

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 232
3003611

BETWEEN A
 Applicant

A N D R Limited
 Respondent

Member of Authority: Rachel Larmer

Representatives: Michael Smyth and Charlotte Foster, Counsel for
 Applicant
 Ken Anderson, Counsel for Respondents

Investigation Meeting: 11 and 12 April 2018 at Auckland

Submissions Received: 16 April 2018 from Applicant
 23 April 2018 from Respondent
 26 April 2018 from Applicant

Date of Determination: 24 July 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

Mr A's claims

[1] Mr A resigned from his employment with R Limited on 23 August 2016 because he said he felt unsafe at work after having been assaulted twice by two different colleagues.

[2] Mr A said his resignation was a constructive unjustified dismissal.

[3] Mr A claimed R Limited breached its duty to provide him with a safe workplace and blamed him for initiating the second assault without first speaking to him about the incident.

R Limited's position

[4] R Limited denied that Mr A was dismissed. It says he resigned to avoid the disciplinary process against him.

[5] R Limited denied that it failed to provide a safe workplace. R Limited says it did not breach any duty to Mr A or otherwise engage in any conduct which gave rise to a personal grievance.

Events leading up to Mr A's resignation

[6] Resignation was Mr A's response to a series of ongoing breaches by R Limited of its duties to him which lead to a situation where he said he did not feel safe to ever return to work. Mr A's resignation must therefore be seen and assessed in the context of the events leading up to it.

R Limited's workplace

[7] R Limited employs eight employees, four who are mechanics. R Limited is part of a global franchise but it has a small workplace which requires its mechanics to work in close proximity to each other.

[8] Mr A was a long serving employee who had worked for R Limited as a mechanic for approximately ten years.¹

[9] In May 2016 R Limited's newest youngest and most junior employee was its apprentice, Mr S. Mr A was the mechanic who was responsible for supporting Mr S with his apprenticeship.

Mr A's work history

[10] During the investigation meeting Mr J acknowledged that Mr A had been a diligent and hardworking employee who had a clean disciplinary record.

[11] Prior to 10 August 2016 Mr A had never been investigated, disciplined or performance managed by R Limited.

[12] Although R Limited was very critical of Mr A in its written statements to the Authority it was unable to produce any written record of any prior complaints being

¹ This period was interrupted by an approximately 8 month break in service.

made about Mr A to management or of management ever having given Mr A informal counselling or informal warnings about his behaviour and conduct. Nor did any of R Limited's witnesses give evidence of this having occurred.

[13] This absence of corroborating evidence undermines R Limited's criticisms of Mr A. R Limited's criticisms of Mr A appear to have arisen for the first time after he was assaulted at work for the second time.

Trial of four day work week

[14] R Limited's mechanics were contractually required to work five days a week and alternative Saturdays. The Saturday work was allocated via a roster system.

[15] In early 2016 R Limited offered its mechanics the opportunity to trial a four day work week, which involved mechanics working longer days over four days instead of shorter hours over five days.

[16] The alternative Saturdays work obligation was not affected by this trial which related to Monday to Friday work only.

[17] R Limited had told staff that if there were any problems with the four day work week then it would return to the usual contractual five day work week.

[18] Mr A and Mr S decided not to take part in the trial so they stayed on their normal contractual five day work weeks. The other mechanics liked working a four day work week so wanted that arrangement to continue indefinitely.

Saturday rostering issues

[19] The four day work week trial resulted in conflict between the mechanics involving the rostering of Saturday work.

[20] The other mechanics who were doing a four day work week wanted to avoid working on any Saturdays that fell in the middle of their four day work weeks. They therefore changed the Saturday rosters to make Mr S work every Saturday so the other mechanics could have extra-long weekends between their four day work weeks.

[21] Mr S was unhappy with that change because he understandably did not want to work every Saturday when he was contractually only required to work alternative

Saturdays. Mr S had told the other mechanics that he wanted some Saturdays off work.

Mr A's concerns about the other mechanics' behaviour towards Mr S

[22] On the morning of 27 May 2016 Mr A heard the other mechanics discussing how to deal with Mr S (who at that time was not yet at work) to get him (Mr S) to agree to cover their Saturday shifts on a permanent basis.

[23] Mr A heard the other mechanics saying that they intended to put Mr S “*in his place*” by refusing to cover for him unless he agreed to the way they wanted the Saturday roster to work.

[24] Mr A believed that the other mechanics had agreed between themselves to ‘gang up’ on Mr S and isolate him in order to get their own way. Mr A was concerned such actions amounted to bullying of Mr S in order to make him agree to Saturday roster arrangements that were unfavourable to him (Mr S) and highly favourable to the other mechanics.

[25] Mr A was concerned that as the newest and most junior employee Mr S would find it difficult having to stand up to the other mechanics. Mr A believed that the other mechanics were acting in a bullying way towards Mr S because they were all agreeing to make Mr S’s life uncomfortable unless he agreed with what they wanted to do about Saturday work.

Mr A's recordings of co-workers

[26] Mr A’s view was that the other mechanics wouldn’t have agreed to treat Mr S in this way if their manager, Mr J, had been around to hear their discussions.² Mr A therefore decided to record their conversations so management had the best available evidence of what had been going on while Mr J was away.

[27] On 27 May 2016 Mr A made two recordings of conversations involving the other mechanics.

² On 27 May 2016 Mr J was on leave.

[28] Mr A was present so could hear both of these conversations which he recorded on his cell phone. Mr A's co-workers would have seen that Mr A was close enough to have heard their conversations but they didn't know Mr A was recording them.

[29] The first recording occurred before Mr S had got to work and was of the other mechanics agreeing on how they were going to deal with Mr S to get him to agree with what they wanted to do.

[30] The second recording was made around 8.30am (after Mr S had arrived at work) and it was of the other mechanics speaking to Mr S in a way that Mr A considered was inappropriate and potentially bullying.

Why did Mr A become involved in the other mechanics behaviour towards Mr S?

[31] Mr A was looking out for Mr S.

[32] Mr A felt that the way the other mechanics had been treating Mr S was wrong and that management needed to know about it so it could be addressed. Mr A didn't feel it was his place to address the behaviour of the other mechanics because they were his co-workers.

[33] Mr A genuinely believed he was doing the right thing by raising his concerns with management. Mr A did not ask R Limited for any particular action or outcome in response to his complaint about the way the other mechanics had been treating Mr S. Mr A was happy to leave it up to management to address his concerns.

[34] Mr A was attempting to support Mr S in the face of inappropriate conduct by his co-workers. Mr A felt a sense of responsibility towards Mr S because of Mr S's young age, and his (Mr A's) role as Mr S's apprenticeship supervisor.

[35] Mr A was concerned about Mr S's ability to stand up against the other mechanics given Mr S was the youngest, least experienced and newest employee who was facing off to all of the other mechanics by himself.

[36] Before reporting his concerns to management Mr A informed Mr S by text that he (Mr S) had Mr A's support and that he (Mr A) was going to tell Mr J about what had occurred that morning because it wouldn't have happened if Mr J had been there.

[37] Mr S replied by thanking Mr A for his support and mentioned that he (Mr S) felt like he'd been "*targeted*." Further texts from Mr A to Mr S referred to Mr A's view that the situation had seemed "*to get really out of hand*" and to Mr A not wanting Mr S to think he was on his own as Mr A had Mr S's back.

[38] Mr S knew Mr A was going to report the situation to management before he (Mr A) did so and Mr S appeared grateful for Mr A's support and involvement.

[39] R Limited has categorised Mr A's actions in making recordings and complaining to management as "*troublemaking*". I do not agree. Mr A raised his genuine concerns about what he had seen and heard regarding Mr S with management in a responsible and appropriate manner. This is consistent with the bullying provisions in his employment agreement.

Mr A's complaint to Mr K that Mr S was being bullied

[40] Mr A reported the concerns he had about the other mechanics' treatment of Mr S on 27 May 2016 to R Limited's General Manager, Mr K that same day.

[41] Mr A told Mr K that he (Mr A) was concerned that Mr S was being bullied and/or improperly pressured by the other mechanics over a Saturday roster dispute. Mr A told Mr K that he (Mr A) had recorded two conversations that had concerned him.

[42] Mr K subsequently asked Mr A to send him (Mr K) the recordings, which Mr A then did.

[43] Mr K could not hear what was on the recordings and told the Authority that he did not understand what Mr A was concerned about. However Mr K never told Mr A that. Nor did Mr K seek clarification or any further information from Mr A. Mr K did not investigate Mr A's concerns.

Mr A's complaint to Mr J that Mr S was being bullied

[44] On 29 May 2016, while Mr J was still on leave, Mr J called Mr A to find out what had been happening while he (Mr J) had been away.

[45] Mr A told Mr J he was worried the other mechanics had been bullying Mr S over the rostering of Saturday work. Mr A told Mr J he had recorded two

conversations the other mechanics had which he (Mr A) considered were inappropriate.

[46] Mr J also did not register any concern about Mr A having recorded his co-workers. Mr J asked for copies of the recordings, which Mr A subsequently provided.

[47] Mr J also couldn't hear what was on the recordings but he did not tell Mr A that. Nor did he seek further clarification or information from Mr A.

R Limited's response to Mr A's complaints involving Mr S

[48] R Limited's response to Mr A's complaints about the way the other mechanics had been treating Mr S was inadequate. It also failed to comply with R Limited's contractual obligation³ to "formally investigate" bullying complaints.

[49] Neither Mr K nor Mr J asked Mr A to provide a statement about what he had heard or to explain what he (Mr A) thought was on the recordings or to give any further information explaining why he had been concerned enough to report the conversations to management.

[50] Without first ensuring he understood Mr A's concerns, Mr J asked Mr S if he was being bullied. Mr S acknowledged there had been a problem over the Saturday rosters but said it had been resolved. Mr J also asked the other mechanics if they had been bullying Mr S, which they denied. No notes were taken of these informal conversations.

[51] Mr J then concluded Mr A's concerns about Mr S being bullied or harassed were without merit. Mr J did not speak to Mr A about his concerns. Mr J also failed to tell Mr A what he (Mr J) had done to investigate the complaint or that he had concluded it was without merit.

Mr J's disclosure to staff of Mr A's recordings

[52] Mr A did not disclose that he had made recordings to his co-workers.

[53] Mr A gave R Limited the recordings as evidence supporting his complaint. Instead of keeping that information confidential Mr J told the other mechanics that Mr A had secretly recorded them as evidence of their wrongdoing.

³ Clause 16 of its employment agreements.

[54] Mr J failed to tell the other mechanics that nothing could be heard on Mr A's recordings or that no action was going to be taken about them. Nor did Mr J explain to the other mechanics that Mr A had only ever made two recordings or that the recordings he had made related to two conversations on the morning of 27 May or what those conversations were about.

[55] This was an inappropriate disclosure by Mr J that caused problems for Mr A.

Mr L's request to Mr A for the recordings

[56] Mr L texted Mr A asking for the recordings. Mr A asked Mr J how to respond to Mr L.

[57] Mr J's advice to Mr A was to tell Mr L that "someone was winding [him] up". Mr A decided not to follow Mr J's advice because he (Mr A) was concerned that saying that to Mr L may have made the situation worse, so Mr A did not respond.

[58] R Limited should have involved itself in responding to Mr L to make the position regarding the recordings clear, namely that nothing could be heard on the recordings and no action was going to be taken over them.

[59] R Limited's failure to appropriately respond to Mr L's request created ongoing problems for Mr A.

Response to disclosure of Mr A's recordings

[60] The other mechanics were angry that Mr A had recorded them. They retaliated against Mr A by making his life difficult at work and by confronting him about the recordings.

First assault on Mr A

[61] Mr W assaulted Mr A at work on 07 July 2016.

[62] Immediately before the assault Mr W had overheard Mr L confronting Mr A about the recordings and Mr A's admission that he had made recordings.

[63] Shortly after that Mr W and Mr A were walking alongside each other inside the workshop. As they turn the corner they are captured on R Limited's video surveillance.

[64] The video shows Mr W grabbing Mr A by both of his shoulders and forcefully pushing Mr A up against a nearby wall more than once.

[65] Mr A is injured as the back of his head bangs against the wall. Mr W places his forearm against Mr A's throat to restrain Mr A against the wall while Mr W speaks in what looks to be an aggressive and intimidating manner up close and in Mr A's face.

[66] Mr A is injured during the assault. He has to have time off work and he receives accident compensation payments for his personal injury.

R Limited's response to first assault

[67] R Limited failed to appropriately respond to Mr W's assault of Mr A.

[68] R Limited did not investigate the assault or the events which lead up to it. It did not interview Mr W or Mr A or anyone else to obtain statements about the assault, in terms of what had occurred or why it had happened.

[69] R Limited briefly discussed the assault with Mr W on 09 June 2018. The notes of this meeting record that Mr W was told his assault on Mr A was "*unacceptable behaviour.*" The notes record "*all parties have agreed this is not to be tolerated by [R Limited] and it will not happen again.*"

[70] The notes of this meeting do not record why Mr W assaulted Mr A or what if any disciplinary sanction R Limited imposed on Mr W.

[71] R Limited did not identify, address or resolve any underlying problems between Mr A and Mr W.

[72] R Limited did not make Mr W apologise to Mr A, it did not make Mr W acknowledge any wrongdoing towards Mr A or to demonstrate any remorse for the injuries Mr A had suffered.

[73] R Limited knew that Mr W was angry about being charged by the police and that he and Mr A had to keep working alongside each other while Mr W's criminal matter proceeded through the court system. However R Limited failed to take any steps to appropriately manage the working relationship between Mr W and Mr A which allowed ongoing tension within the workplace to continue.

[74] On 31 October 2016 R Limited gave Mr W a positive written reference which said that Mr W's "*indiscretion*" arose from his frustration about Mr A's "*increasingly erratic and provocative actions*" and was intended as no more than "*an adult version of a playground shove*" which occurred under "*extreme provocation.*"

[75] This characterisation of Mr W's actions by R Limited does not align with the evidence the Authority saw or heard. Mr A's account of the assault and the lead up to it is preferred on the basis it is considered to be more coherent credible and aligns with the video evidence.

[76] R Limited's decision that Mr A had provoked the assault was not a conclusion a fair and reasonable employer could have reached because R Limited had failed to investigate the incident and had not even spoken to Mr A about it.

[77] The positive reference R Limited gave Mr W is however evidence of R Limited's attempt to minimise the assault on Mr A and to unfairly and unreasonably blame him for it.

Mr A's complaints to R Limited after the first assault

[78] The other mechanics ostracised and harassed Mr A for reporting his concerns about Mr S to management and for reporting Mr W's assault to police.

[79] Mr A complained to Mr J about the way the other mechanics were treating him. Mr A's complaints included that;

- a. the other mechanics would not acknowledge or speak to him;
- b. one mechanic who was responsible for cleaning up the workspaces refused to clean Mr A's space;
- c. abusive comments were made to Mr A by a co-worker;
- d. rubbish had been deliberately tipped over Mr A's workbench;
- e. other mechanics made disparaging comments to him;
- f. motorcycles were being deliberately put into gear to make it very difficult for Mr A (due to his injuries) to move them;

g. he felt unsafe at work.

[80] Mr J initially said he investigated Mr A's complaints which were entirely without merit. However this evidence did not withstand scrutiny.

[81] During the Authority's investigation meeting Mr J acknowledged that he had misunderstood Mr A's complaints. Mr J agreed he had made incorrect assumptions about what it was Mr A was complaining about which meant that Mr J had dismissed Mr A's concerns without actually investigating them.

[82] During a return to work meeting involving an ACC occupational therapist which was held on 04 July 2016 Mr A became emotional and told Mr K and another director that he (Mr A) felt unsafe at work because of workplace tension due to the way the other mechanics were treating him.

[83] The occupational therapist noted in her report that she had observed "*tense relations with other employees*" "*ambivalent employer*" and "*fractious work environment.*" She also recorded that Mr A had "*became emotional and advised he did not feel safe in the workplace*".

[84] Although R Limited agreed during the 04 July meeting that it would investigate Mr A's complaint that he felt unsafe at work it failed to take any steps to do so.

Second assault on Mr A

[85] Another mechanic, Mr L assaulted Mr A on 01 August 2016.

[86] Mr A was injured in the assault. He has been medically assessed by ACC as unfit to work in any capacity since the assault. While Mr A wants to return to the workforce it is unclear when he will be medically well enough to be able to do so.

[87] R Limited say Mr A's actions initiated the second assault on him which it deemed was an "*act of retaliation*" by Mr L. I do not accept that evidence.

[88] I consider it more likely than not that it was R Limited's failure to address the ongoing workplace tensions and his safety concerns that lead to Mr A being assaulted at work for the second time.

Circumstances leading up to second assault

[89] The circumstances leading up to this second assault need to be understood in order to properly assess Mr A's decision to resign.

[90] Mr A was the only person who gave evidence to the Authority about the events that immediately preceded the second assault.

[91] Mr L was not a witness and he never provided a written statement to R Limited or the Authority about these events. The other mechanics present were never asked by R Limited to provide a written statement about what they had seen or heard. Nor did any of them attend the Authority to give evidence.

[92] Mr A's account of what occurred in the lead up to the assault was therefore not contradicted by any sworn/affirmed evidence. I accept Mr A's evidence.

[93] On 01 August 2016 Mr L had been acting in an angry provocative and aggressive manner towards Mr A. Mr L can be seen on video giving Mr A the middle finger gesture shortly before they enter the lunchroom.

[94] Mr L was in the lunchroom eating his lunch when Mr A entered the lunchroom, put his food in the microwave to heat and then left the lunchroom while it heated.

[95] When Mr A returned to the lunchroom he saw that the microwave had been unplugged so his food wouldn't heat. Mr A heard Mr L boasting to another mechanic that he (Mr L) had deliberately unplugged the microwave.

[96] When Mr A confronted Mr L about unplugging the microwave Mr L began yelling abuse at Mr A, calling him "*a piece of shit*" multiple times and threatening to "*f*ck [Mr A] up*".

[97] Mr L moved from the lunchroom to the office where Mr J was and continued yelling. Mr A followed Mr L to the office telling Mr L to tell Mr J what had occurred in the lunchroom.

[98] Mr A was standing in the doorway of the office while Mr L's abusive and threatening comments towards him (Mr A) continued.

Video of second assault

[99] The second assault was captured on R Limited's video surveillance which showed it from two different angles.

[100] As Mr L left the office he shoved Mr A aside. Mr A responded by pushing Mr L in the back. Mr L put his lunch down, then returned and grabbed Mr A in a headlock and started punching him (Mr A) in the head and ribs.

[101] After being assaulted Mr A walked away by himself. No-one went to check on him to see if he was okay. Mr L picked up his lunch and continued eating. The other staff gathered around Mr L in the office. One person can be seen on video patting Mr L on the shoulder in a gesture of support.

[102] Mr A's injuries included concussion. Mr A went to hospital later in the day after losing consciousness as a result of injuries he got during Mr L's assault on him.

R Limited's response to second assault

[103] R Limited did not report this second assault on Mr A as an incident of serious harm.

[104] R Limited failed to adequately investigate the assault on Mr A.

[105] I do not accept R Limited's position that an investigation was not necessary because Mr L had accepted termination of his employment on the day the assault occurred.

[106] R Limited as a responsible employer needed to establish what had occurred and why. Because R Limited did not attempt to speak with Mr A about the incident it did not have his perspective on it or on other issues (such as Mr L's abuse and the lunchroom confrontation) that had immediately preceded the assault.

[107] Notwithstanding its lack of investigation R Limited appears to have accepted whatever Mr L may have said because it decided Mr A was to blame for the assault. R Limited then proceeds to discipline Mr A based on that view.

R Limited's disciplinary letter to Mr A

[108] R Limited started a disciplinary process against Mr A by sending him a disciplinary letter dated 05 August 2016 alleging he had engaged in serious misconduct consisting of “*deliberate misconduct likely to result in harm to fellow employees, threatening language or conduct and harassing behaviour.*”

[109] The disciplinary letter stated that “*there is tension between you and other staff with you displaying a negative and disruptive attitude.*” Neither Mr J nor Mr K, who both signed the disciplinary letter, could give the Authority any examples of Mr A’s engaging in the alleged “*negative and disruptive attitude*” which they were referring to.

[110] R Limited expressed its view that Mr A had been “*extremely abusive*” towards Mr L who was “*concerned for his safety given your abusive attitudes and behaviours.*”

[111] The disciplinary letter further states;

“We have deemed [Mr L’s] actions [the assault] to be an act of retaliation against you as a direct result of the frustration he experienced as a result of being subjected to your ongoing abuse and the physical force you then applied to him.” [...]

“We believe that your inappropriate actions/attitudes (abuse) initiated the incident and that your decision to follow [Mr L] to [Mr J’s] office, to continue to abuse [Mr L] in front of [Mr J], and to use physical force towards [Mr L] (pushing him in the back) resulting in [Mr L] electing to end the incident by physically punching you, may amount to serious misconduct.”

[112] Mr A was not provided with any additional documents or other information with the disciplinary letter so he did not know what other people had said about the incident.

[113] Presumably the information in the disciplinary letter is based on Mr L’s version of events because it depicts Mr L as the victim who has retaliated to abuse by Mr A. There is no record of what Mr L told R Limited.

Mr A's resignation

[114] Mr A received this disciplinary letter while he was still on sick leave due to the injuries he had suffered in the assault. R Limited had not spoken to Mr A about the incident before it started the disciplinary process against him.

[115] The disciplinary meeting was initially scheduled to occur while Mr A was on sick leave but it was rescheduled, at his request, to his first day back at work. The disciplinary meeting did not occur because Mr A resigned on 23 August 2016.

[116] Mr A said he resigned because he did not believe R Limited would keep him safe at work because it had blamed him for being assaulted without even seeking his view of the situation.

R Limited's response to Mr A's resignation

[117] After receiving Mr A's resignation R Limited offered to meet with Mr A to discuss his stated resignation reason which was that Mr A believed his employment was no longer tenable due to recent events.

[118] Mr A says he did not agree to meet because the content of the disciplinary letter made him believe R Limited had already made up its mind about the circumstances involving the second assault on him.

[119] R Limited had deemed Mr L's assault on Mr A to be an act of retaliation for Mr A's abuse and provocation of Mr L so Mr A therefore reasonably believed R Limited had a closed mind about the situation.

[120] R Limited's offer to meet Mr A did not override its previous breaches of duty to him. Nor did it prevent Mr A's resignation in reliance on such breaches from taking effect.

Personal grievance for unjustified dismissal

[121] On 27 October 2016 Mr A raised a personal grievance for unjustified dismissal.

[122] Mr A's personal grievance letter alleged that R Limited had failed to provide a safe workplace and had failed to address the health and safety concerns Mr A had

raised which included the workplace bullying and the harassment that Mr A had been subjected to after he had provided management with the two recordings involving Mr S's issues.

Issues to be determined

[123] The following issues are to be determined;

- a. Was Mr A dismissed?
- b. If so, was his dismissal justified?
- c. If not, what if any remedies should Mr A be awarded?
- d. Should any remedies that may be awarded be reduced on the grounds of contribution?
- e. What if any costs should be awarded?

Was Mr A dismissed?

Legal test for dismissal

[124] A dismissal occurs where the initiative for ending the employment comes from the employer.

[125] Because R Limited denies dismissing Mr A, he bears the onus of proving on the balance of probabilities that his resignation was actually a constructive dismissal.

Constructive dismissal

[126] The test for constructive dismissal in this case requires Mr A to prove on the balance of probabilities that R Limited fundamentally breached a duty to him that was sufficiently serious it was reasonably foreseeable he would resign in the face of such a breach.

[127] Mr A said that R Limited's breaches of its health and safety obligations to him resulted in him being harassed, bullied and assaulted at work. Mr A resigned because he did not feel safe to return to work in light of the above breaches.

[128] Mr A said that the content of the disciplinary letter made it clear to him that R Limited would not meet its employment obligations to provide him with a safe workplace if he had returned to work.

Did R Limited breach its duties under Mr A's employment agreement?

[129] It is a mutual implied term of Mr A's employment that neither party will act in a manner which destroys the trust and confidence inherent in the employment relationship.

[130] The failure of an employer to provide a safe work place, and/or to appropriately address the employee's legitimate safety concerns, which subsequently results in the employee sustaining a workplace injury would breach that implied term.

[131] Mr A's employment agreement dated 04 February 2013 also contains specific health and safety obligations.

[132] Clause 16 of Mr A's employment agreement states that harassment bullying and intimidation will not be tolerated so R Limited agreed that it would undertake a "*formal investigation*" of such complaints.

[133] No formal investigations were undertaken by R Limited of each of the following situations which fell within clause 16 of Mr A's employment agreement;

- a. Mr A's complaint about the other mechanics' treatment of Mr S;
- b. Mr W's assault of Mr A on 07 June 2016;
- c. The bullying, harassment and intimidation Mr A complained he received from co-workers after Mr A reported Mr W's assault to police;
- d. The emotional disclosure Mr A made at the 04 July 2016 'return to work meeting' that he felt unsafe at work because of how he was being treated at work by his co-workers;
- e. Mr L's actions towards Mr A on 01 August 2016, particularly immediately prior to Mr L's assault of Mr A;
- f. Mr L's assault of Mr A on 01 August 2016.

[134] Clause 17 of the employment agreement deals with health and safety at work.

[135] Clause 17.1 records R Limited's obligations to provide and maintain a safe working environment using its OSH systems which R Limited states its staff will be trained in.

[136] R Limited agreed in the employment agreement that its OSH systems were to include a written list of hazards, practical control instructions, procedures for monitoring and methods of training and supervision.

[137] None of these things occurred in respect of the health and safety issues regarding bullying harassment and intimidation Mr A raised with R Limited. Nor did they occur regarding either of the two assaults on Mr A.

[138] Clause 21.6 deals with serious misconduct, which includes (among other examples) threatening language or conduct and using violence or force towards any colleague, client or business contact.

[139] Another example of serious misconduct given in clause 21.6 is "*harassing and threatening behaviour*". Mr W's assault of Mr A clearly fell within this definition but his actions were not investigated and he was not disciplined for serious misconduct.

[140] The failure of R Limited to address Mr W's assault on Mr A as a serious misconduct issue breached its implied duty of trust and confidence to Mr A and clauses 16, 17 and 21 of his employment agreement.

Did R Limited breach its duty to provide a safe workplace?

[141] R Limited had obligations as an employer under the Health and Safety at Work Act 2015 (HSWA) to provide a safe workplace and to manage health and safety within its workplace in a manner that protects others from suffering harm.

[142] Harm includes mental harm, which is a recognised hazard which must be managed under the HSWA. Bullying is also a recognised potential workplace hazard which an employer must take steps under HSWA to prevent.

[143] There is no dispute that Mr A suffered work related injuries as he received accident compensation coverage for injuries he sustained in both assaults which occurred at work.

[144] The adverse effects of Mr A's workplace injuries were ongoing as at the date of the Authority's investigation meeting.

[145] WorkSafe has published "*Best Practice Guidelines for Preventing and Responding to Bullying in the Workplace*" ("the Guidelines") which are freely available on its website. The Guidelines provide advice to employers for dealing with reports of bullying.

[146] R Limited's actions and inaction in response to Mr A's complaints and health and safety concerns about the conduct of his co-workers towards him failed to meet the Guidelines or its HSWA obligations.

Did R Limited's breach of duty cause Mr A's resignation?

[147] Each of the following breaches of duty by R Limited contributed to and/or caused Mr A to resign as a result of his unaddressed health and safety concerns;

- (a) Failure to implement or follow a health and safety system which included a policy on bullying in breach of clause 17 of his employment agreement;
- (b) Failure to induct or educate employees on health and safety, specifically bullying in the workplace in breach of s 36 HSWA;
- (c) Failure to properly investigate the bullying concerns brought to its attention by Mr A in May 2016 in breach of clauses 16 and 17 of his employment agreement;
- (d) Failing to ensure Mr A's privacy following his submissions of the recordings to support his disclosure about bullying concerns to management and management thereafter failing to provide Mr A with support following his bullying complaint, thereby exposing him to danger in the workplace contrary to the HSWA guidelines;
- (e) Failing to properly investigate the assault of Mr A by Mr W on 07 June 2016 in breach of clause 16 and 17 of his employment agreement and ss 56, 58 and 57 of HSWA;

- (f) Failing to properly deal with the assault on 07 June 2016 in breach of clauses 16 and 17 of his employment agreement and ss 56, 58 and 59 of the HSWA;
- (g) Failing to take any steps to ensure Mr A's safety at work following his return to work after the 07 June assault in breach of s 60 of the HSWA;
- (h) Failing to adequately investigate Mr A's complaints of bullying after his return to work following the 07 June assault in breach of ss 36 and 56 of the HSWA and clause 16 of his employment agreement;
- (i) Failing to respond to Mr A's concerns regarding his safety at work which he raised during the meeting with the occupational therapist held at R Limited's premises which were also recorded in the written report of the occupational therapist in breach of ss 36, 58 – 60 HSWA;
- (j) Failing to properly investigate the 01 August 2016 assault on Mr A in breach of clause 16 of his employment agreement and ss 36, 58 – 69 HSWA;
- (k) Failing to inquire about Mr A's health and wellbeing following the 01 August assault in breach of s.59 and 60 HSWA;
- (l) Failing to notify Worksafe of the second assault which resulted in Mr A being admitted to hospital after he lost consciousness in breach of s.56(1) HSWA;
- (m) Commencing a disciplinary process against Mr A without obtaining his version of events which resulted in R Limited accepting without question Mr L's version of events;
- (n) Providing Mr A with a disciplinary letter that indicated pre-determination of the outcome by stating that Mr L's actions were deemed to be an act of retaliation as a result of Mr A's "ongoing abuse" and that R Limited believed that Mr A's inappropriate "actions/attitude abuse had initiated the incident". This finding breached R Limited's duty of good faith under the Employment

Relations Act 2000 (“the Act”) and did not meet the requirements of the justification test in s.103A of the Act.

[148] R Limited breached its contractual obligations to Mr A under clauses 16 and 17 of his employment agreement and its statutory obligations to him under the HSWA.

[149] These breaches caused Mr A to resign because he did not feel safe returning to work. Mr A has therefore established the casual connection between R Limited’s breaches and his resignation.

Was R Limited’s breach of duty sufficiently serious to make Mr A’s resignation reasonably foreseeable?

[150] The final straw for Mr A was receiving the disciplinary letter which said he had been “*extremely abusive*” towards Mr L who R Limited said had been concerned for his safety and who had had assaulted Mr A in “*deemed*” retaliation to Mr A’s abuse.

[151] The comments in the disciplinary letter have to be seen in the context of Mr A’s previous unresolved complaints to R Limited that he was being bullied and harassed to the point where he didn’t feel safe to be at work.

[152] Instead of dealing with Mr A’s concerns, which were objectively supported by the occupational therapist’s observations during the 04 July meeting, R Limited blamed Mr A for being assaulted for the second time. R Limited concluded Mr A was to blame without having spoken to him about the incident.

[153] It is reasonably foreseeable that Mr A would not want to continue working in such circumstances. Not only did R Limited fail to take Mr A’s complaints seriously but it also blamed him for being assaulted.

[154] R Limited’s breaches understandably fundamentally undermined Mr A’s trust and confidence in his employer to keep him safe at work. His resignation was therefore reasonably foreseeable.

Dismissal conclusion

[155] The initiative for Mr A's resignation came from R Limited. Mr A did not freely, voluntarily or genuinely resign. Mr A has therefore discharged the onus of establishing that his resignation on 23 August 2016 was a constructive dismissal.

[156] Mr A's resignation was a constructive dismissal because R Limited's serious and repeated breaches of its duty to provide a safe workplace lead Mr A to resign. Mr A's resignation was reasonably foreseeable in light of the multiple and ongoing breaches of duty that occurred.

Was Mr A's dismissal justified?

[157] Justification is to be objectively assessed in accordance with the justification test in s103A of the Act.

[158] A fair and reasonable employer is expected to comply with its contractual and statutory obligations. Failure to do so is likely to undermine an employer's ability to establish a dismissal was justified.

[159] R Limited defended Mr A's claims on the basis that he was not dismissed so it did not seek to establish that its actions were justified in terms of the s.103A justification test.

[160] R Limited failed to comply with its good faith obligations under s 4(1A) of the Act to provide Mr A with access to information relevant to its decision about his ongoing employment and an opportunity to comment on that before he was dismissed. R Limited also failed to comply with any of the four procedural fairness tests in s. 103A(3) of the Act.

[161] These breaches of its statutory procedural fairness obligations mean that R Limited is unable to discharge the onus of establishing that Mr A's dismissal was justified.

[162] The process defects that occurred were not minor and did result in substantial unfairness to Mr A so the Authority is not precluded by s.103A(5) of the Act from finding that he was unjustifiably dismissed.

[163] R Limited's actions, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time Mr A was dismissed.⁴ Mr A's constructive dismissal was procedurally and substantively unjustified.

What if any remedies should be awarded?

Remedies claimed

[164] From 01 August 2016 to date Mr A has been receiving accident compensation payments under the Accident Compensation Act 2001 ("ACA") for his work related personal injury. Mr A has been paid 80% of his wages, leaving a 20% shortfall.

[165] Mr A's lost remuneration claim consists of;

- a. future lost remuneration for three months after the date of the Authority's investigation meeting;
- b. reimbursement of the 20% shortfall between his salary and the amount of accident compensation he was paid for the period lost remuneration is awarded;
- c. contractual commission payments he would have been paid if he had been able to continue working;
- d. future holiday pay he would have received if his employment had continued had he not been dismissed.

Restriction on available remedies

[166] Section 317(1) of the ACA prevents an employee from receiving damages arising directly or indirectly out of a personal injury which is covered by the ACA.

[167] The Employment Court in *Mitchell v Bluestar Print Limited (NZ) Limited*⁵ examined the operation of section 317 of the Injury Prevention Rehabilitation and Compensation Act 2001 ("IPRCA") which was the predecessor to the ACA.

⁴ Section 103A(2) of the Act.

⁵ [2008] ERNZ 594.

[168] In *Bluestar* the employee had a number of work related injuries then subsequently suffered post-traumatic stress disorder symptoms and had a “*major emotional response*” to his injuries. That appears to be similar to Mr A’s situation.

[169] The Employment Court held that an employee could not be compensated for lost wages or benefits because that was covered by IPRCA compensation but that an employee could recover distress compensation for a personal grievance, because that compensation was unrelated to the personal injury.

[170] Mr Smyth cited *Scissors Platforms (1997) Limited v Brien*⁶ and *Jesson v Judea Tavern Limited*⁷ as supporting an award of lost remuneration to Mr A. These cases can be distinguished from Mr A’s situation because those employees were medically fit to work for the periods during which they were awarded lost remuneration.⁸ That is not the case for Mr A who remains medically unfit to work.

[171] Section 123(1)(b) of the Act allows for an award of lost remuneration where the employee’s loss results from a personal grievance. Section 128(1) of the Act also requires any lost remuneration that is awarded to have resulted from the employee’s personal grievance.

[172] Mr A has been unable to earn wages and commission so he has not continued to accrue holiday pay entitlements because he has been unable to work due to medical incapacity. Mr A’s medical incapacity is a result of his personal injuries.

[173] Mr A’s lost remuneration cannot be said to have resulted from his dismissal because even if he had not been constructively dismissed he would not have been able to return to work because he has remained medically unfit for any work.

[174] The evidence of Mr A’s lost remuneration therefore did not establish the required causal link between Mr A’s dismissal grievance and the loss claimed, because Mr A’s medical incapacity predated his constructive dismissal.

⁶ [1999] NZERA 672.

⁷ [2016] NZERA Auckland 634.

⁸ In *Scissor* the employee’s scheduled return to work 02 December did not occur because he was dismissed on 01 December. In *Jesson* the employee had been medically cleared to return to work to do alternative duties from 26 October but that did not occur because her employer told the ACC case worker that Ms Jesson’s employment had ended, so ACC did not continue with its return to work meeting which was a prerequisite to her returning to work.

[175] Section 317(1) of the ACA also bars the Authority from awarding Mr A compensation for losses that arise directly or indirectly from his personal injuries.

Distress compensation

[176] While the ACA precludes the Authority from awarding distress compensation for the harmful effects Mr A's workplace personal injuries, which include mental harm, have caused him. It does not prevent an award of distress compensation.

[177] It is clear that Mr A has suffered significant physical mental emotional and financial harm as a result of the various workplace issues that occurred, which include the two assaults on him. I recognise that Mr A still suffers adverse medical consequences almost a year after the second assault on him.

[178] An award of distress compensation must be based on evidence. Care must be taken in this matter to limit the award of distress compensation to the adverse effects of Mr A's unjustified dismissal only. It cannot be used to punish R Limited.

[179] The impact of Mr A's family bereavement and the adverse effect his dismissal has had on his wife and children cannot be subject to an award of distress compensation.

[180] Mr A and his wife gave credible, heartfelt and compelling evidence about the adverse effects Mr A's dismissal has had on him. They both became very emotional and cried while giving evidence.

[181] Mr A was passionate about his job, loved working for R Limited and had no plans to leave his employment. He was settled and happy in his employment.

[182] Mr A has lost his career in an industry he has been passionate about and committed to since he was a teenager. Mr A's decades long passion for the type of work he did at R Limited has been extinguished because of the distress he has over R Limited's treatment of him. Such activities just remind him of R Limited and cause unnecessary distress.

[183] Mr A was committed to his job and reasonably believed he had a long term future at R Limited. He was a long serving employee with an unblemished disciplinary record. There was no previous history of problems with co-workers.

[184] Mr and Mrs A moved their family out of Auckland for financial reasons. They relocated to a less expensive region where they had friends but no extended family support. Their family lived in Auckland so moving away from having family in close proximity was difficult.

[185] In addition to suffering financially, Mr A's family and relationship dynamics have fundamentally changed as a result of his dismissal. Mrs A has had to return to work in order to contribute financially to the household which has increased pressure in their household.

[186] Mr A has been ostracised by his previous work colleagues. R Limited has subjected him to ongoing attacks on his integrity and truthfulness. It has blamed him for the problems he experienced at work which I consider arose as a result of him stepping forward to do the right thing by a more junior co-worker.

[187] Mr A's sense of self-worth, confidence and enjoyment of life has been seriously undermined as a result of his dismissal.

[188] Mr A can no longer face working in the same industry he has devoted his entire working life to. This means he is going to have to retrain in order to re-enter the workforce once he is well enough to work.

[189] Within 28 days of the date of this determination R Limited is ordered to pay Mr A \$25,000 distress compensation under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

Should remedies be reduced on the grounds of contribution?

[190] Having determined that Mr A has a dismissal grievance, s.124 of the Act requires me to consider the extent to which he contributed to the situation which gave rise to his dismissal and to reduce remedies accordingly. Contribution denotes blameworthy conduct which has been proven on the balance of probabilities.

[191] R Limited has been extremely critical of Mr A's actions in recording two of the conversations he was present for but did not participate in on 27 May. However such criticism was not raised with Mr A when he first informed R Limited he had recordings.

[192] Neither Mr K nor Mr J told Mr A off for making the recordings. Mr A was never told his actions were inappropriate or illegal or shouldn't have occurred. Quite the contrary. Both R Limited condoned Mr A's actions in this regard because both Mr K and Mr J each separately asked Mr A to give them the recordings he had made.

[193] I am not satisfied to the required standard of proof that Mr A engaged in blameworthy conduct because the purpose of the recordings was to provide R Limited with the best available evidence of possible bullying of the apprentice, for whom Mr A was responsible.

[194] Bullying is a health and safety risk and workplace hazard which is also expressly prohibited in R Limited's employment agreements. Mr A was acting in accordance with his health and safety obligations by notifying R Limited of his concerns and providing it with the best available evidence.

[195] Mr A handled the recordings appropriately by passing them to management, after being asked to do so. I am satisfied that Mr A did not boast about the recordings or taunt other employees about them as R Limited alleged. R Limited's evidence in support of such claims was unconvincing and I consider it unreliable.

[196] R Limited has been unable to prove on the balance of probabilities that Mr A engaged in blameworthy conduct.

[197] In terms of Mr L's assault I have preferred Mr A's account of what occurred on the basis it was cogent, credible and aligned with the video evidence. Mr L was angry and aggressive towards Mr A⁹ before Mr L even headed into the office area. Mr L was demonstratively agitated and waving his arm around.

[198] I consider it more likely than not that Mr L initiated the incident which led to the assault by shoving past Mr A, who was standing in the doorway as Mr L left the office.

[199] Mr L in pushing past Mr A should be seen as the aggressor and the person who initiated the assault. Mr L shoved past Mr A after Mr L had just been verbally abusing Mr A in the lunchroom, from the locker area and then again in the office.

⁹ Mr L gave Mr A the middle finger and appeared to be speaking aggressively to him.

[200] Mr L had been calling Mr A a piece of shit and had made multiple threats to f*ck him (Mr A) up. Mr A retaliated to Mr L shoving him out of the doorway by pushing Mr L on the back. This was a relatively low level response by Mr A to Mr L's ongoing provocation and aggression.

[201] In examining the entire circumstances of Mr L's assault on Mr A, including the lead up to it, Mr L's ongoing abuse of Mr A and Mr L's initiation of physical contact with Mr A, I am not convinced to the required evidential standard that Mr A's push to Mr L is blameworthy conduct requiring a reduction in remedies.

[202] Mr A's push appeared to be an automatic defensive reaction to Mr L physically invading his space by shoving past him (Mr A) after having subjected Mr A to ongoing abuse and threats of physical harm.

[203] Although Mr A did push Mr L in the back this was a minor and perhaps understandable reaction in all the circumstances.

[204] It also bears remembering that prior to Mr L's assault on him Mr A had been subjected to ongoing unresolved bullying harassment and intimidatory behaviour at work. Mr L had also been escalating his abusive behaviour towards Mr A by threatening and taunting him.

[205] Whilst Mr A acknowledges it was wrong of him to have pushed Mr L after Mr L had shoved him, I consider it likely that Mr A was severely provoked by Mr L before doing so.

[206] R Limited's submission that Mr A failed to communicate regarding the workplace health and safety issues he was experiencing thereby denying them an opportunity to take corrective action contradicted the credible evidence.

[207] Mr J confirmed that Mr A had raised complaints with him and so did Mr K. Mr K was also at the meeting on 04 July when Mr A clearly stated that he felt unsafe at work because of the retaliatory actions taken by his co-workers towards him. The occupational therapist's report is also an objective record of what was communicated to R Limited about Mr A feeling scared for his safety.

[208] I am not satisfied that Mr A has engaged in blameworthy conduct that warrants a reduction in the distress compensation he has been awarded. Accordingly Mr A's remedy is not reduced on the grounds of contribution.

Outcome

[209] R Limited constructively dismissed Mr A. R Limited's dismissal of Mr A was substantively and procedurally unjustified.

[210] R Limited is ordered within 28 days of the date of this determination to pay Mr A \$25,000 under section 123(1)(c)(i) of the Act.

What if any costs should be awarded?

[211] Mr A as the successful party is entitled to a reasonable contribution towards his actual costs and disbursements. Proof of costs incurred will need to be provided in support of a costs application.

[212] Mr A has fourteen days within which to file his costs submissions with R Limited having fourteen days within which to reply. If Mr A wishes to file reply costs submissions he has three further working days within which to do so.

[213] This costs timetable will be strictly enforced and any departure from it requires the prior approval of the Authority.

[214] The Authority is likely to adopt its usual notional daily tariff based approach to costs so the parties are invited to identify any factors which they say should result in adjustments being made to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority