

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 275/08  
5111095

BETWEEN                      MARCIA JESSEN  
   Applicant  
  
AND                                FAIRFAX NEW ZEALAND  
   LTD  
   Respondent

Member of Authority:        Dzintra King  
  
Representatives:              Anne-Marie McInally, Counsel for Applicant  
   Richard Harrison, Counsel for Respondent  
  
Investigation Meeting:        15 February 2008  
  
Submissions received:        2 and 16 May 2008 from Applicant  
   12 May 2008 from Respondent  
  
Determination:                4 August 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Ms Marcia Jessen, says she has been unjustifiably dismissed by the respondent, Fairfax NZ Ltd. She seeks reinstatement, compensation and lost remuneration. The respondent denies that the dismissal was unjustified.

**Employment History**

[2]     Ms Jessen was employed as a photographer in the newsroom. In March 2007 a meeting was called at which Mr Kemeys, the Editor in Chief, raised concerns regarding her having made ‘pointed remarks’ and ‘inappropriate comments’ to a colleague, Mr Otto. Ms Jessen was issued with a first written employment warning.

[3] It was agreed that Ms Jessen would apologise to Mr Otto. The editor, Ms Tucker, ascertained some months later when speaking with Mr Otto, that the apology had not in fact been made. She did not take the matter up with Ms Jessen at the time.

[4] Ms Jessen said the argument with Mr Otto had been about abortion and that how she should make the apology had gone round and round in her head and she thought she had apologised.

## **Transfer**

[5] Ms Jessen's employment agreement permitted a transfer to another location within the greater Auckland area after discussion with the affected employee.

[6] On Friday 16 November Mr Kemeys told Ms Jessen that she would be transferring from Manukau, where she had been working for four years, to the Western Leader. This was part of a rotation of photographers following a resignation on the North Shore. As Ms Jessen lived in West Auckland Mr Kemeys thought it would reduce her travel costs.

[7] The transfer was due to take place the following Monday. Ms Jessen was understandably shocked and upset by this notification, especially the short notice period. The contract provides for discussion but what appears to have happened is that a decision that had already been made by Mr Kemeys was conveyed to Ms Jessen.

[8] She asked Mr Kemeys whether he would consider allowing her to remain at Manukau until Christmas. She explained that she had a number of projects that she wanted to complete. Ms Jessen said Mr Kemeys seemed to agree. Mr Kemeys said he told Ms Jessen he would consider it.

[9] Ms Jessen phoned Ms Sally French, the Chief Reporter, and said that she would no longer be working at the Manukau Courier and that Mr Kemeys had agreed that she would transfer at the beginning of the New Year. It is clear that at that stage Ms Jessen believed there was agreement to delay the transfer.

[10] The following Monday, 19 November, Ms Jessen received an email from Mr Kemeys saying she would be starting at the Western Leader the following week.

[11] Ms Jessen, distressed at the news of the transfer, was taken into Ms Tucker's office. Ms Tucker is Mr Kemeys' partner. Ms Jessen was crying. Ms Jessen said Ms Tucker's manner was informal and she was critical of the decision to transfer her so quickly. Ms Tucker told her to go home as she was so upset.

[12] The following day, 20 November, Ms Jessen emailed and telephoned her contacts to let them know she was being transferred. Ms French took exception to the manner in which she felt Ms Jessen was talking to her contacts and spoke to Mr Kemeys. Ms French's communication with Mr Kemeys was also prompted by an incident between Ms Jessen and a new reporter, Mr William Mace. Ms French told Ms Jessen she should not have spoken in that manner to Mr Mace. After Ms French had spoken to Ms Kemeys he asked her to write out the events as she recalled them. She did this in an email on 21 November.

[13] Mr Kemeys said that when the incident with Mr Mace was brought to his attention he asked staff in the newsroom to categorise their relationships with Ms Jessen and was shocked by the level of unhappiness revealed.

[14] On receiving that feedback Mr Kemeys reviewed Ms Jessen's traffic which, he said, revealed personal email exchanges of a negative nature regarding other staff. At that stage he decided to postpone Ms Jessen's transfer to the Western Leader.

[15] On 21 November Ms Jessen received a letter from Mr Kemeys telling her employment was in jeopardy and asking for a meeting. The letter identified a number of concerns which the employer regarded as potentially serious:

- that she had misrepresented her discussions with Mr Kemeys to staff about when she was to transfer;
- that she had "badmouthed" the editor of the Western Leader;

- that she had been rude and unhelpful to a colleague, Mr Mace;
- that she had not heeded previous instructions regarding her interactions with staff;
- That the manner in which she had communicated her transfer to her contacts was inappropriate.

[16] At the end of the week there was a small farewell from the Manukau Courier. Ms Tucker told Ms Jessen to phone Mr Kemeys who was off work sick. He told her she was to go to the Central Park offices on the Monday and that she would be working there in the interim. He did not tell her why.

[17] Ms Jessen said she found it very difficult being in limbo at Central Park. She did not have her own chair or computer and she felt everyone knew there was a cloud hanging over her.

[18] Ms Jessen, concerned about the letter, contacted, Mr Enzo Giordani, an organiser with the EPMU, who wrote to Mr Kemeys seeking clarification of the allegations on 26 November. Mr Kemeys replied the following day saying the information would be provided at the meeting.

### **30 November Meeting**

[19] The meeting was attended by Ms Jessen, Mr Giordani, Ms Carissa Lawry (a friend of Ms Jessen's), Mr Kemeys and Ms Davina Dyne, the Human Resources Manager for Suburban Newspapers Auckland.

[20] Mr Kemeys said that Ms Jessen had misrepresented her conversation with him. He had heard from the newsroom that she had said she had got him to “*back down*” and delay the transfer until after Christmas. Mr Giordani's notes state that Mr Kemeys said “*I get grumpy when [it is] reported back to me from the newsroom that 'I got David to back down'.*”

[21] Ms Jessen denied having said that and said that they had discussed the possibility of her staying until the end of the year.

[22] Mr Kemeys then went on to say that he had asked people to characterise their relationships with her and people had said they felt they were walking on eggshells. Ms Jessen replied that she felt she got on well with most people and that everyone had bad days. At this stage no specific persons or comments had been identified.

[23] He also referred to the incident with Mr Otto. Ms Jessen said she had apologised to Mr Otto.

[24] Mr Kemeys then produced two emails:

- An email from Ms Sally French, the Chief Reporter for the Manukau/Papakura Courier
- An email string between Ms Jessen and a friend, Ms Buckley, working at another newspaper.

[25] Ms French's email said:

*...I was concerned at the way she was announcing why she was leaving. She'd say...I'm ringing to tell you today is my last day here. Obviously the other party then says things like, oh that's sad, and such short notice. And she'd say things like, yeah, tell me about it, I only got told yesterday and have been given four days to move. I don't want to go to the western leader, it's not going to be anything as exciting as working out south etc but I don't have a choice.*

*She wasn't being discreet about her calls, and all of us here between about 8 and 8.25 would have heard her.*

*She didn't badmouth suburban's blatantly, but I am concerned that her tone, and her negative attitude, will have people feeling sorry*

*for her and have them thinking she has been unfairly treated which I think is exactly what she wants.*

[26] Ms French clearly did not know what the people to whom Ms Jessen was speaking actually said. Her views are based on supposition and inference. Furthermore, her recollection of Ms Jessen's conversations is not logical. She says that Ms Jessen was telling people it was her last day at the same time as saying she was telling people she had been told the day before and she had four days to move.

[27] The email went on to comment that Ms Jessen had upset Mr Mace and that Mr Michael Apter, the sports reporter, had been delighted when he found out that Ms Jessen was transferring.

[28] The email string between Ms Jessen and Ms Buckley discusses work and two recent resignations. When asked what his concern was Mr Kemeys said that they went towards Ms Jessen's attitude towards him and the company. He also indicated that he believed Ms Jessen was implying that he was implicated with one of the resignations and that she seemed to be questioning the management style.

[29] An adjournment was taken so Ms Jessen could consider the emails.

[30] Ms Jessen said that she had wanted to get hold of her contacts and let them know she was going and did not think she had been unprofessional. She offered to apologise to Mr Mace. I have seen the email Ms Jessen sent to her contacts and it is totally professional. Mr Kemeys also had access to the email and I find it surprising that he gave great weight to Ms French's impressions when he had a contrary position in writing available to him.

[31] Ms Jessen said the atmosphere in the newsroom had been very difficult at the time of the resignation and it was very sad because the reporter had been good at her job.

[32] Mr Kemeys then produced an emailed image which depicted a colleague with toothache. Ms Jessen said it had been sent to her and the employee depicted by

another employee and the employee depicted thought it was amusing. Ms Jessen had not forwarded the image to anyone.

[33] Mr Kemeys then asked when Ms Jessen had returned from her surgery and produced an email which stated that her ankle was still sore. Mr Kemeys said he had no idea she was still experiencing problems. A further adjournment took place.

[34] Mr Kemeys then said he had sent Ms Jessen to work at Central Park and not the Western Leader because he had heard that she had called the editor a “geek”. Ms Jessen denied it and said she really liked the editor, he was a really nice man.

[35] Mr Kemeys then asked what she had said to staff at Central Park about why she was there. She said she had told them she was waiting for her transfer to the Western Leader. He then asked if she had said anything about being targeted because she was a union member. No details or context regarding this allegation were provided. Ms Jessen denied it.

[36] It would have been preferable to have provided the information to Ms Jessen before the meeting. Such provision would have enabled a more considered response and the ability to place things in context may well have avoided later problems. As it was, Mr Kemeys formed the view that Ms Jessen’s responses, some of which were later found to be factually inaccurate, constituted lies. I do not accept Mr Kemeys’ view that the fact that a statement is found to be factually inaccurate necessarily means that the person making the statement has been lying.

[37] After the meeting Ms Dyne undertook a further inquiry including interviews with staff at the Manukau Courier and at the East & Bays Courier. The questions that Ms Dyne asked and her findings were not provided to Ms Jessen; they were first provided at the Investigation Meeting. One of the questions put to staff by Ms Dyne, for instance, was whether there had been any witnesses to the phone conversations with her contacts and “*Were these handled professionally or did it appear Marcia wanted them to think she was hard done by?*” The investigation by Ms Dyne was carried out on 30 November and her findings were made on 6 December.

[38] The Union wrote on 7 December 2007 asking Mr Kemeys to hand the investigation over to another person who was not as personally involved and asked for details of the allegations and that all information be disclosed prior to a further meeting taking place.

[39] On 7 December Mr Kemeys wrote to Ms Jessen. He said: *Our enquiry indicates that you may have been less than honest in your initial responses and acted in an inappropriate pattern of behaviour in your dealings with workmates*". He proposed a further meeting to enable Ms Jessen to respond to these allegations. The interview notes were forwarded to the Union. However, a list of the questions that had been asked and the conclusions drawn were not provided until the Investigation Meeting.

[40] Ms Jessen did not see the notes provided until shortly before the next meeting. I accept that the employer was not asked for an adjournment so that Ms Jessen could give the notes more attention.

### **The Notes**

[41] Ms French said Ms Jessen had phoned her about the transfer and "*The way Marcia explained these things [the transfer] insinuated that she had talked her way into staying on at least until Christmas*". She also said that Ms Jessen was not blatantly badmouthing the company in her calls to contacts "*but left people thinking she had been badly treated and that Suburban Newspapers was a bad company*". Ms French was not party to these phone calls and did not know what the other people on the calls either said or thought. Ms French's email and recorded notes are often simply assumptions based on inference. They seem, however, to have been treated as accurate and factual by Mr Kemeys and accepted quite uncritically. This is not say that Ms French did not genuinely hold those views.

