New Zealand Employment Relations Authority Decisions

Asiata v New Zealand Post Limited (Auckland) [2017] NZERA 187; [2017] NZERA Auckland 187 (30 June 2017)

Last Updated: 12 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 187
5628276

BETWEEN LISA ASIATA Applicant

AND NEW ZEALAND POST LIMITED

Respondent

Member of Authority: Andrew Dallas

Representatives: Lisa McWilliams, Counsel for the Applicant

Joss Opie and Lorraine Hercus, Counsel for the Respondent

Investigation Meeting: 21 September 2016 at Auckland

Submissions 6 October 2016 and 31 October 2016 for the Applicant and 20 October 2016 for the Respondent with further received, up to and including, 7 November 2016

Determination: 30 June 2017

DETERMINATION OF THE AUTHORITY

A. Ms Asiata was subject to an unjustified final written warning by

New Zealand Post Limited (Post).

B. Post must settle Ms Asiata's personal grievance by:

(i) Reinstating her to the position she was in before the warning was issued, as if no warning had been issued with immediate effect;
(ii) By taking all reasonable and practical steps to reflect this finding on her employment file within three days of the
date of this determination; and

(iii)Paying her $10,200, after deduction for contribution, as

compensation for hurt, humiliation and injury to feelings under s 123(1)(c)(i) of the Act within 28 days of the date of

this determination.

C. Costs are reserved

Employment relationship problem

[1] There is an on-going employment relationship between Lisa Asiata and New

Zealand Post Limited (Post). Ms Asiata is employed as a Team Leader by Post.

[2] Ms Asiata, her union, E tū and Post were parties to the Post Collective Agreement, 2013 – 2016 (collective agreement). The collective agreement contained provisions dealing with Post's employment philosophy and disciplinary procedures.

[3] The basis of the problem between the parties is that Ms Asiata was given a 12 month final written warning (warning) by Post on 5 May 2016 (with effect from 16

April 2016) following an employment investigation which found she had engaged in

serious misconduct.

[4] Post said Ms Asiata's serious misconduct breached Post's employment philosophy contained in the collective agreement, including the requirement to treat people fairly.

[5] Ms Asiata was given a warning by Post after an incident with one of her direct reports, Mr Q on 14 April 2016.1

[6] Ms Asiata claimed the warning was an unjustified action by Post and she was disadvantaged in her employment as a result. Post denied this.

1The identity of this employee of Post, who did not give evidence to the Authority, has been anonymised for the purposes of this determination.

Issues

[7] The following are the issues for investigation and determination:

(i) Was Ms Asiata subject to a unjustifiable action by Post through the imposition of a warning on 5 May 2016?;

(v) If Post's actions were not justified should Ms Asiata be awarded

compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act?;

(vi) If this remedy is awarded, should it be reduced under s 124 of the Act

for blameworthy conduct by Ms Asiata that contributed to the situation giving rise to her grievance?

(vii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[8] During the investigation meeting, I heard evidence from Ms Asiata, Ms Asiata's partner, Parmesh Reddy, E tū organiser, Mohammed Faiaz and E tū delegate, Ken Blackwell. For Post, evidence was provided by Auckland mail centre manager, Gail Colhoun, mail centre dayshift supervisor, Geoff Kirk and human resources advisor, Hayden Martelli. Mr Q did not provide a witness statement or otherwise given evidence. Post did, however, seek to rely on an affidavit prepared by Ryan Beale – who according to Ms Asiata was neither a witness to the incident or involved in the investigation process. As Mr Beale was not available to attend the investigation meeting and be questioned by the Authority or counsel for Ms Asiata, his affidavit was set aside and played no part in the proceedings. The parties provided a number of documents and counsel provided written submissions.

[9] This determination, reserved at the conclusion of a one day investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[10] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. While I have not explicitly referred to all the submissions of the parties in this determination, I have fully considered them.

Background

[11] Ms Asiata is employed as a Team Leader at Post's Highbrook facility in South Auckland. Her role is to manage nine employees spread across two departments and eight processes.

[12] As part of her role, Ms Asiata is responsible for managing leave processes for employees. Seemingly Post's employees were required to apply for leave in advance. Approved leave is then recorded on a leave calendar in the relevant work area.

[13] On 13 April 2016, Mr Q, as he was leaving work for the day, said to Ms Asiata words to the effect of "don't forget I am going on three weeks leave starting on Friday". Ms Asiata responded, to the effect, she would discuss the matter further with him the next day as she did not have any documentation reflecting that. Evidently Mr Q had mentioned to Ms Asiata in January 2016 that he required three weeks annual leave for an overseas holiday funded by his parents to mark his 21st birthday.

[14] Ms Asiata said the extended leave request was outside her authority because

Mr Q did not have enough accrued leave to cover the period in question.

[15] Ms Asiata said she would have expected Mr Q to be familiar with the leave approval process due to three recent unauthorised absences; the last absence resulting in a final written warning. This final written warning had been "extended" by Post as the result of an incident which occurred when Mr Q was operating a fork hoist. Ms Asiata, supported by Mr Martelli, had been involved in the disciplinary process on behalf of Post.

[16] Mr Q was described as a tall – at least six foot – and solid young man who aspired to play professional rugby league.

The incident

[17] At or about 8.00am on 14 April 2016, Ms Asiata approached Mr Q to discuss his proposed leave. She advised him that as he had not submitted a leave form and, correspondingly, there was no notation on the leave calendar, he would need to apply for leave via Post's leave approval process.

[18] Ms Asiata said Mr Q responded in words to the effect of he had told her about his planned leave in January 2016, he had his flight booked, he was going to catch that flight and "it" was not his problem.

[19] Ms Asiata said she reiterated to Mr Q he needs to follow the leave procedure and that if he failed to do so, he would be a "no show" for this next rostered shift requiring management to go through the AWOL (absence without leave) procedure.

[20] At that point, Ms Asiata said Mr Q "lost control" and started shouting. His shouting, which was directed at Ms Asiata, included: "you're bullshit", "you're lying", "fuck the company", "fuck you" and a statement to the effect, he did not care what she was saying because he was going on his holiday regardless.

[21] Ms Asiata said she tried to distance herself from Mr Q's "tirade", as she called

it, but he would not back off.

[22] Ms Asiata said she momentarily lost composure. After becoming seized of the situation again, she told Mr Q that she could not continue to have him on site engaging in such behaviour and he needed to leave.

[23] Ms Asiata said being told to leave the premises made Mr Q angrier and he moved closer towards her and began "eyeballing" her. She said he then stated, as he was "huffing and puffing" and waving his arms in front of her face: "I'm going to knock you the fuck out you fat bitch" and "come on, come on, I'm going to knock you out".

[24] Ms Asiata said she continued to walk away but Mr Q continued to follow her. At some point during the latter part of the incident, Ms Asiata said to Mr Q he was either "pretty much fired" or simply, "fired". Post would maintain it was the latter.

[25] Eventually, Mr Q made to leave the premises and Ms Asiata said she followed him at a safe distance to ensure he departed. She said she also asked administration staff to monitor his movements via closed-circuit television (CCTV) to ensure he had left the premises.

[26] Ms Asiata said the incident lasted for approximately five minutes and she was

"zoning" in and out.

[27] Aspects of the incident were witnessed by, at least, four employees of Post: Marla Tele Terena Karipa, Tory Sutcliffe and Brett Flavell. Their statements were obtained by Mr Martelli. Ms Asiata suggested there were also other witnesses.

Post's response to the incident

[28] Ms Asiata lodged a written complaint with her manager, Geoff Kirk. In the written complaint Ms Asiata did not mention that she told to Mr Q he was "pretty much fired" or "fired".

[29] Mr Kirk responding to an email about the incident copied to various people, including Ms Asiata, on the afternoon of 14 April 2016 reported that Mr Q was observed driving out the carpark's entrance (rather than the exit) at speed, narrowly

avoiding another car and the gate. Also in this email Mr Kirk stated:

... it seems doubtful that Mr Q will be back, most likely AWOL from Saturday forward (he has leave booked for one day this Friday)" ... I back Lisa on this, and believe [Mr Q] to be in the wrong. No team leader should feel threatened (nobody at all should), and the reckless driving in the car park could have become a serious incident. He is currently on a (just) extended final written warning. If he does return to work, I support the strongest outcome the investigation/outcome shows.

[30] Safety and Wellbeing Specialist, Carol Cheshire-Wells, made inquiries as to Mr Asiata's wellbeing between 14 and 15 April 2016. Mr Martelli said he also made inquiries of Ms Asiata's wellbeing. Ms Colhoun said she "observed" Ms Asiata, and based on that observation (or those observations), and the view of Mr Kirk, which had been communicated to her, assumed Ms Asiata was fine. Ms Colhoun also said she arranged for the Post employee acting in Mr Kirk's role while he was on leave to make sure Ms Asiata was "okay" - however, this was after the investigation into Ms Asiata had commenced.

[31] Ms Asiata would say that in hindsight she was not all right but was actually in shock as a result of the incident Ms Asiata said she struggled to get out of bed on the morning of 15 April 2016. Ms Asiata's partner, Mr Reddy, said the couple had a difficult weekend. At Mr Reddy's insistence, they attended the Manukau Police Station on 16 April 2016 and sought to make a complaint. However, they were told as the matter occurred at work, the police needed to give Post an opportunity to go through their processes. Ms Asiata said Post was aware she had been to the police.

First meeting with Ms Asiata on 15 April 2016

[32] Ms Asiata met with Mr Kirk and Human Resources Business Partner, Hayden Martelli to discuss her account of the incident as part of a preliminary investigation into Mr Q's conduct.

[33] At the meeting, Ms Asiata informed Mr Kirk and Mr Martelli about her use of the word "fired" during the incident with Mr Q. Mr Kirk said he was "quite shocked" and Mr Martelli said he was "shocked and disappointed" by this statement.

[34] The meeting concluded with Ms Asiata being told she would be provided with an update later in the day. Mr Kirk and Mr Martelli had a discussion about what Mr Asiata had said to Mr Q. Mr Martelli said he told Mr Kirk that Ms Asiata's conduct in this respect also needed to be investigated. Mr Kirk agreed. Ms Colhoun would also subsequently agree that Ms Asiata's conduct needed to be investigated.

Post's interactions with Mr Q (and members of his family)

[35] Also on 15 April 2016, a cousin of Mr Q's contacted Mr Kirk – he could not remember this cousin's name – who evidently said Mr Q had overreacted to the declining of the leave, believed it was unfair he was dismissed and asked for a meeting. Mr Kirk agreed.

On-site meeting with Mr Q

[36] Mr Kirk said a while later Mr Q and another of his cousins, who was also an employee of Post, appeared at Mr Kirk's desk. Ms Asiata would say she was distressed to hear from co-workers that Mr Q had been on the premises.

[37] Mr Martelli said his main objective for the meeting was "damage control" – that was, he explained, by seeking to limit the risk of Mr Q raising a personal grievance because Ms Asiata told him he was "fired".

[38] Mr Kirk said on the way to the meeting Mr Q told him he had a letter of resignation with him. Mr Kirk said he told him to wait to talk to Mr Martelli.

[39] During the meeting, Mr Kirk and Mr Martelli heard Mr Q's side of the story and Mr Martelli took, in his words, brief notes. Mr Martelli said he sought to "build rapport with [Mr Q] and let him know he was being listened to". Mr Martelli said he did not question Mr Q in detail, observing he had not been formally put on notice about the investigation into his conduct and did not have a support person.

[40] During a break in the meeting, Mr Kirk and Mr Martelli discussed the existence of Mr Q's resignation letter. Mr Martelli said he understood from what Mr Kirk was telling him that Mr Q thought he had been dismissed and he wanted to exchange a resignation for the dismissal. When the meeting recommenced, Mr Martelli told Mr Q he was not dismissed and he could not exchange the resignation for a dismissal at that time. Mr Martelli then advised Mr Q he could take his trip. Mr Martelli told Mr Q that two weeks of his trip would be paid annual leave and the remaining week would be unpaid. He also told Mr Q he would be paid for that day (15 April 2016) as a normal working day rather than as approved annual leave.

[41] Mr Martelli advised Mr Q he would meet with him on 10 May 2016 when he returned to work. Mr Martelli told Mr Q if he decided to resign while he was overseas he should let him know.

[42] Ms Martelli took notes of the meeting with Mr Q. These notes were headed "Catch up ẃ [Mr Q]". Mr Martelli noted, among other things, Mr Q said he was "swearing at [Ms Asiata]". The notes do not mention, however, Ms Asiata "firing" him or that Mr Q believed he was "fired".

[43] Mr Martelli then followed up the meeting with an email, which he drafted with a view that it might be taken to a lawyer. He said he wanted to convey the impression in the email that Mr Q had not been dismissed by Post. Mr Martelli said he took all the steps he did to mitigate Post's risk.

[44] Mr Q resigned on 10 May 2016 while overseas and he did not return to Post. Mr Q did not then, or subsequently, raise a personal grievance with Post.

Second meeting with Ms Asiata on 15 April 2016

[45] Mr Kirk and Mr Martelli met with Ms Asiata again on the afternoon of 15

April 2016 where she was advised that she would also be investigated by Post because in telling Mr Q he was "fired", she may have exposed it to legal and reputational risk. On Ms Asiata's account, Mr Martelli also told her that Mr Q's leave had been approved.

[46] Ms Asiata was on a period of special and, subsequently, annual, leave between

18 April 2016 and 2 May 2016. She had applied for the period of annual leave prior to the incident.

Post's support for Ms Asiata

[47] Ms Asiata said she was not supported by Post. Post denied this. It said she was aware of the employee assistance programme (EAP) counselling services available to her (and was reminded of this by Mr Martelli during both meetings on 15 April 2016 and Ms Colhourn's letter of 19 April 2016). Ms Asiata said Mr Martelli only offered her EAP after she was being told she was being investigated (presumably during the second meeting on 15 April 2016). Post also said Mr Q was not in the workplace and had been instructed by Mr Martelli to report to him upon his return to work on 10

May 2016.

[48] Ms Colhoun said Ms Asiata had been given training which ought to have assisted her in dealing with such circumstances. This training was "enableME", which included a session on "self-awareness" and "Activate", which included, among other things, training in the Events + Responses = Outcome (E+R=O) technique. Post would also say Ms Asiata had undertaken "Managing Misconduct" training in July

2015.

[49] Ms Colhoun, Mr Kirk and Mr Martelli gave evidence to the effect they believed Ms Asiata was "all right" and not exhibiting signs of distress about the incident until it became apparent she was going to be investigated. Mr Kirk said "it did however seem to me that up until the disciplinary investigation into [Ms Asiata's] conduct began, she was all right". Ms Colhoun said "[b]ased on what she said before and during the process, however, I did not understand that it had affected her in the way she is now claiming". Mr Martelli said:

[b]ased on what Lisa said to us before [Ms Colhoun] made her decision to issue the final written warning, I had not understood [Ms Asiata] had been in shock before or after the incident, or terrified by it.

[50] Ms Asiata said she was diagnosed with a stress-related condition caused by workplace stress after the first disciplinary meeting. Mr Kirk also said he was not aware of this until he read the statement of problem but went on to say he believed this was, in effect, a pre-existing condition.

The employment investigation

[51] On 19 April 2016, Ms Colhoun, with the assistance of Mr Martelli, wrote to Ms Asiata "inviting" her to an investigation meeting on 21 April 2016. In the letter Ms Colhourn set out the allegations to be investigated as whether Ms Asiata had:

(i) acted outside her level of authority by informing an employee that their employment was terminated without regard for correct process and consequently exposing Post to considerable risk of a personal grievance; and

(ii) in her role as a Team Leader, and representative of Post, breached three principles of Post's employment philosophy set in the collective agreement:

A. New Zealand Post Employment Philosophy

Joint Objectives

Improving the workplace through consultation, skill development, and good management and leadership practices.

...

Commitment to the People of Post

6. We want New Zealand Post to be a great place to work and to support this we are committed to:

Treating People Fairly

...

To Treat People Fairly

9. We believe in:

• Treating people fairly and with respect

• Acting in procedurally fair way when taking any action that

affects a person's employment or role at New Zealand Post (e.g hiring, promoting, assessing, remuneration, structural or role or process changes, redeploying, *terminating*, poor performance or disciplinary matters) ... .

[52] Ms Asiata was advised that "if substantiated, this allegation will be treated under the serious misconduct provisions of your employment agreement and disciplinary action up to and including a written warning may be taken ...". Ms Colhoun said she considered but ultimately ruled out dismissal as a sanction for proven serious misconduct. The letter noted that EAP was available.

[53] Serious misconduct is defined in Post's guide to "Managing Misconduct: conducting investigations and disciplinary processes" as: [d]eliberate and/or extremely negligent conduct, which so deeply erodes the required trust and confidence that dismissal could be justified in all circumstances". The guide also states "[o]ur CEA's provide several examples of misconduct and serious misconduct. Post's collective agreement contained examples of serious misconduct – however, of those given, none fitted the circumstances of Ms Asiata's alleged misconduct. 2 The collective agreement appeared not to contain an alternative definition of "serious misconduct".

[54] Ms Asiata was provided with witness statements from Ms Tele and Ms Karipa, the notes from the meeting she had with Mr Kirk and Mr Martelli on 15 April 2016 and training material from managing misconduct. She was not provided with the statements obtained from Tory Sutcliffe and Brett Flavell, which is discussed further below. Post said there was no CCTV footage of the incident. Ms Asiata suggested there may have been other witnesses.

[55] Mr Martelli said the statements from Ms Tele and Ms Karipa were obtained as part of the investigation into Mr Q's conduct. Ms Tele's statement, which does not mention Ms Asiata "firing" Mr Q, did state:

... I saw that [Mr Q] was then infront of Lisa's face & screaming at her & that when she told him to leave the premises. At this point [Mr Q] was still screaming at [Ms Asaita] & even threatened to "knock her out" as well as called her "a fat bitch".

2 See, Post Collective Agreement, 2013 – 2016, "Conduct and Performance Expectations", p 52.

[56] Ms Karipa's statement, which does mention Ms Asiata "firing" Mr Q, stated

... [I] saw [Ms Asiata] and [Mr Q] walking towards us and [Ms Asiata] telling [Mr Q] to pack his stuff and he's fired and to leave the building and [Mr Q] telling her to be quiet and don't talk to me but in a swearing way.

[57] A review of the statements provided by Ms Sutcliffe and Mr Flavell discloses they do not mention Ms Asiata "firing" Mr Q or Mr Q threatening to assault Ms Asiata. However, they both state that Mr Q swore at Ms Asiata and Ms Sutcliffe said the discussion between the pair was "heated".

[58] Mr Martelli advised the statements of Ms Sutcliffe and Mr Flavell should not be provided to Ms Asiata because Ms Sutcliffe and Mr Flavell said they did not wish for this to occur, Ms Asiata had admitted she fired Mr Q and Post already had the statements of Ms Tele and Ms Karipa.

[59] Mr Martelli said he applied the same reasoning to the notes he had taken during his meeting with Mr Q on 15 April 2016 and these were also not provided by Ms Colhoun. Instead Mr Martelli said he advised Ms Colhourn:

... that Geoff [Kirk] and I met with [Mr Q], he thought he had been dismissed, and he wanted to swap the dismissal for a resignation. I also said to [Ms Colhoun] that I told [Mr Q] that he was not dismissed, that he could go on leave and that he need to report to me on his return.

[60] The investigation process involved two formal meetings between Post and Ms Asiata. On 21 April 2016, Ms Colhoun and Mr Martelli met with Ms Asiata, Mr Blackwell, Mr Reddy and Mr Faiaz.

[61] During the meeting, the outlined above allegations and Ms Asiata's response to them were discussed. Submissions were also made by and on behalf of Ms Asiata. Ms Colhoun, Mr Martelli and Mr Blackwell took notes during the meeting. Post provided Ms Asiata and her representatives some relevant documentation during the meeting.

[62] On 26 April 2016, during the second meeting, Ms Colhoun advised Ms Asiata she was imposing the disciplinary outcome of a final written warning on her. Mr Martelli then told Ms Asiata, in words to the effect of, she had exposed Post to a "$50,000" risk from a personal grievance by Mr Q. Mr Martelli would say this was an estimate.

[63] Ms Asiata said throughout the investigation process she was "admonished for being too emotional" and had "let her emotions get the better of her" and "overreacted" during the incident with Mr Q. Mr Colhoun and Mr Martelli denied these claims. Mr Martelli and Ms Colhoun also disputed that Ms Asiata told Post during the investigation she was "zoning" in and out during the incident or was otherwise upset by it.

Disciplinary outcome

[64] On 5 May 2016, Ms Colhoun on behalf of Post issued Ms Asiata with a letter detailing the outcome of its investigation. The letter said Ms Asiata admitted to Mr Kirk and Mr Martelli on 14 April 2016 that she said to Mr Q: "[t]hat's fine grab your bag and leave, you're pretty much done, you're fired".

[65] Ms Colhoun said based on this admission she had "significant concerns" about Ms Asiata's conduct in telling Mr Q he was fired "...without any regard to due process or level of authority" and an employment investigation was warranted into possible serious misconduct. The letter then referred to the allegations particularied in Ms Colhoun's letter of 19 April 2016 and the investigation meeting held on 21 April

2016. The letter also included several responses to submissions made by Ms Asiata about the process adopted by Post including:

...

4. Given your admission of using the words "you're fired" and this being verified by a witness we did not see the need to formally interview [Mr Q] in order to conclude the investigation.

5. We saw no reason to delay the meeting to allow you time to "get over the incident". Following the incident Geoff [Kirk] asked you if you were okay. You responded that you were fine and gave no indication that you were upset. Geoff checked again with you later in the day and the next day and you continued to reconfirm that you were okay.

[66] The letter concluded by stating:

We discussed the level of risk your behaviour and conduct have exposed the business to in not following due process. It is this level of risk brought about by your disregard for procedural fairness that was a key influencer in our consideration of the level of disciplinary action to take.

Upon consideration of your explanation, I find that given your position and relevant training, you knew what was expected of you but you still chose to terminate an employee's job on the spot with no regard to process. It is reasonable to expect someone in your positon, with your level of training and experience, to manage the situation in a procedurally correct manner and your behaviour and conduct did not meet the company's requirements.

This amounts to serious misconduct and as such the allegations have been substantiated. I appreciate that it was a heated situation and I have also taken this into consideration in my decision-making process. Accordingly I am issuing you with this final written warning. This warning will remain on your personal file for 12 months, effective 21

April 2016.

As part of this process, and to reinforce the correct procedure when dealing with misconduct situations, including suspensions, you will be required to attend the next Managing Misconduct training session.

You are advised that any recurrence of this type of behaviour or any other incidents breaching policies, procedures or your employment agreement may, if substantiated, result in further disciplinary action, up to and including a written warning or dismissal, being taken ....

[67] On 13 May 2016, Ms Asiata, through her union, raised a personal grievance in a detailed letter to Post. Ms Colhoun responded to this on 20 May 2016. In the body of that letter, she stated:

...

IV Ms Asaita and [Mr Q] were parties to the same incident that resulted in *two entirely separate sets of allegations* against each party, consequently each cases was treated *separately* on its merits. (emphasis added).

We were able to instigate the investigation with Ms Asiata in the days following the incident as she was present in the workplace and we had all the relevant information required to do so.

It is not within an employer's right to restrict an employee from going on a holiday and as such any process with [Mr Q] had to wait until his return.

...

V. The investigation that was undertaken was full and fair. There was no requirement to formally interview [Mr Q] as we had a personal admission from Mr Asiata leaving no question as to the substantiation of the allegation.

...

We stand by our decision to issue Ms Asiata with a Final Written

Warning and will defend this to the utmost.

NZ Post does not tolerate abusive or threatening behavior (sic) in the workplace by anyone. This situation was an isolated incident which is reflective of the safe work environment we provide to employees. It is not reasonable for us to be able to predict how individuals behave in such situations. What is reasonable is our expectations of how our leaders handle these situations.

Ms Asiata remained at work in the days following the incident but once she became aware of an investigation into her actions she took sick leave ....

[68] The parties attempted mediation to resolve Ms Asiata's personal grievance but

this was unsuccessful.

Relevant post-discipline events

Ms Asiata's request for additional EAP sessions

[69] On 21 June 2016, Ms Asiata advised Mr Martelli she had requested three additional EAP sessions. Mr Martelli asked Ms Asiata to get the provider to email him about these, as he was happy to approve them. However, for a variety of reasons, this did not occur.

[70] After reviewing the witness statement lodged by Mr Reddy, Ms Asiata's partner, in the Authority, Mr Martelli made enquiries about the additional EAP sessions and eventually approved these.

[71] On 15 August 2016, Mr Martelli emailed Ms Asiata, referred to Mr Reddy's evidence and proceeded to set out his view on what had happened. Ms Asiata responded to this email on 16 June 2016 and said that the EAP provider had sent a request to Mr Martelli on 21 June 2016 for additional sessions and he had approved these on 11 August 2017. Mr Martelli said this view did not accord with his enquires.

[72] Ms Asiata expressed concern about Mr Martelli approaching her directly rather than going through her solicitor. She drew a parallel with the approach taken by Ms Colhoun and Mr Kirk in relation to Mr Q's leave form, which is discussed below.

Mr Q's leave form

[73] On 12 August 2016, at the request of Ms Colhoun, who was preparing her witness statement, Mr Kirk obtained Mr Q's employment file from Ms Asiata's filing cabinet, where it was kept. Upon reviewing the file, Mr Kirk found a leave application for Mr Q, which covered the period of his proposed leave in April and May 2016. Ms Colhoun observed that for some reason only the first day of the leave request – 15

April 2016 – had been actioned.

[74] Ms Colhoun said she then referred the form to Post's solicitors and was advised to write to Ms Asiata's solicitor about it. However, Ms Colhoun thought it would not be "right" to say nothing about the form before being advised of its existence by her solicitor. Ms Colhoun and Mr Kirk decided to meet with Ms Asiata to discuss the form.

[75] On Ms Asiaita's account, Mr Kirk approached her during morning tea on 16

August 2016. Ms Asiata said she did not think anything of it and went to Mr Kirk's office shortly thereafter. Ms Asiata said Mr Kirk told her she needed to have a meeting with Ms Colhoun. She said she paused because she did not feel comfortable and sensing this, Mr Kirk said words to the effect of "don't worry you're not in trouble". Ms Asiata assumed the meeting was to do with her bonus, about which she had received a letter that morning.

[76] At the meeting, Ms Colhoun showed her the leave form and explained how it had been found. Ms Asiata said Ms Colhoun said it was "... only fair they showed her this piece of evidence before sending it to the Authority". Ms Colhoun said she asked Ms Asiata if she was "okay" after she had reviewed the form.

[77] In her evidence, Ms Asiata said she could not remember the form. She said the form was not signed and dated by her, which was her normal process. Ms Asiata said she felt "blindsided" by the presentation of Mr Q's leave form. Ms Asiata said this occurred at a time when she was waiting for Post's evidence-in-reply to be lodged in the Authority.

[78] Ms Asiata, through her solicitor, would alleged that Ms Colhoun and Mr Kirk had “big smiles” on their faces during the meeting and also asked questions subsequently set out in Post’s solicitors email to Ms Asiata’s solicitor about the leave form. Mr Kirk would “deny” and Ms Colhoun would “absolutely deny” these allegations.

Evaluation

The employment investigation

Serious misconduct?

[79] It seems to me that one of the difficulties faced by Post right at the outset was its view Ms Asiata had (allegedly) engaged in “serious misconduct”. As set out above, Post had adopted a definition for serious misconduct which was: [d]eliberate and/or extremely negligent conduct, which so deeply erodes the required trust and confidence that dismissal could be justified in all circumstances”.

[80] In order to substantiate the allegation of serious misconduct against Ms Asiata, Post would, in satisfying the requirements set on s 103A of the Act, need to demonstrate that she was either “deliberate” or “extremely negligent” in the conduct she exhibited during the incident with Mr Q on 14 April 2016 including telling him, on its case, he was “fired”.

Procedure

[81] Unfortunately, the investigation undertaken by Post was deficient in several major respects.

[82] First, confronted as it was with allegations that Mr Q had sworn at Ms Asiata, had threatened to knock her out and, independently of Ms Asiata’s allegations, had driven his car at speed out of carpark narrowly avoiding another car and the gate, a fair and reasonable employer would have taken immediate steps to suspend Mr Q. Mr Q, as noted above, was already subject to an (extended) final written warning. Instead, what happened was Mr Kirk agreed to a meeting with Mr Q (through a person representing themselves as his cousin over the telephone), Mr Q then “appeared” at Mr Kirk’s desk in the workplace and after a short “catch up” with Mr Martelli and Mr Kirk (also in the workplace) which included the granting of his annual leave, Mr Q left the premises. Post subsequently allowed Mr Q to resign, without investigating his misconduct.

[83] Second, the approval of Mr Q’s annual leave (including prospective annual leave and paying him a normal day’s pay on 15 April 2016 rather than as approved annual leave) and allowing Mr Q to resign was disparate treatment of two employees said to have misconducted themselves during the same incident. A fair and reasonable employer would have not arrived at such an outcome. This is particularly so in circumstances where Mr Q was the aggressor and his actions towards Ms Asiata included a threat of violence.

[84] Third, Post should have ensured that Ms Asiata was afforded all the support reasonably and practically necessary given the circumstances. I do not accept Post’s view Ms Asiata was adequately or appropriately supported. This, I believe, added to her distress. For example, Mr Kirk and Mr Martelli were initially very supportive of Ms Asiata, but subsequently became involved in her employment investigation. Ms Colhoun said she “observed” Ms Asiata and believed she was okay, without seemingly asking her directly. While EAP was offered to Ms Asiata, this increasingly became within the context of the employment investigation into her own conduct and there appeared to be, on the evidence, although it was not entirely clear, some sort of administrative issue involving Mr Martelli preventing Ms Asiata accessing addition sessions.

[85] Four, a fair and reasonable employer, particularly one the size of Post with the resources it had available to it, would have commenced two separate, parallel investigations into the actions of Mr Q and Ms Asiata. The involvement of Mr Martelli, Ms Colhoun and, to the extent he was, Mr Kirk in supporting Ms Asiata, then investigating her and also seeking to assuage Mr Q to reduce the (perceived) risk of a personal grievance emanating from him was fraught and clearly problematic for Post. To some degree the need for separate investigations was recognised by Post. In Ms Colhoun’s letter to Ms Asaita dated 20 May 2016, referred to “two entirely separate sets of allegations” directed at Ms Asaita and Mr Q with each case “treated separately on its merits”.

[86] Fifth, the investigation Post did carry out was insufficient. It failed to interview all relevant employees, including another team leader and possibly other witnesses. Mr Martelli withheld the statements of Ms Sutcliffe and Mr Flavell from Ms Asiata and the decision-maker, Ms Colhoun. He also did not disclose the notes of the meeting with Mr Q on 15 April 2016. When asked about this Mr Martelli cited respect for the “privacy” of Ms Sutcliffe and Mr Flavell, that Ms Colhoun did not need to take the statements into account because Ms Asiata had provided an account of what had happened, including saying she told Mr Q he was “fired”, and because Post already had the statements of Ms Tele and Ms Karipa. It is unc lear how the privacy of witnesses to a workplace incident trumps an employer’s obligation to conduct a fair and reasonable investigation including the disclosure of all relevant information to the person being investigated. Further, the statements in question confirmed Mr Q swore at Ms Asiata and to, that extent, were corroborative of her evidence. While Mr Martelli did not disclose the statements and notes of the meeting with Mr Q to Ms Colhoun, he was aware of their contents and he advised her on the investigation process. This was simply unfair to Ms Asiata. The failure to conduct a sufficient investigation is reinforced, in my view, by the discovery, several months after Ms Asiata was given her warning, a leave form for Mr Q. Post were also supposed to be investigating Mr Q’s conduct and a review of his employment file as part of that would be the prudent action of a fair and reasonable employer.

[87] Sixth, while an ongoing employment relationship and Post continued to engage with Ms Asiata as an am employee and team leader this ought not to have extended to engaging with her about evidence that was before the Authority in respect of EAP or, in the case of the Mr Q leave application, would come before the Authority. The latter appeared to be contrary to the legal advice Ms Calhoun received.

[88] These procedural deficiencies whether viewed individually or cumulatively were no minor and they resulted in Ms Asiata being treated unfairly

Substance

[89] Counsel for Post invited me to conclude Ms Asiata's evidence was unreliable. However, I decline to do so. In reviewing Ms Asiata's evidence, there were some minor inconsistencies in her accounts of the words actually exchanged between her and Mr Q. However, the tenor of what she said was consistent and it was not contradicted in any meaningful way by other evidence. The existence of inconsistencies does not, of itself, render an account of the events unreliable. There are many factors which impact on the power of recall including stress, trauma or, in

Ms Asiata's case, she said she was in shock.3

[90] Indeed, Ms Asiata's account of what was said to her by Mr Q was generally corroborated by witnesses. For example, Ms Tele confirmed that Mr Q was "screaming", had called her a "fat bitch" and threatened to "knock her out"; Ms Karipa confirmed Mr Q was swearing and, while their statements were not provided to Ms Asiata at the time, Ms Sutcliffe and Mr Flavell confirmed Mr Q swore at her and Ms Sutcliffe said their discussion was "heated".

[91] One aspect of Ms Asiata's evidence which was keenly contested between the parties which was whether Ms Asiata said to Mr Q he was "fired" or "pretty much fired". Mr Martelli noted down that Ms Asiata told him and Mr Kirk that Mr Q was "fired" during the meeting on 15 April 2016. The absence of any evidence from Mr Q did not assist the resolution of this factual contest.

[92] Ms Asiata accepted during the investigation meeting there was a difference between "pretty much fired" and "fire". However, regardless of the word or words spoken by Ms Asiata, it, or they, must be considered in all circumstances at the time.4

It is impermissible to separate out some or, merely, convenient circumstances.

3See, generally, *George v Auckland Council* [2014] NZCA 209 at [34].

4*A Ltd v H* [2016] NZCA 419 at [36]

[93] One of the key allegations levelled by Post at Ms Asiata was she acted outside her authority by informing Mr Q his employment had been terminated. This allegation was allied with a further allegation that Ms Asiata had exposed Post to "considerable risk of a personal grievance". Counsel for Ms Asiata said Mr Q knew Ms Asiata could not fire him. Counsel for Post took issue with this submitting there was no evidential foundation to support it. However, in my view there was no evidential foundation to support the proposition Mr Q believed Ms Asiata could terminate his employment and that is precisely the point.

[94] For Post to credibly and reasonable accept that Mr Q believed he was fired, it would require a positive statement from Mr Q that be believed this to be the case. As Post failed to properly interview Mr Q – beyond an informal "catch-up" with Mr Martelli and Mr Kirk – and investigate his responses it was unable to demonstrate a proper evidential foundation for the allegations relating to Ms Asiata acting without authority and "firing" Mr Q. Instead Post appeared to rely on a second-hand account of Mr Q's belief communicated over the phone to Mr Kirk by someone identifying as Mr Q's cousin, the name of whom Mr Kirk could not remember. This issue is central to Post's case because being "fired" in circumstances where one believed they could not actually be fired is effectively meaningless.

[95] More problematically for Post, the allegation that Mr Asiata put Post at risk of a personal grievance is not supported by any evidence at all - hearsay or otherwise. This allegation appears to have found its beginnings in a concern held by Mr Martelli, supported by Ms Colhoun and Mr Kirk, based on Ms Asiata's statement on 15 April

2016 and his belief that defending a personal grievance from Mr Q may cost $50,000.

[96] It was not clear from the evidence why Mr Q sought to resign on 15 April

2016. A more robust investigation by Post may have assisted here. Mr Martelli's notes of the meeting with Mr Q did not record that he believed he had been dismissed by Ms Asiata on 14 April 2016. Given it cannot be known with any certainty why Mr Q sought to resign, it is equally plausible to suggest Mr Q knowing he was on a (extended) final written warning and having engaged in further apparent serious misconduct – his conduct here would fall within one of the examples of serious misconduct given in the collective agreement – would likely be dismissed and he wanted to resign instead; which he ultimately did.

[97] On the evidence, I am satisfied Ms Asiata was sworn at, threatened with violence and subject to personal insults from Mr Q. Within the context of all the circumstances at time, Mr Asiata told Mr Q was or "pretty much fired" or simply, "fired". Even on Post's best case that Ms Asiata said Mr Q was "fired", there is no proper evidential foundation that he believed he was. Even

where such an evidential foundation existed, in my view Ms Asiata's actions were an angry response to what Mr Q said and did, and her telling him he was "fired" (on Post's best case), while a poor choice of word, was a Pavlovian or reflex responses which sought to assert her dignity and re-establish her authority. Such responses by both employers and have

employees have been recognised by the Court. 5

[98] In my view, no amount of training, which often occurs in sterile and controlled environments – usually training rooms – can completely prepare a person for such a situation. Consequently, I do not accept Post's evidence and submissions, extensive as it was, Ms Asiata had been trained to deal the situation she was confronted with and should not have allowed it to escalate in the manner it did. In its submissions, Post made much of the "other options" available to Mr Asiata including walking away, seeking support form security or HR or telephoning Ms Colhoun or Mr Kirk – however, these were not realistic options in the circumstances. Even on Mr Q's account, such as it was, the incident occurred very quickly.

Conclusion about Ms Asiata's personal grievance

[99] For the forgoing reasons, I find in conclusion that the final written warning issued to Ms Asiata, objectively assessed, was not the actions of a fair and reasonable employer in all the circumstances as they existed at the time. Ms Asiata's actions on

14 April 2016 were neither "deliberate" or "extremely negligent" and Post's procedurally deficient investigation into those actions failed to yield a substantive justification for imposition of the final written warning. Consequently, she has a

personal grievance against Post.

5See, for example, *Kostic v Dodd* EC Christchurch CC 14/07, 11 July 2007 at [71] and *Housham* v

Juken New Zealand Ltd [2007] 1 ERNZ 183 at [47] – [50]

Remedies

[100] Having found that Post's action was not justified, Ms Asiata was entitled to an assessment of remedies to settle her personal grievance. Ms Asiata sought compensation for humiliation, loss of dignity and injury to feelings and any other order the Authority deems just.

The final written warning

[101] Consequent to the finding the issuance of the final written warning was an unjustified action by Post, Ms Asiata is reinstated to the position she was in before the warning was issued, as if, no warning had been issued with immediate effect.6 Post is to take all reasonable and practical steps to reflect this order on Ms Asiata's employment file within three days of the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[102] Ms Asiata sought $15,000 compensation for humiliation, loss of dignity and injury to feelings. Ms Asiata, supported by her partner, Mr Reddy, gave credible and matter of fact evidence about the effects of the events on 14 April 2016, and their aftermath, upon her.

[103] I accept that Ms Asiata suffered humiliation, loss of dignity and injury to feelings by Post's failure to provide appropriate support in the aftermath of the incident with Mr Q on 14 April 2016, the procedurally deficient employment investigation that followed and the substantively unjustified imposition of a final written warning. I also take into account the allegations made against her, and the circumstances within which they occurred, have had an impact on her.

[104] Subject to a consideration of contribution under s 124 of the Act, which is outlined below, I find $12,000 as compensation for that humiliation, loss of dignity and injury to feelings is an appropriate amount to award under s 123(1)(c)(i) of the Act. The amount is consistent with recent awards by the Authority and Court and one

made mindful of the Court's guidance on granting such remedies.[7]

6See, *Creedy v Commissioner of Police* [2011] NZEmpC 104; [2011] ERNZ 285, *Pathways Health Ltd v Moxon* [2013] NZEmpC 18 and *X v Secretary of Justice* [2011] NZERA Christchurch 177

7See *Hall v Dionex Pty Limited* [2015] NZEmpC29 at [87]–[90] and *Rodkiss v Carter Holt Harvey*

Limited [2015] NZEmpC 34 at [133].

[105] Having found Ms Asiata was entitled to remedies for her personal grievance, I was required by s 124 of the Act to consider whether she contributed to the situation giving rise to her grievance.

Contributory behaviour by Ms Asiata?

[106] For Ms Asiata, it was submitted the extent to which her actions were causative or blameworthy of the situation she found

herself in was minimal when considered within the whole circumstance giving rise to her grievance. Consequently, it was argued that any reduction for contribution should be modest.

[107] In contrast, Post said there were a number of factors which needed to be taken into account when assessing Ms Asiata's contribution. These included finding a leave application for Mr Q in Ms Asiata's filing cabinet, the lack of consideration by Ms Asiata of other options for Mr Q's leave such as unpaid leave (rather than just saying he would have been "AWOL" if he did not present for work) and telling Mr Q he was "fired" and the attendant risk said to flow to Post from that.

[108] The most significant of these factors was, however, Post finding the leave application. Having considered the matter, in my view, at its highest, Ms Asiata made an administrative error in respect of the form. Ms Asiata said she could not remember the form and her usual process was to sign and date such forms, which had not been done. There was no evidence Ms Asiata was motivated by malice in respect of Mr Q's leave application and Post did not allege any existed. It would require a reasonable degree of post-fact speculation to posit how the situation may have turned out differently and in any event, Mr Q's conduct cannot be condoned or excused. However, Ms Asiata's administrative error did contribute to the incide nt and to that extent, it is "blameworthy".

[109] In *Xtreme Dining Ltd t/a Think Steel v Dewar*[8] a full bench of the Court examined the circumstances where an otherwise successful applicant in a personal grievance claim could be partially or fully disentitled from any remedies due to their contribution to the grievance. It is tolerably clear this assessment is not limited to

misconduct discovered post-dismissal.[9]

8 [2016] NZEmpC 136

9*Salt v Fell* [2008] NZCA 128 (CA)

[110] Ms Asiata was awarded $12,000 for hurt, humiliation and injury to feelings. Standing back and assessing the matter *in toto*, this amount should be reduced to take into account Ms Asiata's contribution which, after considering, in particular, the decision in *Dewar* and the evidence and the submissions of the parties, has been assessed at 15%. Consequently, Ms Asista is awarded $10,200, after deduction for contribution, under s 123(1)(c)(i) of the Act.

Orders

[111] In summary, the orders made are for Post to settle Ms Asiata's personal

grievance by:

(i) Reinstating her to the position she was in before the warning was issued, as if no warning had been issued with immediate effect;

(ii) By taking all reasonable and practical steps to reflect the order set out in (i) above on her employee file within three days of the date of this determination; and

(iii)Paying her $10,200, after deduction for contribution, as compensation for hurt, humiliation and injury to feelings under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

[112] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, $3,500 for a matter such as this commenced before 1 August 2016, and

adjusted upwards or downwards for relevant factors.[10]

Andrew Dallas

Member of the Employment Relations Authority

10*PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC

135 at [106]-[108].