

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 357
3242139

BETWEEN	JOHN REYNOLDS Applicant
AND	REDICAN ALLWOOD 2021 LIMITED Respondent

Member of Authority: Natasha Szeto

Representatives: Tim Vogel, advocate for the Applicant
Michael Gould, counsel for the Respondent

Investigation Meeting: 15 March 2024 in Wellington

Submissions received: 22 March 2024 from the Applicant and Respondent

Date of Determination: 17 June 2024

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] John Reynolds was employed by Redican Allwood 2021 Limited (Redican) as a Project Manager.

[2] A complaint was made that Mr Reynolds had hugged a female tradesperson at Redican's construction site, making her feel uncomfortable. Redican commenced an investigation into the complaint and Mr Reynolds started looking for another job. Following its investigation, Redican upheld the complaint and issued Mr Reynolds with a formal written warning on his last day of employment with the company.

[3] Mr Reynolds says the investigation into the complaint and the decision to issue him with a written warning were not the actions of a fair and reasonable employer, and he was disadvantaged. He also says he was unjustifiably (constructively) dismissed. Redican says its actions were fair and reasonable.

The Authority's Investigation

[4] Written witness statements were lodged from Mr Reynolds and three witnesses from Redican: Glen Thoms, Construction Manager; Calum Finlayson, Managing Director; and Angie Finlayson, Director. All witnesses attended the Investigation Meeting and answered questions from me under oath or affirmation.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

Issues

[6] The issues the Authority is to investigate and determine are:

- (a) Whether Mr Reynolds was unjustifiably disadvantaged in his employment in that the investigation into allegations against him, and the decision to issue him with a written warning were not actions that a fair and reasonable employer could take.
- (b) Whether Mr Reynolds was unjustifiably (constructively) dismissed from his employment.
- (c) If Mr Reynolds has a valid personal grievance, whether he should be awarded:
 - (i) Compensation under s 123(1)(c) of the Act; and
 - (ii) Special damages of representative fees incurred prior to litigation.
- (d) If Mr Reynolds is provided remedies, whether they should be reduced on the basis of any contributing behaviour by Mr Reynolds.
- (e) Costs and disbursements.

Relevant Background

[7] Mr Reynolds started working for Redican as a project manager in mid-May 2022 and then became a Site Manager. Initially Mr Reynolds reported to Glenn Thoms, Construction Manager, then another Site Manager. Mr Reynolds managed a busy site with around 50 (mostly male) workers. Part of Mr Reynolds's role involved running the pre-start meetings and health and safety for the site.

[8] On 26 April 2023, another Site Manager contacted Mr Thoms near the end of the day to say people had been talking about an incident between Mr Reynolds and a female tradesperson. Mr Thoms asked the Site Manager to put his concerns in writing and he received an email the next day. The allegation was Mr Reynolds had come up behind the tradesperson and hugged or put his arms around her around three weeks before, on 4 April 2023.

[9] Calum Finlayson, Redican's Managing Director, heard about the complaint soon after. Mr Finlayson felt the company should undertake an internal investigation because the complaint alleged serious behaviour that was not part of the culture promoted by the company. Mr Finlayson asked Mr Thoms to conduct the investigation as he was the Construction Manager and part-owner of the company.

[10] Mr Thoms started the process by calling Mr Reynolds the day he received the complaint in writing. Mr Reynolds was shocked when Mr Thoms told him a complaint had been made against him. Mr Reynolds recalls Mr Thoms saying: "I think you know what you've done", which Mr Thoms denies.

[11] Mr Reynolds met with Mr Thoms briefly around 12:30pm that day. At the meeting, Mr Thoms explained the allegations involved hugging and favouritism. Mr Thoms said there would be a potential investigation, and told Mr Reynolds he was entitled to have a support person. Mr Reynolds said he did not want to continue without a support person or lawyer.

[12] Later that day Mr Thoms sent Mr Reynolds a letter confirming Redican would be investigating an allegation of "inappropriate behaviour to a female tradesperson". The letter set out:

The concern raised is that you wrapped your arms around a female tradesperson (approx.. 2 weeks ago) making her feel uncomfortable and that

you have treated her favourably since then which has added to her feeling of being uncomfortable since the initial event.

[13] Mr Reynolds was advised the investigation was not disciplinary action, and no decision had been made. Mr Thoms invited Mr Reynolds to let him know of any emails, documents, information or people who may have seen or heard anything relevant. To ensure independence, Mr Thoms asked Mr Reynolds to keep the investigation confidential and specifically asked Mr Reynolds not to contact the tradesperson.

[14] Although he had not been told who the tradesperson was, Mr Reynolds identified her because there were so few female workers on site. He went to talk to the tradesperson as he was bewildered and still did not know exactly what the complaint was about.

[15] Mr Thoms decided to progress from a potential investigation to an actual investigation after talking to Mr Finlayson, and partly because Mr Reynolds had approached the tradesperson despite being asked not to.

[16] Mr Reynolds then engaged a representative, who wrote to the company on 28 April 2023. On 2 May 2023 Redican agreed the allegation of favouritism would not be discussed further on request from Mr Reynolds' representative.

[17] The next day on 3 May 2023, Mr Reynolds was interviewed by Mr Thoms with his representative present. Mr Reynolds denied the allegation he had wrapped his arms around the tradesperson, but said he may or may not have put his hand on her shoulder while he was on the phone on a scaffold.

[18] Over the next couple of days, Mr Thoms took statements from the tradesperson, her manager, and the Site Manager. The tradesperson confirmed Mr Reynolds had hugged her while they were working together on 4 April 2023. She also said on 27 April Mr Reynolds had a conversation with her about the incident and asked her to keep their conversation confidential, which Mr Reynolds denies. Mr Thoms wrote to Mr Reynolds asking him to refrain from discussing the matter as per previous advice.

[19] Mr Thoms sent Mr Reynolds copies of the statements on 9 May 2023. On 12 May 2023, Mr Thoms met with the tradesperson to update her statement. The tradesperson clarified Mr Reynolds had come up from behind her, stood beside her, put his arm around her and pulled her in tight against him. She said her version of a hug can mean someone putting their arm around her like Mr Reynolds did.

[20] The same day, and unknown to Redican at the time, Mr Reynolds met with Redican's competitor to discuss a job. He was offered a role there about a week later.

[21] Redican sent the tradesperson's updated statement to Mr Reynolds on 15 May 2023. Mr Thoms told Mr Reynolds the company had a duty to investigate and deal with the complaint, regardless of whether the parties involved wanted it pursued. Mr Thoms again confirmed the company would not be addressing the favouritism allegation.

[22] Mr Reynolds responded to Redican the same day. He again denied hugging the tradesperson or wrapping his arms around her, but says he may have inadvertently placed his arm on her shoulder. Mr Reynolds pointed out there were no witnesses to the incident, and even if the tradesperson had told one or two people about the incident, Mr Reynolds had denied it to one or two people as well. Mr Reynolds said his version of events had always been consistent, but the tradesperson's had changed over time. He also raised after the alleged incident he exchanged a number of "friendly, cordial and business-like" text messages with the tradesperson.

[23] On 16 May 2023, Mr Thoms finalised his investigation report. He found:

From the information made available throughout the investigation, and on the balance of probabilities, it is likely that JR has "hugged" or otherwise touched (put his arm around her) [the tradesperson] inappropriately.

[24] Mr Thoms' conclusion was based on two key findings:

- (a) The tradesperson was concerned enough about the incident that she chose to raise it with her Manager the following day; and
- (b) Mr Reynolds acknowledges he may have touched the tradesperson.

[25] The allegation relating to favouritism was formally noted as not being considered.

[26] On 19 May 2023, Mr Thoms sent the summary report to Mr Reynolds and advised Mr Reynolds the report would be reviewed by Mr and Mrs Finlayson and himself to determine if disciplinary action was appropriate. Around a week later, Mr Thoms agreed to step aside as a decision maker following a request from Mr Reynolds.

[27] Mr Reynolds raised issues with the investigation including that Mr Thoms had given insufficient reasons for why the tradesperson's version of events was accepted over his. He said a reasonable investigator should have concluded the totality of evidence was insufficient to substantiate the complaint.

[28] A couple of days later, Redican responded the investigation was not flawed, and disciplinary action was appropriate. On 31 May 2023 the Finlaysons provided Mr Reynolds a provisional decision to issue him with a written warning under clause 32.2 of his employment agreement. Mr Reynolds asked for clarification over whether he had an opportunity to challenge the decision or just the proposal to issue a written warning. Mr Finlayson confirmed Mr Reynolds could comment on the proposal to issue a written warning. There was no response for two weeks, and after Mr Finlayson followed up, Mr Reynolds confirmed he had nothing further to add on the issue of penalty.

[29] Mr Reynolds resigned from Redican on 20 June 2023. It was mutually agreed Mr Reynolds' notice period would be shortened from 20 working days to three. On 23 June 2023, which was Mr Reynolds' last day of employment, Redican issued him with a formal written warning:

To the effect that should there be any further episode of your uninvited touching of a co-worker, you may receive a final written warning.

Was Mr Reynolds unjustifiably disadvantaged?

[30] For his disadvantage claim to succeed, Mr Reynolds must establish that one or more conditions of his employment was affected to his disadvantage by an unjustified action by Redican.¹ This means I need to determine whether Mr Reynolds suffered a disadvantage in his employment, and – if so – whether this was caused by an action by Redican and whether that action was unjustified.

[31] Redican's actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[32] At the heart of this matter, Mr Reynolds says Redican did not properly investigate the allegations against him, and the decision to issue him with a written

¹ *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

warning was unjustified because the investigation and report were deficient. Redican says giving a first written warning three days after an employee has resigned, and on the last day of their employment, cannot be a disadvantage in employment. Redican says it did investigate properly, and the disciplinary outcome was justified.

The investigation and disciplinary process

[33] There are multiple aspects of the investigation Mr Reynolds says were insufficient, and which led to the finding of hugging or inappropriate touching being upheld. Mr Reynolds says the report did not reveal any analysis of the issues, there were no findings of credibility, issues he had raised were not considered (including the text message exchanges), and findings were made that were weak or given inappropriate weight. In summary, Mr Reynolds says Redican accepted the tradesperson's version of events over his without justification.

[34] The starting point is, I accept Mr Reynolds was disadvantaged. The way in which an investigation is carried out, adverse findings made in an investigation report, and the decision process around issuing a written warning – even if the warning itself is issued on the employee's last day of employment – can support a claim of disadvantage in employment. Based on the evidence before the Authority, Mr Reynolds has persuaded me that the way in which the disciplinary investigation was carried out disadvantaged him.

[35] It is then necessary to examine Redican's actions throughout the investigation and disciplinary process to determine whether it acted as a fair and reasonable employer.

[36] Firstly, I find it was appropriate for Redican to appoint Mr Thoms to investigate the complaint. Although Mr Thoms had not previously been involved in an investigation of this nature, the company decided he was the right person to investigate given Mr Thoms' management role and the small size of the company. The complaint was always likely to be investigated because it involved a female at the construction site and the company took it seriously. When Mr Thoms told Mr Reynolds about the complaint, he asked Mr Reynolds not to contact the tradesperson. Mr Thoms was aware people on the worksite were already discussing the incident and in order to keep some independence and avoid influence, Mr Thoms arranged for meetings about the complaint to be held at the offsite office. He asked those involved, including the Site

Manager, to keep matters in confidence. These were appropriate actions to take in the circumstances. Redican relied on those involved to be discreet. Mr Reynolds did not reciprocate by honouring Redican's request to keep the matter confidential, choosing to contact the tradesperson immediately after he had been informed of the complaint. While I accept Mr Reynolds was immediately concerned about the complaint, contacting the tradesperson when he had been asked not to was objectively unwise, particularly if it is accepted he asked her to keep their discussion confidential.

[37] Secondly: Mr Reynolds says there were inconsistencies in the tradesperson's story that were not sufficiently investigated by Redican. Mr Reynolds says the tradesperson's version of events changed from the initial complaint of "wrapping arms" to "hug" to "inappropriate touching". Mr Thoms did not agree the tradesperson had changed her story – he saw the changes as being clarifications rather than inconsistencies. In the circumstances, I find that conclusion was open to Mr Thoms on the information he had available, and does not support an allegation the investigation was insufficient.

[38] Mr Reynolds says a further example of insufficiency in the investigation is Redican failed to investigate text messages he had exchanged with the tradesperson, which he says were "cordial and businesslike" and showed the tradesperson speaking to him "as normal". It is common ground between the parties the text messages were not provided to Redican during the investigation, and Redican did not specifically request them. Mr Reynolds was invited on multiple occasions to provide further information and it is unclear how Mr Reynolds says Redican's failure to request the text messages shows Mr Thoms had a 'closed mind'. Having read and considered the tradesperson's statements and heard from Redican, I find it was open to Redican to consider the changes in the tradesperson's statements to be clarifications rather than inconsistencies, and to conclude the text messages were not relevant to its enquiries.

[39] Thirdly, Mr Reynolds says Redican was required to make a credibility finding if it was going to accept the tradesperson's version of events over his. Mr Thoms says his role in investigating the complaint was not to judge guilt or innocence, but to make a finding about whether inappropriate touching had happened. While perhaps not clearly expressed as a credibility finding in the report, it is implied Mr Thoms did not agree the touch was inadvertent, given he concludes it was inappropriate. Mr Thoms said the touch made the tradesperson feel uncomfortable, and that was what he was

investigating. I am not persuaded it was necessary for Mr Thoms to make a credibility finding in the circumstances, because the underlying reasons for his findings were explicitly stated in the report and Mr Reynolds was given the opportunity to respond to them.

The disciplinary process

[40] Mr Reynolds says Mr Finlayson's decision to issue him with a written warning was procedurally and substantively deficient because Mr Finlayson did not genuinely consider whether there was sufficient evidence to uphold the allegation, did not have an open mind, did not address credibility, did not allow Mr Reynolds to challenge the provisional decision or meet to discuss the outcome, and did not disclose all the matters that influenced his decision on the appropriate disciplinary outcome.

[41] When Mr Finlayson took over the investigation, he saw his role as not being to re-open the investigation into what had happened, which had been completed by Mr Thoms, but to determine the appropriate disciplinary outcome. He read the file including emails and responses from Mr Reynolds' representative. He took advice, but did not have a discussion with Mr Thoms about what should happen. In his mind, there were various levels of potential disciplinary outcomes from a written warning not to repeat the behaviour, through to summary dismissal. Mr Finlayson told the Authority he spent "many an hour" thinking about Mr Thoms' report and although not all of his reasoning was recorded in Redican's provisional decision letter, it submits succinctness should not be equated with a lack of natural justice.

[42] While I do not criticise Redican for its brevity, based on the evidence before the Authority, I find there were issues with its disciplinary process that did result in Mr Reynolds being treated unfairly.

[43] Mr Finlayson's decision to uphold the findings of Mr Thoms' report was based on his opinion about what had happened and the facts as he saw them. Mr Finlayson told the Authority he agreed with Mr Thoms' finding the inappropriate touching had happened. Mr Finlayson said having worked on construction sites, he did not accept Mr Reynold's sequence of events and he found it strange Mr Reynolds had contacted the tradesperson – a more junior worker on the site - by text message. He also says his decision to issue a written warning was the lowest level of disciplinary action and was justified following a finding of uninvited touching of a co-worker.

[44] While I accept Mr Finlayson was not required to effectively re-run the investigation into the original complaint, as the decision-maker on the disciplinary matter he was required to consider all information from the investigation afresh, consider the matter with an open mind, put his concerns to Mr Reynolds, genuinely consider his response, and then come to his own view about the appropriate outcome.

[45] Redican's provisional decision letter was provided to Mr Reynolds on 31 May 2023. This letter confirmed Redican accepted Mr Thoms' report but did not provide sufficient reasons. In particular, on an objective view of the facts, Mr Reynolds' acknowledgement of potential "inadvertent" touching did not support Redican's finding of inappropriate touching.

[46] Mr Reynolds was initially given two days to make any further statements in response to the provisional decision. As it transpired, the company did not actually follow up until two weeks later on 14 June which would have been ample time for Mr Reynolds to respond. However, after issuing the provision decision, Mr Finlayson made it clear to Mr Reynolds his response was limited to the disciplinary outcome and Mr Thoms' findings would not be revisited. It is not entirely clear why Mr Reynolds was not permitted to address the decision makers on the report findings once the provisional decision had been issued - especially since the company had agreed Mr Thoms would not be part of the decision making on the disciplinary outcome.

[47] In addition to this, evidence before the Authority suggests there was other information in Mr Finlayson's mind when he made the disciplinary decision which was not put to Mr Reynolds for response. This includes Mr Thoms' investigation notes (which were never disclosed to Mr Reynolds), Mr Finalyson's non-acceptance of the sequence of events around the incident, and his views of the inappropriateness of the text message contact between the tradesperson and Mr Reynolds given his more senior managerial role. Overall, there was a lack of transparency about the information the decision-maker took into consideration, and this compromised the fairness of the process.

Analysis of disadvantages

[48] The duty of good faith requires both parties to be active and constructive in maintaining a productive employment relationship which includes a duty to be responsive and communicative. The duty is elevated for an employer who later intends

relying on its communication in a disciplinary setting. It must be open and transparent, and remove any ambiguity from the process.

[49] The Employment Court has said the test of whether an investigation is fair and reasonable is not one of “minute and pedantic scrutiny” but rather a broad assessment of fairness in light of the seriousness of the allegation and potential consequences.²

[50] Based on the evidence before the Authority, I find Mr Reynolds was disadvantaged by the disciplinary process. At the initial investigation stage, Redican did sufficiently investigate the complaint, raise its concerns with Mr Reynolds, give him a reasonable opportunity to respond and genuinely consider Mr Reynolds’ explanations. However Redican’s actions during the disciplinary stage did not meet the test of justification set out in section 103A of the Act - particularly its obligations to raise the concerns it had with Mr Reynolds and to genuinely consider Mr Reynolds’ explanations. The procedural flaws were more than minor defects and resulted in Mr Reynolds being treated unfairly. It follows Mr Reynolds’ claim of unjustifiable disadvantage succeeds.

Was Mr Reynolds unjustifiably (constructively) dismissed?

[51] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* stated:³

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment.

[52] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited*⁴ where a constructive dismissal might occur. These situations are not exhaustive:

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

² *King v PPCS Richmond Ltd* EmpC AC61/05.

³ *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich* [1983] ACJ 965.

⁴ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374.

(c) Where a breach of duty by the employer leads a worker to resign.

[53] The conduct complained of must amount to a repudiation of the contract rather than just be unreasonable.

[54] The Court of Appeal⁵ has stated the broad legal approach starts with the question of whether the resignation has been caused by a breach of duty on the part of the employer by looking at all the circumstances of the resignation. If so, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under those conditions. The court has emphasised that the focus of such claims is on the employee's motivation for their decision to leave, and whether that motivation arises from a breach of the employer's duty, or some other factor.⁶

[55] Mr Reynolds claims constructive dismissal on the third ground under *Woolworths*, on the basis Redican breached a duty to him and should have been able to reasonably foresee that rather than putting up with breaches, he would resign. Mr Reynolds says Redican breached its duties to comply with s 103A of the Act, and the implicit finding the company preferred the tradesperson's version of events irreparably damaged the relationship of trust and confidence.

[56] Mr Reynolds says it was hard to stay on at the company once he had been through the investigation process. He was not sure if he would be dismissed or given a written warning but he was worried as he felt he was not supported and was blamed. He felt uncomfortable on site, and he wanted to leave "once he could see what was coming". Mr Reynolds says he started looking for other employment before the investigation was completed, knowing he would not be treated fairly and what the outcome would be and in those circumstances his resignation was a reasonably foreseeable outcome.

[57] Underlying this, Mr Reynolds suspected Redican's pipeline of work was drying up because jobs were coming to an end and the company was running out of work for the number of managers it had. Redican denies this. Mr Finlayson says the contract Mr Reynolds was working on was to continue running until October but did not actually

⁵ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA) at 419.

⁶ See for example, *Commissioner of Police v Hawkins* [2009] NZCA 209.

wrap up until November, and there was plenty of work. Although it did not surprise Mr Thoms when Mr Reynolds resigned, he says there was no particular unpleasantness between Redican and Mr Reynolds. Mr Finlayson said he did not make the written warning decision lightly and although Redican could have kept better records, there was no intention on his part or anyone's to push Mr Reynolds out of his job.

[58] Redican also says even if there had been a breach of duty, giving a first written warning could not bring a reasonable employee to the conclusion that the employer no longer intended to be bound by the employment agreement – Mr Reynolds' resignation in these circumstances was simply not foreseeable by Redican.

[59] Based on the evidence before the Authority, I am not persuaded there was a breach of duty sufficient to amount to repudiation of the employment agreement. The end of Mr Reynolds' employment came about because he had secured another job opportunity and made a choice to end his employment with Redican – his resignation was not caused by Redican. Although it was not established exactly when Mr Reynolds first began to look for other work, he confirmed he had contacted a recruitment agent prior to his interview with the competitor company on 12 May. Logically, Mr Reynolds must have started exploring other employment options in the early days of Mr Thoms' investigation, or at least well prior to its finalisation on 16 May. I also accept Redican's submission that Mr Reynold's resignation due to the investigation and consideration of a warning was not foreseeable, because I accept the written warning was a disciplinary outcome at the lower end of the scale.

[60] I conclude Mr Reynolds' motivation for his decision to leave his employment did not arise from a breach of Redican's duty and Mr Reynolds was not constructively dismissed.

Remedies - personal grievance

[61] I have found Mr Reynolds was unjustifiably disadvantaged in his employment and he is therefore entitled to an assessment of remedies.

[62] Mr Reynolds seeks:

- (a) Compensation under s 123(1)(c) of the Act.
- (b) Loss of monetary benefits under s 123(1)(c)(ii) – superannuation fund.

Compensation

[63] Mr Reynolds seeks an award of compensation for his unjustifiable disadvantage claim under section 123(1)(c)(i) of the Act of not less than \$15,000. He says the way in which the investigation and disciplinary process were conducted caused him humiliation, embarrassment, anger and injury to feelings. Mr Reynolds gave evidence of being embarrassed and humiliated knowing employees on the site were gossiping about what had happened, and he was emotionally distressed about feeling like he had not been listened to.

[64] Redican says there has been little evidence put before the Authority in relation to claimed humiliation, loss of dignity and injury to feelings.

[65] Based on the information before the Authority, Mr Reynolds appears to have suffered the greatest amount of embarrassment and humiliation at the time when Mr Thoms started investigating the complaint, which – as I have set out above – was a process generally conducted sensitively and discreetly. Mr Finlayson gave evidence of his concern for the parties involved and particularly Mr Reynolds and the tradesperson, and I accept those concerns as genuine. I also consider Mr Reynolds' approach to the tradesperson was not conducive to the investigative process being kept confidential. The hurt and humiliation Mr Reynolds says he suffered as a result of workplace gossip cannot be attributed to Redican in these circumstances. A small amount of compensation is appropriate to recognise injury to Mr Reynold's feelings during the disciplinary process, in feeling like he was not listened to and his views were ignored.

[66] I have considered the general range of compensation awards in other cases. Standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$8,000.00.

Contribution

[67] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr Reynolds may have acted in a way that contributed to the situation that gave rise to his grievance.⁷

⁷ Employment Relations Act 2000, section 124.

[68] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:⁸

- (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- (b) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[69] The Court also stated:⁹

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[70] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[71] Redican submits that Mr Reynold's action in touching the tradesperson was the principal contribution to the situation and was blameworthy and a significant reduction in remedies would be appropriate.

[72] Mr Reynolds says he has not contributed to his personal grievance because he denies the inappropriate touching, and he participated in the investigation and disciplinary process.

[73] Given Mr Reynolds' consistent denial that he touched the tradesperson other than potentially inadvertently, I do not find his actions in relation to the incident contributed to the situation giving rise to his personal grievance. Mr Reynolds did not contribute to the procedural flaws in the disciplinary investigation that I have found were unjustified, and I am not persuaded compensation should be reduced for contribution.

Special damages claim

[74] Mr Reynolds claims special damages, which is a class of loss of monetary benefit pursuant to s 123(1)(c)(ii) being the legal fees incurred prior to litigation. Mr Reynolds has provided invoices for his legal fees which total \$3,987.50 plus GST. He further says if he is successful on only one of his two personal grievance claims, it

⁸ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

⁹ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [17].

would be reasonable for the Authority to award half of this amount claimed as special damages.

[75] Mr Reynolds relies on the Court of Appeal judgment in *Binnie v Pacific Health Limited*¹⁰ the Employment Court in *Stormont v Peddle Thorp Aitken*¹¹ and *Henry v South Waikato Achievement Trust*¹² as establishing the principle that legal expenses incurred prior to the issuing of proceedings can be treated as special damages rather than costs.

[76] Mr Reynolds says the legal fees incurred were reasonable, and were reasonably and necessarily incurred given the issues and matters that were not able to be resolved with Redican.

[77] Case law shows employees may recover damages for legal costs under s123(1)(c)(ii) of the Act only in exceptional circumstances. The purpose of special damages is not punitive. The Court of Appeal in *Binnie v Pacific Health Limited* held:

Legal expenses properly incurred in relation to issues such as wrongful suspension of employees and investigations into their conduct might well be classified as special damages rather than as party and party costs. The latter generally have as their focus the issue of proceedings, preparation for the hearing, and the hearing itself.

[78] The Employment Court has since confirmed legal costs may be recovered as special damages where such a line can be drawn and where the costs were reasonable and necessary in light of the defendant's actions.

[79] I am not persuaded exceptional circumstances have been made out in this case, sufficient to warrant an award of special damages. The legal costs incurred were not as the result of an unwarranted process because Redican's investigation arose out of a genuine need to respond to a complaint. Its actions were therefore not entirely baseless, or otherwise comparable to the "disingenuous" circumstances that warranted special damages in *Stormont*. I therefore decline to award special damages. As costs are reserved on the substantive matter, it remains open for the parties to make submissions on an appropriate award of costs in terms of the Authority's investigation.

¹⁰ [2002] 1 ERNZ 438 (CA).

¹¹ [2017] NZEmpC 71.

¹² [2023] NZEmpC 20.

Orders

[80] I order within 28 days of the date of this determination:

- (a) Redican Allwood 2021 Limited is to pay John Reynolds compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of \$8,000.00.

Costs

[81] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[82] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Reynolds may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Redican will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[83] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹³

Natasha Szeto
Member of the Employment Relations Authority

¹³ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1