[42] Ms French also stated that she heard Ms Jessen say she didn't want to go out west because nothing happened out there. She said it wasn't only the area that was boring, but so were the staff and the editor was a geek. No context for this was provided.

[43] The respondent says that the context in which this was said is unimportant. I disagree. If she said it to a friend and/or co-worker that would be quite different from her saying it to an external person. It may have been something she said when upset after being told about the move, the same way she said it to Ms Tucker. People in workplaces often complain about their colleagues, their boss, their clients. Whether such behaviour is appropriate or not will depend on the context in which comments are made and to whom they are made.

[44] Ms Tucker provided a statement about the conversation she had had with Ms Jessen in her office. Ms Tucker said she was “*visibly upset and crying*” and “*very upset that she could not stay at Manukau until Christmas*”. She said Ms Jessen told her she had nothing in common with the people at the Western Leader, the editor was a geek and the others were weird and boring. Clearly the comment made to Ms Tucker was made by a distressed person. Ms Jessen understandably regarded her conversation with Ms Tucker as private and confidential. She had been previously told that Ms Tucker’s office was a safe place where she could “vent”.

[45] Ms Tucker stated that she had had complaints about Ms Jessen in the past and had worked through them with her. She was not aware of any problems Ms Jessen had in working with the public and that “*in and of themselves the ongoing issues were minor.*” Ms Jessen had never been rude to her.

[46] Mr Apted said: “*I don’t even bother dealing with Marcia. I just cut her right out ...I don’t even say ‘good morning’ any more.*” However, he also acknowledged that the issues were not anything major.

[47] Mr Mace said he had approached Ms Jessen regarding a location for a photo shoot asking whether there were any Christmas decorations up around Manukau City. Ms Jessen said she did not and made him feel unappreciated. He felt she was abrupt and dismissive.

[48] Mr Mace also commented on Ms Jessen’s calls to her contacts. He was the only other person to do so despite Ms French having said that other staff were present.

It must also be remembered that Mr Mace had had a disagreement with Ms Jessen and that the question asked was leading. Mr Mace said Ms Jessen “*may have impressed on them a questioning tone implying why she was leaving, that the company had treated her badly and unfairly*”.

[49] Ms Melanie Loudon, the Editor at East & Bays (previously the Chief Reporter at Manukau) said the atmosphere had been quite negative at Manukau for the two and a half years she had worked there, that Ms Jessen was very difficult to handle and set in her ways.

[50] Ms Melanie Allan said Ms Jessen asked her if she was a union member (she was) and later said the company was targeting union members.

#### **Dismissal Meeting 10 December 2007**

[51] Mr Kemeys was accompanied by his legal representative, Mr Harrison. Ms Dyne took notes. Ms Jessen was represented by Mr Giordani, Ms McNally and a friend, Ms Lawry.

[52] Both Mr Giordani and Ms Lawry had also been with Ms Jessen at the March meeting after which she had received the first written warning. They both commented that there was a significant difference in Mr Kemeys’ attitude . Mr Giordani said Mr Kemeys was noticeably hostile towards Ms Jessen. Ms Lawry is a Human Resources Manager. She felt that Mr Kemeys had conducted himself professionally during the warning meeting in March.

[53] Ms Lawry felt that the catalyst for the first disciplinary meeting had been Mr Kemeys’ concern that Ms Jessen had told others that she had got him to “*back down*” on the transfer date. She said he interrupted Ms Jessen several times to say she was a liar and was lying regarding her denial of that allegation. Mr Kemeys said he did not recall calling her a liar or saying that she was lying. He said “*I think it was very stressful for everyone and recollections differ.*” That is an interesting statement in view of Mr Kemeys’ repeated assertions that Ms Jessen had been lying when she denied making certain comments at the first disciplinary meeting.

[54] Ms McInally reiterated that Mr Kemeys was not an unbiased decision maker, a view he rejected.

[55] Mr Kemeys said the new allegations were that Ms Jessen had not in fact apologised to Mr Otto and that she had, despite her initial denial, called the editor a geek.

[56] After a short adjournment Ms Jessen was summarily dismissed on the basis that the company no longer had trust and confidence in her.

[57] The respondent says it was satisfied that Ms Jessen had:

- misrepresented the discussion with Mr Kemeys; and
- made derogatory remarks about the editor of the Western Leader and the staff and had been untruthful in her initial denials; and that
- her conduct to other staff, including Mr Mace, was at times rude and unhelpful and it undermined working relationships which impacted negatively on the work environment and the employer's business; and that she
- had engaged in inappropriate communications with others in a manner that had undermined the employer and presented the company and its management in a negative light; and
- been untruthful in her responses.

[58] In the dismissal letter Mr Kemeys said:

*We considered your responses to the investigation notes and the information to date plus your request in way of moving forward. In light of the concerns raised both before and during this investigation, we find that we are left with the conclusion that we no longer have trust and confidence in you as an employee*

## **Misrepresentation**

[59] Mr Kemeys said the misrepresentation was the statement that she was not moving until after Christmas when what had been said was that consideration would be given to a delay.

[60] Mr Giordani's notes of the meeting in November indicate that Mr Kemeys had said "*I get grumpy when it is reported back to me from the newsroom "I got David to back down'."*

[61] However, when Ms French was interviewed on 30 November she did not corroborate this. She said:

*Marcia phoned me on my mobile on the Friday after leaving David's office. She said that she was being transferred to the Western Leader ... The way Marcia explained these things insinuated that she had talked her way into staying on at least until Christmas.*

[62] This comment in Ms French's 30 November statement regarding "insinuation" is the only iteration of Mr Kemeys' complaint. This vague comment is insufficient to sustain an allegation of misrepresentation. To insinuate is to convey a thought gradually and insidiously, to suggest indirectly by hints or innuendo. There was nothing direct or clear upon which Mr Kemeys could have based his view that Ms Jessen had misrepresented their conversation.

[63] Even if Ms Jessen had said she had got Mr Kemeys to back down or change his mind that would not constitute serious misconduct.

## **Derogatory Remarks**

[64] While it was foolish of Ms Jessen to make the remarks they were made while she was understandably upset about being moved to a location which she thought

would not be as stimulating as South Auckland. The remarks do not constitute serious misconduct.

### **Conduct Towards Other Staff**

[65] Ms Jessen offered to apologise to Mr Mace. The conduct revealed by the investigation does appear to indicate that Ms Jessen had problems in her relationships with her colleagues. At the dismissal meeting it was said that *“There appears to be a pattern of behaviour of negative, disruptive and causing ill feeling”*. Apart from the issues with Mr Otto (the subject of the verbal warning) and the Mace incident, the concerns that arose out of Mr Kemeys’ and Ms Dyne’s investigation had not been previously raised with Ms Jessen. Such issues as had come to Ms Tucker’s attention had been dealt with by her and the consensus was that the issues were not major in themselves.

### **Inappropriate Communications**

[66] The respondent submitted that Ms French confirmed that in Ms Jessen's calls to contacts the way in which the transfer was presented left people thinking that she had been badly treated and that Suburban Newspapers was a bad company.

[67] As I have already indicated, this allegation is based on Ms French’s suppositions and inferences. There is no evidence that could safely be relied on that Ms Jessen spoke to her contacts in an inappropriate manner. She told them she was leaving, said when she would be leaving and that she did not have a choice. That is factual information, as Mr Kemeys conceded. She may also have said she did not want to go and did not think the new location would as exciting as the one she was leaving. There is nothing in this to warrant disciplinary action.

### **Untruthful Responses**

[68] I have already mentioned that it was unfortunate that details of the allegations were not provided prior to the first meeting. Memory is not like a page one can bring up on a computer screen. One’s recollections of things are modified by circumstances

and one's emotional state. Context is helpful in enabling people to recall events. I do not think a reasonable employer would have concluded that the responses were deliberately untruthful.

### **Emails**

[69] The emails reveal more about the manner in which this matter was escalated rather than misbehaviour on Ms Jessen's part. The material that was found and presented to Ms Jessen is nothing other than gossip between friends. People will hold all manner of views about their employers and their workplaces. An employee does not have to like his or her employer or be happy in the workplace.

### **Cumulative Effect**

[70] Mr Kemeys accepted that none of the incidents in isolation would justify dismissal. Mr Harrison acknowledged in his submissions that the email comments, for instance, could not constitute serious misconduct. He maintained that the findings were interrelated and could not be separated out. Even cumulatively, the incidents do not constitute serious misconduct.

### **Justification**

[71] The question of whether a dismissal is justifiable must be determined on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done at the time the dismissal occurred.

[72] I accept the applicant's submission that Mr Kemeys was less than a dispassionate investigator. The manner in which the first meeting was conducted, including the failure to supply relevant information prior to the meeting, was less than satisfactory. Some information was not revealed to Ms Jessen at all.

[73] In *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA) at 487 the Court stated that definition of the kind of conduct that will justify

summary dismissal: “... *is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*”

[74] It cannot be said that Ms Jessen’s actions constituted conduct that deeply impaired or was destructive of the basic trust and confidence essential to an employment relationship.

[75] The dismissal was unjustified.

## **Remedies**

[76] Ms Jessen has sought reinstatement, compensation and lost remuneration.

### Reinstatement

[77] This is the primary remedy for unjustifiable dismissal, wherever practicable. In *Sefo v Sealord Shellfish Ltd* CC 4A/08, 17 April 2008, Colgan CJ, the Court stated that the employer bore the onus of displacing the status requirement for reinstatement as the primary remedy.

[78] The Court went on to say that an assertion by the employer that trust and confidence had been lost was insufficient. Mr Harrison submitted that the evidence before me was that Ms Jessen’s working relationships with her colleagues were well and truly severed.

[79] However, I was struck by the paucity of witnesses deposing that there had been a loss of trust and confidence and identifying the grounds for that. Although a number of staff had apparently said they found Ms Jessen difficult none of those people were called to say they opposed reinstatement. Ms French did not say that in her brief and I had to ask her about it. All her brief said was that the atmosphere in the office had been very positive since Ms Jessen’s departure. In reply to my questions, Ms French said Ms Jessen “*could be great but her mood creates problems*”.

[80] Mr Harrison also submitted that sending Ms Jessen to another newsroom would not remedy the situation as demonstrated by the short time she spent at the East & Bays Courier. Ms Jessen was placed in a difficult situation when she was sent there. As a result, I cannot draw the conclusion that whatever difficulties there may have been in that interim period (and again I have only the results of Ms Dyne's investigation during which she asked leading questions) would recur.

[81] As for Ms Jessen's comments about working in the west, those were made at a time she was distressed.

[82] Ms Dyne's evidence was that there were staff who had said they would resign if Ms Jessen were reinstated. These people were not identified. Ms Dyne said that from the interview process and the feedback since the dismissal she felt it would be damaging to working relationships and harmful to the business.

[83] When I asked Mr Kemeys to elaborate on the issue of damage to the business he said it was likely that Ms Jessen's behaviour would continue which would make it more difficult to deal with the other staff and run the business properly. I note that when Mr Kemeys was asked whether he had considered counselling as an alternative to dismissal he said he had not because he felt that as Ms Jessen had not acknowledged that there was a problem he could see no way to rectify it.

[84] Ms Jessen said she was willing to make a fresh start and recognised that there were ways in which she could improve and learn as an employee and a colleague. She said she was prepared to do whatever was necessary to re-establish herself. She was willing to go to any location in the greater Auckland area.

[85] The main ground for alleging lack of trust and confidence was the assertion that Ms Jessen had lied. I have found that this was an unsafe conclusion based on a failure to provide adequate information at the proper time.

[86] The respondent is to reinstate Ms Jessen in her former position or a position no less advantageous to her. Given that Ms Jessen was in the process of being transferred the parties may find it helpful to obtain the assistance of the Mediation Service to implement Ms Jessen's reinstatement.

#### Lost Earnings

[87] I am satisfied that Ms Jessen has taken steps to mitigate her losses. She seeks \$11,352.84 gross pursuant to s 128 (2). She also seeks the sum of \$3,134.64 pursuant to s 128 (3) being the shortfall in her earnings from the 13<sup>th</sup> week after dismissal until the hearing.

[88] The respondent is to pay the applicant the sums of \$11,352.84 and \$3,134.64.

[89] Ms Jessen provided an account of her earnings in the past 12 months from weekend work paid at \$33.33 per hour according to a casual contract. She says she has lost the opportunity to derive those earnings as a result of the dismissal. She seeks an order under s 128 (3) based on a minimal calculation of three hours per week (\$99.99 gross). Over the 17 weeks since the dismissal this totals \$499.95 that she could reasonably have expected to earn had she not been dismissed.

[90] Mr Harrison submitted that the casual contract did not guarantee earnings and that there was no causal link between the dismissal and lost income. The casual arrangement to work weekends ceased as at the week ending 12 May 2007. Ms Jessen's notes indicate that she did do one further weekend in December 2007.

[91] I accept that casual work is not a guaranteed income and decline to make an award for the loss of any possible income derived from casual work.

#### Compensation

[92] Ms Jessen seeks the sum of \$16,000.

[93] I accept that Ms Jessen was hurt and humiliated by the termination of her employment. I set compensation for that at \$4,000.

### Contributory Conduct

[94] Section 124 requires me to consider the extent to which Ms Jessen's actions contributed towards the situation giving rise to the grievance; and, if those actions so require, to reduce the remedies accordingly.

[95] Ms McInally referred to me to *Sefo* [78] where the Court held:

*Not every element of blameworthy conduct on the part of an employee that contributed to a dismissal that is subsequently found to be unjustifiable should be reflected in remedy reduction. To do so would be to expect standards of perfection of work performance by employees that are simply unrealistic ... the Authority and the Court should take a robust and realistic attitude to what occurs in workplaces and not scrutinise pedantically and critically every slight deviation from the ideal or even the norm.*

[96] Ms McInally submitted that Ms Jessen's personal emails and a few ill-chosen expressions of disappointment and distress fell into this category. I accept that submission.

[97] I have considered the failure by Ms Jessen to apologise to Mr Otto. Mr Harrison said she could not reasonably have been confused when she said she had apologised to Mr Otto. The reality was that she had got caught out and that went to contribution.

[98] It is possible that Ms Jessen was confused regarding the apology to Mr Otto. More problematic is the fact that she had a first employment warning regarding her behaviour.

[99] Mr Harrison pointed to her behaviour towards staff including the mistreatment of Mr Mace. He noted that Ms Jessen had been given plenty of opportunity and assistance to improve her behaviour and attitude, particularly towards her colleagues. She was not expected to meet unreasonable perfectionist standards, simply common standards of decent office interaction.

[100] I agree that Ms Jessen was not expected to meet unreasonable standards with regard to her interactions with her colleagues. It is clear that they often found her difficult. Her behaviour towards her colleagues contributed to the situation giving rise to the personal grievance and it was blameworthy conduct.

[101] There should therefore be a reduction in remedies. The remedies are to be reduced by 20%.

### **Costs**

[102] Costs were reserved. If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority