

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 273
3001637

BETWEEN ANDY LEE
 Applicant

AND GR & S DYSON LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Stephen Clews for Respondent

Investigation Meeting: 18 May 2017

Submissions Received: 16 June 2017 from Applicant
 9 June 2017 from Respondent

Determination: 12 September 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Lee raised his personal grievances within the statutory 90 day period.**

- B. One or more conditions of Mr Lee’s employment were affected to his disadvantage by the unjustified actions of GR & S Dyson Limited when it issued Mr Lee with a final written warning.**

- C. GR & S Dyson Limited is ordered to pay to Mr Lee the sum of \$5,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.**

- D. Mr Lee was not constructively dismissed.**

E. Costs are reserved.

Employment relationship problem

[1] Mr Andy Lee is originally from Korea. He was employed by GR & S Dyson Limited trading as Westend New World in Rotorua (Westend NW) from 19 October 2013 to 20 January 2017.

[2] Mr Lee resigned from his employment on 7 January and claims his resignation was in fact a dismissal, which he says was unjustified. Mr Lee says his resignation arose as a result of being bullied and after he received a final written warning. He says these actions also led to one or more conditions of his employment being affected to his disadvantage by the unjustifiable actions of Westend NW.

[3] Westend NW denies the claims and says a number of matters raised by Mr Lee were not raised as personal grievances within the statutory 90 day period.

[4] During the investigation meeting I was assisted by an interpreter in the Korean language. I found Mr Lee's English skills to be reasonable but it was useful to have the services of the interpreter at times to help clarify questions and answers from both myself and Mr Lee.

Issues

[5] To resolve Mr Lee's claims I must consider whether:

- a) any of Mr Lee's claims fall outside the jurisdiction of the Authority under section 114 of the Act;
- b) one or more conditions of his employment were affected to his disadvantage by the unjustifiable actions of Westend NW and if so, what if any remedies should be awarded; and
- c) Mr Lee was unjustifiably constructively dismissed and if so, what if any remedies should be awarded.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Lee and Westend NW but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Section 114

[7] Employees who wish to raise a personal grievance must do so within the period of 90 days beginning with the later date of the date the action alleged to amount to a personal grievance occurred or came to the notice of the employee.¹

[8] Westend NW asserts many of the matters raised by Mr Lee were not raised within the 90 day statutory time frame but does not identify the specific matters it says were raised outside that time frame.

[9] A grievance is raised with an employer as soon as the employee has made, or taken reasonable steps to make, the employer aware that he alleges a personal grievance that he wants the employer to address.²

[10] When raising a grievance the Act does not impose an obligation to particularise the relief sought. The focus is on the alleged grievance and the extent to which it is drawn to the employer's notice. The underlying purpose is to identify and address employment relationship issues by direct communication between the parties. Grievance processes are designed to be informal and accessible.³

[11] Mr Lee's claim for unjustified disadvantage relates to allegations that he was bullied during his employment and an allegation that a final written warning issued to him on 19 October 2016 was unjustified.

[12] His claim for unjustified constructive dismissal also relies on his claims that he was subject to bullying and includes the final written warning to the extent that he says he had no option but to resign from his employment because Westend NW failed to take any action to prevent the bullying.

¹ Employment Relations Act (the Act) s 114(1).

² The Act s 114(2).

³ *Idea Services Ltd (in stat man) v Barker* [2012] NZEmpC 112 at [40].

[13] On 18 October 2016 Mr Lee wrote a letter of complaint to Mr Greg Dyson, managing director, and Ms Christine Hickson, Human Resources Manager, making a formal complaint that he had been subjected to bullying behaviour during his employment by members in the bakery team including his manager Mr Thomas. Mr Lee provides specific examples of the behaviour giving him cause for concern. He states that leaving the company is not the best solution and requested Westend NW to take his complaints seriously and investigate them.

[14] Mr Lee's complaint should not have come as a surprise to Mr Dyson or Ms Hickson. He had been raising concerns about bullying consistently since March 2016.

[15] Mr Lee has not stated that he is raising a personal grievance specifically, but his letter details examples of the conduct that was affecting him and he sets out the way in which he wants Westend NW to address the complaints.

[16] I am satisfied that through his 18 October letter Mr Lee made Westend NW sufficiently aware of his employment relationship problems to enable Westend NW to respond to them.⁴ I find Mr Lee raised a personal grievance on 18 October for unjustified disadvantage as a result of bullying.

[17] Mr Lee's grievances arising from the final written warning and his alleged unjustified dismissal were raised for the first time by Mr Lee in his statement of problem which he lodged with the Authority on 9 January 2017.

[18] The final written warning was issued to Mr Lee on 19 October 2016. The 90 day period for raising this grievance expired on 18 January 2017. The statement of problem was served on Westend NW on 12 January 2017 which was within the 90 day period.

[19] I am satisfied that when Westend NW received the statement of problem Mr Lee had taken reasonable steps to make Westend NW aware of his grievances, albeit via a circuitous route.⁵

⁴ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36]; *Gates v Air New Zealand Ltd* (2009) 7 NZELR 41 (EmpC).

⁵ *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [11].

Unjustified disadvantage

[20] Mr Lee claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Westend NW with respect to bullying and the final written warning issued to him.

[21] Mr Lee bears the onus of establishing on the balance of probabilities that he was disadvantaged in his employment. If he discharges that onus then the burden of proof moves to Westend NW to establish on the balance of probabilities that any disadvantage Mr Lee may have suffered was justified.

[22] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what I may have done in the circumstances. I am required to consider on an objective basis whether Westend NW's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

Alleged bullying

[23] Mr Lee points to the following issues which he raised during 2016 as part of his allegations that he was being bullied at work:

- Reprimands
- Radio
- Apology from his manager
- Breaks
- Photos regarding instructions
- Phone
- Christmas/New Year Rosters

Reprimands

[24] On 3 March 2016 Mr Lee was issued with two written reprimands from his manager Mr Thomas. Mr Lee says the issuing of these reprimands singled him out and was part of the ongoing bullying he had been subject to by his manager.

[25] The reprimands are about the use of a radio used in the bakery section and an alleged breach of health and safety requirements by Mr Lee when using a mixer bowl (verbatim):

[Mr Lee] lifted the sides of the small mixer bowl while it was mixing butter for melting moments. This is a breach of safety practices & we have spoken about this in September 2015 and again when we did our 6 month review.

and

At a discussion held at 0605hrs today it was agreed that the radio would be left on at a reduced volume, and that it would be relocated today. You went out from our discussion and promptly turned it off. This is a not being a team player. You later in the day showed an extreme lack of respect by accusing [Mr Thomas] of being lazy in front of the team.

[26] Mr Thomas called Mr Lee into a meeting where he had the completed reprimand forms. Mr Thomas explained the content of the forms and invited Mr Lee to sign them. Mr Lee signed the forms because he partially agreed with them. He agreed he had lifted the mixer up in a way that he should not but says others also did this. Mr Lee said that he was trying to explain this to Mr Thomas but he [Mr Thomas] was not interested in hearing from him.

[27] On 6 March 2016 Mr Lee provided a written statement to Westend NW answering the claims made on the reprimand forms and claiming he was being bullied.

[28] At the investigation meeting Westend NW told me the reprimand forms are a report and do not form part of a disciplinary process. This explanation is not consistent with the following statement on the form:

Employee was advised of the consequences of further continuation of misconduct or failure to improve will be a formal warning or dismissal.

[29] On the two forms completed by Mr Thomas on 3 March 2016 the box next to the statement set out above is checked and Mr Lee has signed beneath it. This form is clearly intended to be used in the event that further continuation of the conduct will result in a warning or dismissal.

[30] Mr Dyson invited Mr Lee into a meeting with him and Mr Thomas on 18 March. Mr Dyson set up the meeting to discuss Mr Lee's claims of bullying. Mr Lee also raised the issue of the reprimands. Mr Lee told Mr Dyson that others should have

also been reprimanded over the breach of health and safety relating to the cake mixer, because others were not doing things correctly.

[31] Mr Lee requested an apology from Mr Thomas for his actions which Mr Lee said amounted to bias and discrimination. Mr Thomas apologised verbally during the meeting and confirmed his apology in writing to Mr Lee on 21 March. Mr Thomas apologised for any misunderstanding in his communication of matters relating to the bakery.

[32] Mr Lee accused two other employees of incorrectly using the cake mixer, but Mr Thomas was aware that only one person had used the cake mixer on the morning in question and that was not one of the two employees named by Mr Lee. Mr Thomas undertook to speak with the employee the next time he was in the department.

Radio

[33] The issue of the radio is a matter of some importance to Mr Lee. Westend NW operates a store wide radio system and individual departments can also have separate radios playing at the same time. Employees start work in the various departments as early as 3 am. Mr Lee starts work each day at 6 am. When he arrives at work the bakery radio is usually on. It was common for the radio to be on for the whole day.

[34] In his letter dated 6 March and in answer to the reprimand relating to the radio Mr Lee explained that he had expressed concerns about excessive noise of the radio since 2014, and twice during his annual performance reviews.

[35] Mr Lee complained that after receiving the reprimand, Mr Thomas moved the radio and turned the volume up. Mr Lee requested that the radio be completely removed from the bakery, claiming that the noise from the radio was harsh, squeaky and distorted with bad reception.

[36] During the meeting on 18 March Mr Lee was told that everybody in the department needed to be happy and that the employees in the department needed to come to an agreement about what was an acceptable level of volume for the radio so that everyone could work in a pleasant environment.

[37] It was not disputed that the reception in the bakery occasionally affected the radio and it turned to static. Mr Lee told Mr Dyson it was this noise he found

offensive. Mr Lee alleged that Mr Thomas or another employee from the department had moved the radio to right in front of his workstation, deliberately, to annoy him. Mr Thomas denied knowing about the radio being moved and told Mr Lee he had not touched it other than to move it away from Mr Lee to its current location.

[38] Mr Dyson suggested they try and get an agreement from all members of the bakery team about the radio use. This was not met with any enthusiasm by Mr Lee. He did not see that as an option.

[39] Mr Dyson suggested he attend the bakery team meeting being held the following morning which was a Saturday. This was agreed and Mr Dyson duly attended and addressed the bakery staff about the radio use. Mr Dyson told the bakery team that having a radio may help with productivity but if productivity dropped, or mistakes were made, it would be removed. Mr Dyson told the team it would become a store wide policy that radios were not to be operating in any departments once the store opened at 7 am at which time the store wide radio would be operating.

[40] Mr Lee met with Ms Hickson on 21 July. During this meeting he raised again his concerns about the use of the radio. Mr Lee requested the radio be turned off in the department at 6 am and not 7 am. His request was declined.

[41] During a meeting with Mr Dyson and Mr Thomas on 4 August, Mr Lee complained that despite Mr Dyson's instructions the radio had not been turned off at 7 am that morning and it was still being played loudly after 7 am. Mr Lee told Mr Dyson that the use of the radio was having a negative impact on productivity because pumpkin seeds had been burnt.

[42] Mr Lee reiterated his request that the radio be turned off at 6 am. Mr Thomas told Mr Lee that turning the radio off at 6 am was not going to solve any efficiency issues. Mr Lee was told that if the radio was not turned off at 7 am by somebody else that he himself should feel free to turn it off.

[43] Mr Dyson told Mr Lee that the rest of the bakery team liked having the radio going and it was not on all day. Mr Dyson explained that sometimes the staff became busy and were not looking at the clock, but Mr Lee was able to turn it off. Mr Lee requested again that it be turned off at 6 am. This was not acceptable to Mr Dyson

who said that it will stay on until 7 am but the volume prior to that must stay low, and that Mr Thomas was to ensure this happens. Mr Lee agreed with this and said that this would resolve his issue with respect to the radio.

[44] In his formal complaint on 18 October Mr Lee again raised the issue of the radio. In this complaint Mr Lee maintained that the issue had remained unresolved and that the radio had been annoying him.

Apology from his manager

[45] During the meeting on 18 March Mr Lee asked Mr Thomas to apologise to him. Mr Thomas apologised verbally and then on 21 March he wrote to Mr Lee reiterating his verbal apology in the following terms:

I apologise if there has been any misunderstanding with our communication of matters relating to the bakery. It was never my intention to make anyone feel ostracised in the department. I have tried to have an inclusive team where all members work together, I also recognise that there are many ethnic cultures in the department and as such have tried to learn from each team member how best to communicate with and understand each person as individuals to get the best results from the team.

[46] Mr Lee met briefly with Ms Hickson and Ms Lissa Haira, store manager, on 21 July. Among other matters Mr Lee raised for the first time his belief that the apology he had received from Mr Thomas was not sincere.

[47] During the meeting on 4 August Mr Lee told Mr Thomas that he was unhappy with the written apology which he claimed took Mr Thomas 1-2 weeks to give him. Mr Lee told Mr Thomas he wanted two simple things to make everything go away. The radio turned off at 6 am and for Mr Thomas to give him another genuine written apology.

[48] Mr Thomas believed he had already given a genuine apology and felt nothing further was required of him. Mr Dyson asked Mr Lee to move on from the written apology and confirmed that he would not require Mr Thomas to do anything further in that regard. Mr Lee would not accept this.

[49] At the investigation meeting Mr Lee told me he did not believe the apology was sincere as Mr Thomas's actions did not change. He told me that the bullying became worse. In support of this evidence Mr Lee referred to photos (which I have addressed later in this determination) which were used by Mr Thomas to support a

conversation he had with Mr Lee about him not carrying out Mr Thomas's instructions.

Breaks

[50] In July 2016 Ms Haira asked all department managers, including Mr Thomas, to keep an eye on the time staff took for breaks. Mr Thomas noted that Mr Lee seemed to be taking too long on his breaks. He was concerned because he felt Mr Lee was inefficient in his work and taking longer breaks was a contributing factor.

[51] Mr Thomas checked the store security footage to ascertain if his general impression was correct. The security footage confirmed his concerns were justified and he passed this information on to Ms Haira.

[52] Ms Haira met with Mr Lee on 19 July to discuss the concerns about his break times with him. During the meeting Ms Haira provided Mr Lee with the information Mr Thomas had provided about his breaks. Mr Lee apologised and explained that he was comparing the timing of his breaks with other employees.

[53] Mr Lee assumed other employees were on the same length of break as he was. Ms Haira explained that by agreement between a department manager and their team members, other employees may have different break periods to Mr Lee and that he cannot compare his break time to others. Mr Lee questioned whether the butchery department had longer breaks. Ms Haira offered to look into it with the butchery department manager.

[54] Mr Lee says the actions of Mr Thomas checking security footage and passing information to Ms Haira that he was late getting back from his breaks was a continuation of Mr Thomas's bullying actions against him.

[55] Ms Haira told me it is common practice to check the video surveillance footage when concerns are raised about employee returning late from their breaks. She told me there are no company policies on the use of the video footage.

[56] Other than Ms Haira's discussion with Mr Lee no action was taken against Mr Lee regarding the length of his breaks.

Photos regarding the following of instructions

[57] Mr Lee says that steps taken by Mr Thomas to photograph instructions given by him and then taking photos of the product shelves after he had finished work was unfair and bullying in nature.

[58] Mr Thomas told me he only saw Mr Lee once a week so he would leave written work instructions for Mr Lee. Mr Thomas had ongoing concerns about Mr Lee not following his instructions. Knowing Mr Lee would want evidence if he raised any concerns with him, Mr Thomas kept a record of the instructions he had given Mr Lee and created a photographic record of his lack of compliance. The photos covered the period from 30 June to 12 August 2016.

[59] On 18 August Mr Thomas met with Mr Lee and provided him with the photographic record he had created. Mr Thomas says that while Mr Lee had some objection to the photographic record, he agreed the instructions Mr Thomas had left were clear and undertook to follow instructions in future. Mr Thomas provided copies of all of the photos, notes and production plans to Mr Lee for his records.

[60] Mr Thomas's concerns included Mr Lee not filling shelves as requested before leaving work, leaving empty shelves when there were full crates of product in the produce department, and not completing all tasks expected of him.

[61] In his letter dated 18 October Mr Lee told Mr Dyson about the photos and the discussion he had with Mr Thomas on 18 August. Mr Lee finished his shift each day at 4.30 pm. He complained that each of the the photos were taken the morning immediately after his previous days shift.

[62] Mr Thomas told me the photos were all taken on a Friday morning when he started work at 5 am. I asked Mr Thomas about the difference in time between Mr Lee finishing at 4.30 pm and him taking the photos at 5 am the following morning. Mr Thomas said that some of the photos show that the stock levels on the Friday morning were similar to the levels he had seen on the previous Thursday morning. He says this indicated to him that Mr Lee had not carried out his instructions on the numbers of product to be put out in the store.

[63] As agreed at the 18 August meeting Mr Thomas continued to review Mr Lee's progress. Meetings were held on 1 and 29 September and 27 October 2016.

Telephone answering

[64] During August 2016 an issue arose in the bakery department between Mr Lee and other employees regarding the answering of the department's telephone. Mr Lee says he was instructed by other employees to answer the phone in circumstances where they could have answered it. Mr Lee says the instruction was a continuation of the bullying he was experiencing.

[65] During the day it was common practice for all staff to answer the phone when it rang and at times this occurred when Mr Lee was alone in the bakery department. Mr Lee told me he was reluctant to answer the phone when others were in the department because he sometimes struggled to understand what people were asking of him.

[66] Mr Lee complained that on one occasion he was preparing to take his lunch break and the person who told him to answer the phone was "...talking rubbish..." with another employee and wasting time.

[67] Two incidents on 10 and 11 August 2016 led to one of Mr Lee's team members making a formal complaint about him. In particular the complainant said that on 10 August 2016 her hands were dirty and she asked Mr Lee to answer the phone. The complainant says Mr Lee told her to "...shut up...".

[68] On 11 August 2016 the complainant moved the phone so that it was accessible to everyone in the bakery. Two incoming calls were made to the bakery phone. The first call went unanswered even though both Mr Lee and the complainant were working in the area. The second call was answered by the complainant. Mr Lee and the complainant exchanged comments that were not complimentary of either of them about Mr Lee's refusal to answer the bakery phone.

[69] At a meeting later that day with Mr Lee, Ms Haira set out for Mr Lee's benefit Westend NW's rules that department phones must be answered by the person nearest the phone who had clean hands. Mr Lee explained to Ms Haira that he has trouble hearing and understanding customers and they get annoyed. Ms Haira reiterated that

Mr Lee was expected to answer the phone along with all other employees in the bakery department.

[70] At that meeting Ms Haira raised with Mr Lee concerns that the relationships between team members in the bakery department had broken down. After the issues regarding the radio and the cake mixer she was concerned about the reaction of Mr Lee's colleagues if she had to inform them that he was not required to answer the phone. Ms Haira told Mr Lee that she did not want to see the relationships in the team break down further. Mr Lee assured Ms Haira that everything was okay and he would help the others out at times.

[71] Ms Haira told me that it was her view the telephone issue had been blown out of proportion.

Christmas/New Year Rosters

[72] Mr Lee says Mr Thomas's refusal to put him on the 2015/2016 Christmas/New Year roster was a further example of his bullying conduct toward him and not working on the holiday disadvantaged him. There is no evidence that Mr Lee raised this issue as a discrete personal grievance with Westend NW. I have therefore, considered it to be further evidence of the continuing conduct Mr Lee claims was bullying in nature, which is the subject of his personal grievance.

[73] There is no dispute that Mr Lee had requested to be on the Christmas/New Year roster but was not included. 1 January 2016 fell on a Friday which is a normal working day for Mr Lee who usually worked on Wednesdays, Thursdays and Fridays. Mr Lee received his normal pay for the holiday in accordance with the Holidays Act 2003.

[74] The roster for the public holidays falling over the Christmas/New Year period is a special roster. Employees are invited to put their names forward for consideration to work on a public holiday. Mr Thomas told me that during public holidays the department runs with a skeleton staff as he tries to give all staff the day off.

[75] I have accepted the evidence from Mr Thomas that Mr Lee worked part-time and had never completed a full shift. This means Mr Lee could not complete all of the tasks that needed to be undertaken on the public holidays. Mr Thomas and Mr

Lee had discussed this and he had tried to get Mr Lee to start earlier so that he could learn all of the tasks that were needed to be completed between 4 am and Mr Lee's normal start time of 6 am. Mr Lee never took up this opportunity.

Other matters

[76] Mr Lee also claims other events occurred which he says constituted bullying. Included in those events was being told by a colleague to put the rubbish out and being asked to move a tray within the cooking oven. The employee concerned was pregnant. When the employee had announced to the team that she was pregnant, Mr Thomas had made it clear that all team members were expected to provide assistance to her. When asked to do these two tasks Mr Lee refused.

[77] Another incident related to a piece of plastic being dropped on the floor by Mr Lee. Two colleagues reminded Mr Lee that plastic should not be left on the floor and requested that he pick it up. Mr Lee did pick up the plastic, but then dropped it back on the floor and left it there. Mr Thomas told me that plastic on the floor in the bakery becomes very slippery and was therefore a slip hazard and needed to be picked up.

[78] The final incident referred to by Mr Lee is a complaint that Mr Thomas wrote graffiti all over one of his recipe cards which was pinned to the wall. Mr Thomas agrees he wrote on the card but denies it was graffiti. Mr Thomas told me the recipe cards were for the benefit of all staff in the department and did not belong to Mr Lee. The message Mr Thomas wrote was for all bakery staff and was to prevent a situation where more than one canola oil container was opened at once. He had discussed this with the team previously and had found it to be a continuing issue so he wrote his instruction where everyone would see it.

Conclusion

[79] Mr Lee claims he was bullied as a result of his culture and national origins. I do not accept that. The bakery department employed up to five employees. At least four of these were immigrants like Mr Lee from varying nationalities and cultures. There was no evidence Mr Lee was treated differently as a result of him being from Korea.

[80] In a recent High Court proceeding the court considered the elements of the term “workplace bullying”:⁶

- a) It involves unreasonable and persistent conduct by one person against another.⁷
- b) The conduct in question is unwarranted and harmful to the recipient.
- c) The recipient of the conduct lacks the ability to defend him or herself, possibly because of their lower status or ranking in the workplace environment where the conduct in question takes place.

[81] I have concluded Mr Lee has not established on the balance of probabilities that he was subject to bullying behaviour by Mr Thomas or other managers and staff during his employment.

[82] Westend NW says the reprimand forms signed by Mr Lee in relation to the use of the work radio and the cake mixer did not form part its formal disciplinary process. In reality the reprimand is a low level form of disciplinary action used informally.

[83] That there was no process leading up to the issue of the reprimands and no opportunity for Mr Lee to properly respond to the concerns set out on them is concerning. Mr Lee acknowledged he signed the forms because he agreed that the concerns set out on them were correct. Mr Lee has not challenged the issuing of the reprimands but says they formed part of the bullying conduct. I find that was not the case. Mr Thomas was seeking, through the use of the reprimands, to address areas of concern with respect to Mr Lee’s behaviour in the workplace.

[84] Westend NW attempted to address and/or resolve all of Mr Lee’s concerns as they were raised. Mr Lee was not prepared to have his complaints fully resolved. For example, on 4 August 2016 Mr Lee agreed how the radio issue would be handled moving forward. He told Mr Dyson that having the radio turned off at 7 am with the

⁶ *Newton v Dunn 1 or* [2017] NZHC 2083 at [6].

⁷ The Court referred to Duncan Black and others (eds) *Collins English Dictionary* (10th ed, HarperCollins Publishers, Glasgow, 2009) for the definition of “bully”: “a person who hurts, persecutes, or intimidates weaker people”; Tony Deverson and Graeme Kennedy (eds) *New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005): “a person who uses strength or power to coerce others by fear”; Lesley Brown *The New Shorter Oxford Dictionary* (Oxford University Press, Oxford, 1993): “a person who uses strength or influence to harm or intimidate those who are weaker”.

volume on low between 6 am and 7 am would resolve the issue for him. On 18 October Mr Lee raised the issue of the radio again, citing the historical issues Mr Dyson thought had been resolved on 4 August 2016.

[85] Mr Thomas clearly became frustrated in his dealings with Mr Lee. He had raised concerns with Mr Lee about his productivity. Contributing to these concerns was Mr Lee's failure to adhere to break times and specific instructions. I am satisfied Mr Thomas felt the need to provide supporting evidence when addressing matters with Mr Lee which is why he used video footage to show Mr Lee returning late from breaks and photos to demonstrate to Mr Lee where he was not following instructions.

[86] Despite the raising of concerns with Mr Lee, no formal action was taken by Westend NW. Instead Mr Dyson, Ms Hickson and Mr Thomas attempted to resolve the concerns they had about Mr Lee's conduct and performance informally.

[87] Mr Dyson's uncontested evidence was that Mr Lee was never happy with any of the outcomes proposed to him and that he [Mr Dyson] had offered a number of times to get a third party involved to assist in resolution of Mr Lee's concerns. Mr Dyson had tried to accommodate Mr Lee particularly in respect of his concerns with the radio. For example Mr Dyson changed the store wide policy when he instructed all departments to turn their radios off at 7.00 am each day.

[88] I have concluded that Mr Thomas was more zealous in managing Mr Lee than other members of the team but this was not bullying. In reaching this conclusion I have taken into account the different cultures and personalities of the two men which has led to difficulties between them which have heightened Mr Lee's perception of being targeted and bullied. I find no compelling evidence that Mr Lee was bullied.

Final written warning

[89] On 8 September 2016 an incident occurred in the bakery department that led to one of Mr Lee's colleagues making a formal complaint about him. Mr Lee had placed cheese rolls in the wrong place in the shop on the basis that ciabatta rolls were not ready at the time. When the ciabatta rolls were ready the complainant had to spend time going through the stock to tidy up the shelves.

[90] To save time on 8 September the complainant asked Mr Lee not to put the cheese rolls back on the shelf he had used the previous day and to wait for the ciabatta to come out. Mr Lee did not agree with this and continued to put the cheese rolls back in the same place. The complainant says he and Mr Lee continued to disagree and argued with about where the cheese rolls should go.

[91] The complainant says he went to walk out to the shop floor to move the cheese rolls but Mr Lee put an arm across his chest holding the complainant's shoulder back to stop the complainant from moving. The complainant reports feeling threatened and harassed by Mr Lee's actions and told Mr Lee to "...get his f..k...g hands off him".

[92] There was one other person working in the bakery that morning who witnessed the incident. What he says he witnessed, largely supported the version of events provided by the complainant. The witness said Mr Lee physically stopped the complainant with one arm and words were exchanged. The witness said he had to intervene to separate the two, he then arranged for the complainant to take a break to cool down.

[93] Mr Lee was invited to provide a response to the allegations made by the complainant. On 9 September he provided a written response. Mr Lee confirmed there was an incident arising from the placement of the cheese rolls. He said that when he saw the complainant move towards the display he involuntarily stretched his right arm to point to the cheese rolls and was intending to tell the complainant he did not need to move them.

[94] Mr Lee acknowledged his arm slightly touched the complainant's front because the complainant continued moving forward. Mr Lee says he does not know how long his arm was there but the complainant then swore at him in an abusive way which Mr Lee found offensive. Mr Lee described the use of the "f" word as bullying by the complainant. Mr Lee linked this new complaint about him to the complaint made about the telephone issue and claimed that both complaints amounted to bullying.

[95] After a disciplinary process Mr Lee was issued with a final written warning. Mr Lee claims the procedure adopted by Westend NW when investigating the incident and issuing the warning was unfair.

[96] There was a time delay of over one month between the incident occurring and the disciplinary process being instigated. The delay was caused by Westend NW's lawyer not being available for personal reasons.

[97] On 13 October Mr Lee was invited to attend a disciplinary meeting. The allegation was that he had forcibly restrained a staff member from going about their business. Mr Lee was invited to bring a representative and was advised that depending on his explanation disciplinary action up to and including dismissal may result.

[98] Westend NW has a written policy dealing with disciplinary processes which includes examples of the type of conduct that may be considered serious misconduct. Included in the list of serious misconduct is fighting, physically assaulting or verbally abusing another person on company premises or during working hours.

[99] The policy also includes examples of the type of conduct that may be considered less serious misconduct which includes disorderly conduct, including being aggressive or argumentative, using offensive language and being discourteous to others.

[100] It was not clear from the 13 October letter whether the alleged conduct fell to be considered under serious misconduct or less serious misconduct. The only indication Mr Lee had was that any of the penalties for misconduct may apply. That is, from a warning through to dismissal.

[101] The disciplinary meeting took place on 18 October. Just prior to the meeting Mr Lee presented Westend NW with his letter raising his personal grievance alleging bullying. It was agreed that Mr Lee's complaints would be put to one side until the disciplinary process had been completed.

[102] At the disciplinary meeting Mr Lee was told the allegation was that he had "...assaulted..." another member of staff. This was not the same allegation presented in the 13 October letter which refers to Mr Lee "...forcibly restraining..." another employee. Mr Lee was shown statements written by the complainant and a witness. This was the first time Mr Lee had seen these statements. Mr Lee was told what was contained in the statements but was not provided with copies.

[103] Mr Lee's explanation at the meeting was that he involuntarily stretched his arm out but could not recall touching the complainant.

[104] The meeting adjourned to allow Mr Dyson the opportunity to consider Mr Lee's explanation. Mr Dyson preferred the explanations of the complainant and the witness rather than Mr Lee's explanation. He was satisfied Mr Lee had tried to physically stop the complainant from rearranging the shelf in the store. Mr Dyson was satisfied the degree of force was not great but that the situation could have gotten out of hand.

[105] After considering whether to dismiss Mr Lee, Mr Dyson concluded that a final written warning was the appropriate sanction and this was given to Mr Lee at a meeting convened for that purpose on 20 October.

[106] The final written warning states that Mr Lee had used force to attempt to restrain another employee and that this was completely unacceptable and amounted to serious misconduct. The warning does not reflect Mr Dyson's conclusion that the force used was not great.

[107] I am satisfied Mr Dyson could reasonably conclude that Mr Lee's behaviour amounted to misconduct but not serious misconduct. Both the complainant and the witness describe Mr Lee as "restraining" the complainant. This means Mr Lee must have more than touched the complainant inadvertently. All three employees refer to the complainant's language when he told Mr Lee in no uncertain terms not to touch him.

[108] Mr Lee's conduct is more akin to being aggressive, rather than the more serious conduct of physically assaulting another person.

[109] Before concluding whether the issue of a final written warning was an action open to Westend NW, I must also consider whether there were any defects in the process that resulted in Mr Lee being treated unfairly.

[110] After hearing Mr Lee's explanation on 18 October Mr Dyson did not undertake any further investigation with the complainant or the witness to satisfy himself that he could reject Mr Lee's explanation. He relied on the written statements

provided to Ms Hickson in September. Mr Lee did not receive copies of these statements.

[111] I have concluded there was no unfairness to Mr Lee in him not receiving the statements of the complainant or the witness. Mr Lee provided a written statement on 9 September which fully addressed the complaint made about the incident and his statement mostly accorded with the statements provided by the complainant and the witness.

[112] Mr Lee's explanations provided at the disciplinary meeting on 18 October was inconsistent with his written statement dated 9 September. In his written statement Mr Lee says he may have touched the complainant, whereas during the disciplinary meeting he could not recall if he had touched him or not.

[113] The letter inviting Mr Lee alleged that he had "forcibly restrained" the complainant. This was escalated at the disciplinary meeting to "assault". This escalation of the allegation was not a minor defect in Westend NW's process and resulted in Mr Lee being treated unfairly.

[114] Mr Lee was not given an opportunity to comment on the proposed sanction before it was finalised. Mr Dyson met with Mr Lee five minutes prior to Mr Lee's finishing time and presented him with the letter setting out his final decision. The meeting occurred in a small storeroom and was not prearranged. Mr Dyson informed Mr Lee verbally of his decision. Mr Lee was upset by the suddenness of the decision and asked Mr Dyson to reconsider. Mr Dyson refused to reconsider. The failure to consult with Mr Lee over the proposed sanction was not a minor defect in Westend NW's process and resulted in Mr Lee being treated unfairly.

[115] I have one further concern about the conduct of the disciplinary meeting. At one point during the disciplinary meeting Westend NW's lawyer raised concerns that Mr Lee was secretly recording the meeting. Mr Lee had placed his mobile phone on a table beside him.

[116] When Mr Lee acknowledged that he was recording the meeting he was instructed by the lawyer to turn his phone off and delete the recording. Mr Lee did as he was instructed. Mr Lee was told that he should have asked permission to record.

After deleting the recording Mr Lee then requested permission to record the remainder of the meeting. This request was denied.

[117] I am surprised at the stance taken by Westend NW through its lawyer regarding Mr Lee recording the meeting. Mr Lee acknowledged he was recording. He could not afford to have representation at the meeting and wished to have an accurate record of what was discussed. This was not unreasonable.

[118] It is always preferable that recording of meetings is carried out with the knowledge of all those present. Permission to record the meeting was not required and Mr Lee was entitled to keep a record of what was discussed.

[119] Westend NW did not provide a copy of its notes to Mr Lee so that he could ensure there were no errors or omissions in the notes. I find the refusal to allow Mr Lee to record the meeting on 18 October 2016 was unreasonable.

[120] The defects outlined above were not minor and resulted in Mr Lee being treated unfairly. The decision to issue Mr Lee with a final written warning was not a decision a fair and reasonable employer could make in all the circumstances.

[121] Mr Lee has established a personal grievance in relation to the issue of the final written warning and is entitled to a consideration of remedies.

Remedies

[122] Mr Lee has not lost any wages relating to the final written warning. He is entitled to consideration for compensation for humiliation, loss of dignity and injury to feelings.

[123] Mr Lee says he became unwell after receiving the final written warning and had to take some sick leave. An appropriate award in all the circumstances of this matter is \$5,000.

[124] I am required to consider the extent to which Mr Lee's actions contributed towards the situation that gave rise to the personal grievance. Mr Lee did not contribute to the failure of Westend NW to follow a fair and reasonable process.

[125] GR & S Dyson Limited is ordered to pay to Mr Lee the sum of \$5,000 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Constructive dismissal

[126] There are three situations in which a constructive dismissal may arise:⁸

- a) an employee is given a choice between resigning and being dismissed;
- b) there has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign; and
- c) there has been a breach of duty by the employer which causes an employee to resign.

[127] The very nature of a claim for constructive dismissal is dependent on the events that preceded the employee leaving their employment. The focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.⁹

[128] The breach or breaches of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable.¹⁰ Repudiatory conduct by the employer may involve a series of events over a period such that no single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect of all the events may be.¹¹

[129] In *Ramkisson v Commissioner of New Zealand Police* the Court held that there are cases in which a dismissal takes place after a very long period of disputation, unsatisfactory relations, and the like which, which must be taken into account.¹²

⁸ *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; [1985] 2 NZLR 372.

⁹ *Commissioner of Police v Hawkins* [2009] NZCA 209.

¹⁰ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140.

¹¹ *Lewis v World Motor Services Limited* [1986] ICR 157 (CA).

¹² *Ramkisson v Commissioner of New Zealand Police* [2013] NZEmpC 147.

[130] I must be satisfied that the breach or breaches were so serious as to make it reasonably foreseeable that Mr Lee would not be prepared to work under the conditions prevailing.¹³

[131] Mr Lee consistently raised concerns about the environment in which he was working and the behaviour of Mr Thomas and other employees in the bakery team. The complaint he made on 18 October mirrored complaints he had previously made.

[132] During a meeting between Mr Lee and Ms Hickson on 11 August, Ms Hickson attempted to address the issues raised by Mr Lee with respect to his relationship with Mr Thomas, the telephone and the radio. At the end of this meeting Mr Lee advised Ms Hickson that he believed Mr Thomas and other staff had a malicious intent towards him, that Mr Thomas was not clear on his instructions to him and that Westend NW should demonstrate a zero tolerance of harassment and discrimination.

[133] Ms Hickson told me that Mr Lee's response to anything he disagreed with was to claim he was being bullied, harassed or discriminated against. Mr Thomas, Mr Dyson and Ms Haira had become frustrated in their unsuccessful attempts to resolve all of Mr Lee's complaints.

[134] Following the 11 August meeting with Mr Lee, Ms Hickson embarked on a process to try and find a solution to Mr Lee's complaints. Ms Hickson spoke to each member of the bakery team separately asking about any concerns they had about bullying, discrimination or harassment. Ms Hickson kept notes of each of her meetings but did not compile a report or reach any conclusions.

[135] Mr Lee raised his formal complaints in writing on 18 October. It was agreed that his complaints would not be investigated until after the conclusion of the disciplinary process. In November 2016, following the outcome of the disciplinary process, Mr Lee sought mediation assistance and so the investigation into the 18 October 2016 complaints was again put to one side.

[136] Mediation took place on 22 December 2016 but was unsuccessful in resolving all matters between Mr Lee and Westend NW and Mr Lee then commenced a period of sick leave.

¹³ *Auckland Electric Power Board v Auckland Provision District Local Authorities Officers IUOW Inc.* [1994] 2 NZLR 415 (CA) at 419.

[137] On 7 January 2017 Mr Lee resigned from his employment effective from 20 January 2017. He was on sick leave when he resigned and did not return to work.

[138] A medical certificate dated 30 December 2016 records Mr Lee as suffering from work related stress reportedly due to workplace bullying and suggested that management investigate and attempt to rectify matters promptly. It is not known whether Mr Lee advised his doctor that the parties had attempted mediation in order to rectify the workplace situation, prior to Mr Lee becoming unwell.

[139] Mr Lee has failed to establish Westend NW has breached any duties owed to him that would constitute dismissive or repudiatory conduct sufficient to justify the termination of his employment relationship.

[140] I have previously found that Mr Lee has not established bullying behaviour. There were certainly conflicts in the workplace between Mr Lee and other members of the bakery team including his manager Mr Thomas. However, each of the conflicts was dealt with appropriately by Westend NW.

[141] I have found that one or more conditions of Mr Lee's employment were affected to his disadvantage by the unjustified action of Westend NW in issuing a final written warning. However, this did not constitute a breach of sufficient gravity to give rise to a repudiation of the employment relationship.

[142] I am satisfied Westend NW took steps to try and address all of Mr Lee's complaints as they arose, including attending mediation while the employment relationship was ongoing.

Costs

[143] Costs are reserved. The parties are invited to resolve the matter. Both parties have been partially successful and I am of a mind to let costs lie where they fall. If the parties do not agree with this proposal then they will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority