inappropriately aggressive attitude and demeanour towards the Authority, Sailors’ Corner’s witnesses and its counsel. Mr Hawkins was openly defiant of instructions he had been given by the Authority, to the extent that his actions disrupted the investigation meeting as he tried to insist on getting his own way.

[128] Sailors’ Corner’s evidence that Mr Hawkins had acted in a confrontational and disrespectful way in the workplace in response to management decisions he disagreed with seemed credible, because the Authority had observed similar behaviour from him during its investigation meeting.

[129] The Authority was mindful that Mr Hawkins was a self-represented applicant and had experienced health issues. Allowances therefore had to be made for his conduct during the investigation meeting, to recognise that he was likely under considerable stress and pressure as a result of these proceedings. He was also clearly still angry about the breaches he believed had occurred.

[130] Despite those factors weighing in Mr Hawkins’ favour, the comments attributed to Mr Hawkins (that he vehemently denied) had a ring of truth in terms of how the Authority had observed him to have interacted with it, and others. They also reflected the same sentiments that Mr Hawkins had repeatedly and forcefully expressed in his evidence.

[131] One witness gave evidence that Mr Hawkins was someone who had a tendency to misunderstand a situation, or form a subjective perception about something, then become convinced that he was right and everyone else was wrong.

[132] That evidence aligned with the Authority's observations of him. For example, Mr Hawkins gave evidence that he would never ever swear in front of women, immediately after having done so - in front of this Member and other women who were present - numerous times.

[133] Mr Hawkins mouthed to a witness "*you are full of shit*" in front of this Member, then adamantly denied doing so. He called out while witnesses were giving evidence that their evidence was "*shit*", "*crap*" and "*rubbish*." That occurred despite the Authority telling Mr Hawkins repeatedly not to keep saying "*shit*", to refrain from giving his own commentary on answers given by a witness and not to make adverse comments about a witnesses' evidence while they were giving it.

[134] Mr Hawkins also adamantly insisted that a witness had given evidence that they had not given. Despite this Member explaining to Mr Hawkins that she had very carefully explored that part of the evidence with the witness, so knew with absolute certainty that the witness had definitely not said what Mr Hawkins had attributed to them, he still aggressively maintained that the witness had said what he claimed they had said.

[135] Mr Hawkins could not accept that he could have been mistaken, or have misheard, misunderstood or misinterpreted the evidence, even though he was obviously wrong. That example demonstrated that although Mr Hawkins strongly believed he had not made the disputed comments, he could still have been mistaken about that.

[136] As an aside, the Authority notes that an honest witness can nevertheless still be a mistaken witness.

[137] The evidence established on the balance of probabilities that adverse comments made to Mr Hawkins by members of the Innes-Jones family were unlikely to have potentially caused him harm. Because the WorkSafe definition of bullying was not met, Mr Hawkins' bullying claim does not succeed.

What remedies should Mr Hawkins be awarded for his successful disadvantage grievances?

[138] Mr Hawkins gave evidence in person at the investigation meeting and he also set out in his witness statement the hurt, humiliation, stress and distress he suffered as a result of his disadvantage grievances.

[139] The Authority has assessed distress compensation for Mr Hawkins' successful unjustified disadvantage grievances as \$4,000, to be paid to him under s 123(1)(c)(i) of the Act.

Did Sailors' Corner breach its duty of good faith?

[140] Section 4 of the Act requires parties in an employment relationship to deal with each other in good faith. This includes a mutual obligation for parties to "*be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*".⁶

[141] While Sailors' Corner did actively and constructively respond to many of the matters Mr Hawkins raised with it, the following requests were not adequately responded to:

- (a) Mr Hawkins' December 2016 email suggestion regarding the proposed management of rest breaks for all staff. Sailors' Corner's explanation that a verbal response was provided is not accepted because the rest break issue remained an unresolved problem for the duration of the employment relationship; and
- (b) The 29 January 2017 job share request. Although Sailors' Corner appeared to have verbally responded to the other employee who had requested to job share with Mr Hawkins, it did not directly respond to Mr Hawkins about his request.

[142] These instances breached Sailors' Corner's good faith obligations to be responsive and communicative.

[143] Mr Hawkins' other claims of alleged breaches of good faith do not succeed. Sailors' Corner did respond to Mr Hawkins regarding his other issues, just not in the way he had wanted it to.

Should a penalty be imposed for these breaches of good faith?

[144] The pre-requisites in s 4A of the Act for imposing a penalty for a breach of good faith have not been met. The breaches of good faith that were proven were inadvertent and

⁶ Section 41(A)(b) of the Act.

were not intended to undermine the employment relationship. Nor were they deliberate, serious or sustained.

[145] Mr Hawkins' penalty claim for breaches of good faith does not succeed.

Was Mr Hawkins constructively dismissed on 3 June 2016?

[146] Mr Hawkins' claim that he was constructively dismissed on 3 June 2017 does not succeed.

[147] Although not constructively dismissed, the Authority has determined that Mr Hawkins was actually dismissed on 3 June 2017 - he did not resign. The initiative for Mr Hawkins' employment ending came from Sailors' Corner's deliberate actions.

[148] Regardless of whether or not Sailors' Corner intended to dismiss Mr Hawkins, the evidence established that it was responsible for ending his employment, because it initiated, and was responsible for, a 'sending away' of Mr Hawkins.

[149] Asking the Police to serve Mr Hawkins with a trespass order was a deliberate act by Sailors' Corner, it was not a breach of duty or part of a course of action designed to get Mr Hawkins to resign. The trespass order went into effect around 2.40-2.45pm on 3 June 2017 and it remained in force for two years.

[150] Although Sailors' Corner could have withdrawn or rescinded the trespass order the Police had served on Mr Hawkins, it did not do so. Sailors' Corner therefore legally barred Mr Hawkins from its premises and in doing so effectively prevented him from doing his job.

[151] The existence of the trespass order meant that Mr Hawkins would have committed a criminal offence if he returned to his workplace at Sailors' Corner after 3 June 2017. Mr Hawkins acted appropriately in observing the trespass order by remaining away from his workplace.

[152] The following factors established that Sailors' Corner actually (not constructively) dismissed Mr Hawkins on 3 June 2017:

- (a) It asked the Police to serve a trespass order on him;
- (b) It removed Mr Hawkins from its payroll on 3 June 2017;

- (c) It did not pay Mr Hawkins after the trespass order had been served on him;
- (d) There was also no contractual right to suspend Mr Hawkins;
- (e) Its actions were not consistent with a suspension, during which the employment continues, but were instead consistent with a dismissal, that had ended the employment relationship;
- (f) It paid him out his final pay, which was calculated on the basis his employment had ended at around 2.45pm on 3 June 2017;
- (g) It recorded on the Employer Monthly Schedule (EMS) it sent to Inland Revenue Department that his employment had ended on 3 June 2017;
- (h) It signed the EMS to confirm the information in it was accurate, thereby formally confirming Mr Hawkins' employment had indeed ended on 3 June 2017;
- (i) It never instructed Mr Hawkins to return to work;
- (j) It never agreed on any terms to facilitate Mr Hawkins' to return to work; and
- (k) It never rescinded or discharged the trespass order against him.

[153] Sailors' Corner took a number of discrete steps that proved it had deliberately ended the employment relationship on 3 June 2017.

[154] Sailors' Corner's evidence that the removal of Mr Hawkins from its payroll system on 3 June 2017, and that its entry on its June Employer Monthly Schedule that Mr Hawkins' employment had ended on 3 June 2017, were merely errors was not accepted.

[155] That evidence was contradicted by Sailors' Corner's payroll clerk's evidence. She told the Authority she had been instructed on the afternoon of 3 June 2017 to remove Mr Hawkins from the payroll immediately, which is why the contemporaneous documentation reflected that his employment had ended that day.

[156] Sailors' Corner's claim that the so-called 'disciplinary meeting' held on 9 June 2017 was evidence that the employment relationship had continued past 3 June 2017 is not accepted, because all of the other evidence established that an actual dismissal had already occurred.

[157] The fact that the parties attempted to resolve their issues by meeting in person, with their representatives, to discuss their respective concerns to see if an agreed return to work could be negotiated, did not in itself establish that the employment relationship had continued past 3 June 2017.

[158] Mr Hawkins' employment ended because Sailors' Corner dismissed him, without notice, on 3 June 2017.

Was Mr Hawkins' dismissal on 3 June 2017 justified?

[159] Sailors' Corner bears the onus of proving on the balance of probabilities that its dismissal of Mr Hawkins was justified, in accordance with the s 103A justification test in the Act.

[160] A fair and reasonable employer is expected to comply with its statutory obligations. These include the s 4(1A) good faith obligations to provide access to information and an opportunity to comment on it, and each of the four procedural fairness tests in s 103A(3) of the Act.

[161] Sailors' Corner is unable to establish that it conducted a fair or proper process before it dismissed Mr Hawkins on 3 June 2017. Its ability to do so was fundamentally undermined by its failure to comply with any of its statutory obligations.

[162] Sailors' Corner breached its s 4(1A) of the Act good faith obligations because it did not provide Mr Hawkins with access to information relevant to its decision to dismiss him or an opportunity to comment on that information before he was dismissed on 3 June 2017.

[163] Nor did Sailors' Corner comply with any of the four procedural fairness tests in s 103A(3) of the Act before it dismissed Mr Hawkins.

[164] These process defects were serious and resulted in Mr Hawkins being treated unfairly. Accordingly, s 103(5) of the Act does not prevent the Authority from concluding that his dismissal was unjustified.

[165] Sailors' Corner's failure to conduct a fair and proper process, and its failure to comply with its statutory obligations regarding minimum procedural fairness requirements, fundamentally undermined its ability to substantively justify its dismissal of Mr Hawkins.

[166] Mr Hawkins had a different view of his actions than Sailors' Corner had. However the manner of his dismissal on 3 June effectively deprived him of an opportunity to provide his explanation to the various matters of concern that had resulted in his dismissal.

[167] That meant that Sailors' Corner was not in a position as at 3 June to be able to form a fair and reasonable view about whether or not the trust and confidence in the employment relationship it had with Mr Hawkins had been destroyed.

[168] While Mr Hawkins did engage in blameworthy conduct on 3 June 2017, the background to him acting in that way was that there were ongoing unresolved employment relationship problems between the parties, that had likely caused him to 'act out' inappropriately.

[169] It was unfair for Sailors' Corner to treat Mr Hawkins' inappropriate actions on 3 June 2017 as a fundamental breach of trust and confidence, in light of its failure to appropriately address the many outstanding underlying concerns.

[170] Mr Hawkins' unjustified dismissal grievance succeeds.

What if any remedies should be awarded?

Mitigation of loss

[171] Mr Hawkins gave evidence that established he had appropriately mitigated his loss. He is therefore entitled to an award of lost remuneration.

Did an intervening event break the chain of causation for his lost remuneration claim?

[172] Sailors' Corner claimed that even if Mr Hawkins had not been dismissed on 3 June 2017, then he would have been justifiably dismissed for serious misconduct on 13 June 2017.

[173] That position is not accepted. The so called 'disciplinary' outcome of summary dismissal, as communicated in Sailors' Corner's letter dated 13 June 2017, was not an 'intervening event' that broke the chain of causation of the lost remuneration Mr Hawkins has claimed.

[174] None of the disciplinary concerns that Sailors' Corner set out in its letter to Mr Hawkins dated 3 June 2017 would have, in all the circumstances, substantively justified his

summary dismissal on 13 June 2017, had his employment not already ended on 3 June 2017. Sailors' Corner had an obligation to try to resolve the outstanding employment issues that were causing Mr Hawkins to act out inappropriately.

[175] The adverse comments the Authority concluded Mr Hawkins likely made would not have justified his dismissal because they arose out of problems Sailors' Corner was responsible for creating. Its managers had also made adverse comments to him that he was reacting to. An appropriate sanction had to be assessed in that wider context, to ensure that the "*all of the circumstances*" element of s 103A(2) justification test in the Act was appropriately applied.

[176] While not justifying summary dismissal of Mr Hawkins, Sailors' Corner did prove on the balance of probabilities that a disciplinary sanction short of dismissal would have been substantively justified as a response to the disciplinary concerns it had discussed with him on 9 June 2017.

[177] Sailors' Corner had justified concerns:

- (a) About Mr Hawkins' failure to follow its reasonable and lawful instructions that he was not to use his personal mobile device at work (which he had repeatedly breached);
- (b) Regarding the unsatisfactory and insubordinate manner in which he interacted with, and spoke to and about, managers; and
- (c) The unnecessarily verbally aggressive manner in which he had engaged with another staff member (MS).

[178] So although the chain of causation regarding Mr Hawkins' lost remuneration claim was not broken, the likelihood of a substantively justified disciplinary sanction being imposed on him is relevant to an assessment of how long the employment relationship would have continued, if he had not been dismissed.

Lost remuneration

[179] In determining how much lost remuneration to award Mr Hawkins, the Authority has objectively assessed how long it considered Mr Hawkins' employment would have been reasonably likely to have continued, had he not been dismissed on 3 June 2017.

[180] In making that assessment the Authority has considered that:

- (a) Mr Hawkins held strong views about the appropriateness of his actions and about wrongdoing towards him by all of the members of the Innes-Jones family;
- (b) Mr Hawkins believed that members of the Innes-Jones family were “*liars*” and he did not respect the way they were running the business;
- (c) Mr Hawkins’ believed that in the months preceding his dismissal he was being bullied, harassed and singled out for unfair treatment by Sailors’ Corner’s managers in an attempt to get him to resign;
- (d) Mr Hawkins considered Sailors’ Corner to be a bad employer;
- (e) Sailors’ Corner would have been able to have justified a disciplinary sanction short of dismissal in response to the disciplinary concerns it had discussed with Mr Hawkins on 9 June 2017;
- (f) Mr Hawkins would have likely taken exception to any sanction that could have justifiably been imposed on him, if his employment had not already ended on 3 June;
- (g) The relationship between the parties had been deteriorating over many months, and the events of 3 June and the concerns raised at the 9 June meeting were unlikely to have stopped that deterioration from continuing;
- (h) It was clear there was significant disharmony in the workplace;
- (i) The parties were distrustful of each other;
- (j) Mr Hawkins’ belief that he was “*unsafe*” at work had turned the simple act of Rex Innes-Jones handing him an envelope into the over the top 3 June incident;
- (k) The parties were both unhappy and they each blamed the other for the problems that were occurring, without accepting that their own actions may have caused/contributed to the problems that were arising; and
- (l) Sailors’ Corner’s lack of employment documentation was likely to continue creating conflict and confusion between the parties over their rights and obligations.

[181] For these reasons, the Authority was not satisfied that the employment relationship would have been likely to have continued for more than three months after 3 June 2017. Mr Hawkins is therefore awarded three months' lost remuneration, on the basis that is the amount of lost remuneration that can reasonably be attributed to his dismissal grievance.

[182] Sailors' Corner is ordered to pay Mr Hawkins three months' lost remuneration of \$5,928 under s 128(2) of the Act.

[183] This award of lost remuneration is calculated on the basis of \$19 per hour, for 8 hours a day = \$152, x 3 days per week = \$456 per week, x 52 weeks = \$23,712 per annum, divided by 12 months = \$1,976 per month, x 3 months = \$5,928.

Compensation for remainder of 3 June shift

[184] This has already been covered by the award of lost remuneration, so no separate amount is awarded under this heading.

Notice claim

[185] Mr Hawkins' notice pay claim does not succeed. Mr Hawkins was summarily dismissed. The lost remuneration he has been awarded covered what would have been his notice period, had he been dismissed on notice.

Apology

[186] Mr Hawkins sought an apology from Sailors' Corner, but the Authority has no power to award that to him.

Distress compensation – unjustified dismissal grievance

[187] Mr Hawkins gave evidence about the emotional and other adverse effects his unjustified dismissal had on him.

[188] Mr Hawkins said he needed to increase his medication as a result of his unjustified dismissal. He also identified the following factors as having increased his distress;

- (a) Rex Innes-Jones had made inappropriate comments to Mr Hawkins during the 3 June altercation that occurred between them, that were hurtful to him. Rex admitted this inappropriate name calling;
- (b) Other colleagues told him that on 6 June 2017 Sean Innes-Jones said that “*he [Mr Hawkins] didn’t know shit*” about a work related issue that had arisen;
- (c) A notice was posted outside the Sailors’ Corner’s office, which staff and potentially suppliers who were attending the office could have seen, regarding his departure;
- (d) He suffered delays in obtaining financial assistance from Work and Income New Zealand (WINZ) because of the two weeks’ it had taken Sailors’ Corner to respond to WINZ’s request for information about him;
- (e) He had been publicly escorted from his workplace by the Police, in view of customers and staff;
- (f) He had been issued with a trespass order that prevented him from attending the workplace for two years; and
- (g) He had found it very difficult to find a new job, although he had done so by the time the investigation meeting occurred; and
- (h) He suffered financial hardship and embarrassment because he was without any income for many months, requiring him to borrow money from friends.

[189] Sailors’ Corner is ordered to pay Mr Hawkins \$15,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his unjustified dismissal.

Should the remedies awarded to Mr Hawkins be reduced on the grounds of contribution?

Section 124 of the Act - assessment of contribution

[190] Having determined that Mr Hawkins has successful personal grievance claims, s 124 of the Act requires the Authority to consider the extent, if any, to which his actions contributed to the situations that gave rise to his personal grievances, and if so, to reduce remedies accordingly.

[191] Contribution denotes blameworthy conduct by Mr Hawkins that has been proven on the balance of probabilities. While Sailors' Corner had some legitimate concerns, not all of the matters it sought to rely on met that required evidential standard of proof.

[192] The Authority considers that the origins of the deterioration in the relationship between the parties can be traced back to Sailors' Corner's breaches of its statutory obligations regarding the provision of a written employment agreement and rest break arrangements. It must also bear responsibility for the lack of clearly communicated written policies and procedures, because that had increased the difficulties that had occurred.

[193] Sailors' Corner's failure to clearly communicate its expectations to Mr Hawkins at the beginning of the employment relationship regarding its expectations about the dress code, use of personal mobile devices in the workplace during work hours, rest break requirements, and shift and roster changes created an environment that enabled conflict and confusion to flourish.

Assessment of contribution – disadvantage grievances

[194] Mr Hawkins' blameworthy conduct that contributed to the situation that gave rise to his successful unjustified disadvantage grievances included:

- (a) The use of profanity towards Sailors' Corner employees, directors and managers;
- (b) Engaging in swearing, derogatory comments and openly confrontational behaviour criticising managers and their decision-making;
- (c) Raising his voice to management, telling Rex Innes-Jones that his dress code policy was "*crap*", telling Sean Innes-Jones that he was "*fucking useless*", and "*didn't know what the fuck he was doing*" and calling management "*useless*" and "*pricks*".
- (d) Using derogatory and dismissive language, which included telling Rex Innes-Jones that he was "*pathetic*" and that his view about matters in dispute was "*absolute rubbish and he was making it up*".
- (e) Demonstrating an ongoing lack of respect for managements' authority. He was challenging in the way he interacted with the Innes-Jones family. That

included under-cutting Sean Innes-Jones' decision-making, making derogatory comments about him and ridiculing Rex Innes-Jones to other staff.

[195] Mr Hawkins contribution to the situations that gave rise to his successful disadvantage grievances requires his distress compensation to be reduced by twenty five percent, under s 124 of the Act.

Assessment of contribution – dismissal grievance

[196] Mr Hawkins contributed to the situation that gave rise to his successful dismissal grievance.

[197] The way he reacted to, and interacted with management, after being handed an envelope blameworthy. Contrary to Mr Hawkins' subjective belief, the mere act of handing him an envelope did not make him "*unsafe*" or justify his over the top reaction.

[198] The Authority accepted evidence from Sailors' Corner's witnesses that Mr Hawkins was highly agitated and disruptive, which was why he ended up being trespassed. Mr Hawkins was more likely than not unnecessarily verbally aggressive and confrontational. He refused to leave the workplace despite a number of repeated requests to do so.

[199] Mr Hawkins' responded to Rex Innes-Jones' requests for him to leave by saying "*what a load of crap*" and "*rubbish*". Mr Hawkins spoke to others (Mrs Innes-Jones and DO) in an angry and agitated tone.

[200] When Mrs Innes-Jones reiterated her husband's advice to Mr Hawkins that he was trespassing, Mr Hawkins told her to "*stay out of it, it has nothing to do with you*" in a rude and aggressive manner.

[201] Mr Hawkins' actions escalated the situation to the extent that the handing him of an envelope ended up with Police involvement, and a trespass order. That is evidence that a normal work situation had spiralled out of control.

[202] Mr Hawkins called Rhys Innes-Jones a "*liar*", Rex Innes-Jones a "*bloody liar*" and told Rex Innes-Jones that he (Mr Hawkins) would not go back to work until he had received a "*please*" – when Rex Innes-Jones had already asked Mr Hawkins to "*please return to work.*"

[203] The evidence presented to the Authority established that Mr Hawkins created an unpleasant scene. He goaded Rex Innes-Jones into involving his lawyers and the Police by being openly defiant of instructions to return to work, and then subsequent instructions to leave the workplace.

[204] Mr Hawkins told Rex Innes-Jones to “*dial 111/ ha ha ha*” when Mr Innes-Jones expressed frustration that Mr Hawkins was not following instructions to return to work and would not leave the work premises.

[205] Mr Hawkins’ excuse that he had to finish making a note on his mobile device (that he should not have been using on the shop floor) before leaving did not reasonably explain why it had taken almost 30 minutes for him to record that he had been handed an envelope, that he had not opened, but had taped shut and put in his bag. Mr Hawkins’ claim that he had returned to work but there had not been any work for him to do was not credible.

[206] Despite Mr Hawkins’ denials, the evidence given by Rex Innes-Jones and Jeanette Innes-Jones that they wanted Mr Hawkins off the premises because he had become angry, agitated, confrontational and disruptive in view of other staff and customers was credible.

[207] Rex Innes-Jones called Sailors’ Corner’s lawyer and also sought help from the Police by phone. Mr Hawkins knew that was occurring, but still did not leave. The Innes-Jones then approached in person police, who coincidentally happened to have walked into the shop after Mr Hawkins had refused to leave. None of that would have been necessary if Mr Hawkins had simply left when he was asked to do so.

[208] The partial recording made that same day also tends to indicate that Mr Hawkins’ had an unsatisfactory attitude and demeanour. After being trespassed by the Police, Mr Hawkins provocatively stood on the footpath outside the shop, videoing those inside, until the Police escorted him away.

[209] Mr Hawkins should have left work, without incident, after being asked by his employer to leave its workplace. He should not have needed to have been removed by the Police. Mr Hawkins’ decision to remain in the workplace until he was escorted off the premises by the Police was an unnecessary and blameworthy provocation that led to his dismissal.

[210] Mr Hawkins' distress compensation for his dismissal grievance should be reduced by twenty five percent, under s 124 of the Act to reflect his contribution.

Adjusted distress compensation award

[211] Sailors' Corner is ordered to pay Mr Hawkins total distress compensation of \$14,250, consisting of:

- (a) \$3,000 distress compensation under s 123(1)(c)(i) of the Act for his successful disadvantage grievances. This is the \$4,000 he was awarded, reduced by \$1,000 under s 124 of the Act to reflect his contribution to the situations that gave rise to his successful disadvantage grievances;
- (b) \$11,250 distress compensation under s 123(1)(c)(i) of the Act for his successful dismissal grievance. This is the \$15,000 he was awarded, reduced by \$3,750 under s 124 of the Act to reflect his contribution to the situation that resulted in his dismissal.

Interest

[212] It is not appropriate to award interest at this time because the substantive matter has only now been determined. This decision does not preclude Mr Hawkins from later seeking interest in connection with any enforcement proceedings that may become necessary.

Penalties

[213] The parties have been offered an opportunity to provide information relevant to the Authority's assessment of penalties.

Costs

[214] Although Mr Hawkins represented himself at the investigation meeting, he seeks reimbursement of legal costs. Mr Hawkins as the overall mostly successful party is likely to be entitled to a contribution towards his actual legal costs.

[215] The parties have been given an opportunity to provide information relevant to the Authority's assessment of costs.

Summary of outcome of these proceedings

[216] The Authority makes the following findings/orders:

- (a) Mr Hawkins' claims against the named respondent members of the Innes-Jones family do not succeed;
- (b) A penalty is to be imposed on Sailors' Corner for its failure to provide Mr Hawkins with a written employment agreement, in breach of s 65 of the Act;
- (c) A penalty is to be imposed on Sailors' Corner for its failure to provide Mr Hawkins with paid rest breaks, in breach of s 69ZD of the Act;
- (d) The parties have been provided with an opportunity to provide information relevant to the Authority's assessment of penalties;
- (e) Mr Hawkins' wage arrears claims do not succeed;
- (f) Sailors' Corner unjustifiably disadvantaged Mr Hawkins as a result of the way it handled dress code issues and by the adverse comments that managers made to him;
- (g) Mr Hawkins contributed to the situations that gave rise to his successful disadvantage grievances, so his distress compensation was reduced by 25% under s 124 of the Act to reflect that;
- (h) Sailors' Corner is ordered to pay Mr Hawkins distress compensation of \$3,000 (\$4,000 awarded, but reduced by \$1,000 to reflect contribution) for his disadvantage grievances;
- (i) Sailors' Corner breached its s 4 of the Act good faith obligations by not responding to issues Mr Hawkins had raised;
- (j) These breaches of good faith do not result in penalties being imposed, because the s 4A of the Act penalty requirements were not met;
- (k) Sailors' Corner dismissed Mr Hawkins on 3 June 2017;
- (l) Sailors' Corner's dismissal of Mr Hawkins was unjustified;
- (m) Mr Hawkins contributed to the situation the gave rise to his successful dismissal grievance, so his distress compensation award is to be reduced by 25% under s 124 of the Act to reflect that;

- (n) Sailors' Corner is ordered to pay Mr Hawkins:
 - (i) \$5,928 under s 128(2) of the Act, to compensate him for three months' lost remuneration; and
 - (ii) \$11,250 distress compensation under s 123(1)(c)(i) of the Act (\$15,000 awarded, but reduced by \$3,750 to reflect his contribution);
- (o) Mr Hawkins' interest claim does not succeed;
- (p) Mr Hawkins is entitled to an award of costs in his favour, to compensate him for the actual legal costs he has incurred;
- (q) A timetable has been set for the parties to provide additional information relevant to the Authority's assessment of costs.

Rachel Larmer
Member of the Employment Relations Authority