

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 495
5405704

BETWEEN EMILY SMITH
 Applicant

AND WASTE DISPOSAL
 SERVICES
 Respondent

Member of Authority: Robin Arthur

Representatives: Alan Taylor, Advocate for the Applicant
 Daniel Erickson, Counsel for the Respondent

Investigation Meeting: 28 August 2013

Submissions: 4 and 13 September 2013 for the Respondent
 and 7 September 2013 for the Applicant

Determination: 31 October 2013

DETERMINATION OF THE AUTHORITY

- A. Waste Disposal Services (WDS) acted fairly in suspending Emily Smith during its disciplinary investigation of allegations about her conduct.**

- B. Its dismissal of Ms Smith was unjustified because WDS had not fully and fairly investigated the allegations and had treated other employees differently over alleged breaches of the same policy.**

- C. Ms Smith is not entitled to an award of lost wages.**

- D. WDS must settle Ms Smith's personal grievance by paying her \$5000 compensation for hurt and humiliation, an amount which**

has been reduced due to behaviour by Ms Smith that contributed to the situation.

- E. Costs are reserved and a timetable set for memoranda from the parties if a determination of costs by the Authority is required.**

Employment relationship problem

[1] Waste Disposal Services (WDS) dismissed Emily Smith from the role of site manager of its East Tamaki refuse transfer station on 26 September 2012. Her dismissal followed an investigation carried out by Transpacific Industries Group (NZ) Limited (TPI) operational general manager Ian Kennedy, with assistance from TPI human resources advisor Keshwant Kaur. TPI manages WDS, an unincorporated joint venture of TPI and Auckland Council.

[2] Mr Kennedy's investigation initially concerned allegations that Ms Smith had broken WDS policy against "*scavenging*" of items left at the site, had allowed others to break the policy and had not followed WDS health and safety policy and its code of conduct in the way she dealt with some workers managed by her. Those allegations arose from a discussion Mr Kennedy had on 17 July 2012 with three of those workers, who made various complaints to him about Ms Smith.

[3] During his investigation Mr Kennedy added further allegations about Ms Smith's conduct as the result of actions by her after he told her about the investigation on 15 August 2012 and after she was suspended on pay from 16 August 2012. Soon after Mr Kennedy told her of the investigation Ms Smith called the labour agency that provided one of the workers at the site and told the agency not to send that worker for any further assignments there. She did so because she suspected he was one of the complainants. She also contacted, or tried to contact, other employees about the investigation, which Mr Kennedy said he had specifically told her not to do. The allegations about those actions formed part of the reasons WDS later gave for its decision, made by Mr Kennedy, to dismiss her.

[4] Ms Smith's personal grievance application to the Authority sought reinstatement to her former position, loss of wages (including future earnings if not reinstated) and compensation for hurt and humiliation. WDS, in reply, said its decision to dismiss Ms Smith

was justified, based on conclusions reached after a fair investigation and, if that were not the case, reinstatement was not a reasonable or practicable remedy. WDS also argued that if Ms Smith were found to have a grievance, any remedies awarded to her should be reduced because blameworthy conduct by her contributed to the situation.

Issues

[5] Ms Smith's personal grievance application and WDS's response raised the following issues for investigation and determination by the Authority:

- (i) whether WDS acted fairly in suspending Ms Smith from her duties during its investigation; and
- (ii) whether WDS carried out a full and fair investigation of the allegations about Ms Smith; and
- (iii) whether WDS' decision to dismiss Ms Smith was what a fair and reasonable employer could have done in all the circumstances at the time; and
- (iv) if WDS had acted unjustifiably towards Ms Smith, whether she should be reinstated to her former position, be paid lost wages and be awarded compensation for hurt and humiliation; and
- (v) if any remedies are awarded to Ms Smith, should they be reduced for any blameworthy conduct by her contributing to the situation giving rise to her personal grievance; and
- (vi) whether either party should contribute to the reasonably incurred costs of representation of the other party?

The Authority investigation

[6] In preparing this determination I took account of witness statements from Ms Smith, Mr Kennedy and Ms Kaur; relevant background documents lodged by both parties; answers to questions asked of the three witnesses by me and the two parties' representatives at the investigation meeting; and written submissions lodged by both parties after the meeting. As permitted by section 174 of the Employment Relations Act 2000 (the Act) this determination has not set out all evidence and submissions received but has stated findings of fact and law, conclusions on issues requiring determination, and specified orders made.

(i) Suspension

[7] Ms Smith said the arrangements for her to attend an initial meeting about the prospect of suspension were confusing and she was not specifically advised of her right to support and representation at that meeting.

[8] Suspension on pay was authorised by a term of Ms Smith's employment agreement and was justified if WDS exercised the discretion given by that express term in the way that a fair and reasonable employer could do so. A fair employer, before making such a decision, will provide a proper opportunity for an employee to comment on a proposal to suspend her from her duties while it investigates allegations about her conduct.¹ I find WDS did so in this case.

[9] Mr Kennedy and Ms Kaur came to Ms Smith's office in the early afternoon of 15 August 2012 and gave her a letter, headed "Please Explain". The letter set out allegations numbered one to six and gave six instances of alleged "scavenging" of items at the transfer station.

[10] The letter referred to a meeting scheduled for 22 August to hear her response to the allegations. However when Mr Kennedy gave Ms Smith the letter he also asked her to leave work for the rest of the day and to come to a meeting at the TPI offices in Mt Wellington the next day to discuss whether she should be suspended while WDS investigated the allegations set out in the letter.

[11] Ms Smith attended the meeting on the next day and, on her own account, agreed to Mr Kennedy's proposal to suspend her on pay. The suspension decision was made with her consent.

[12] While the "Please Explain" letter had not specifically mentioned the meeting to discuss suspension and the right to get advice and representation for that particular meeting, it did expressly refer to Ms Smith's "*right to support and advice, be it from your union, or from any other person of your choice*". This reference was to the whole process, not just one part

¹ *Singh v Sherildee Holdings Limited* (unreported, EC AC 53/05, 22 September 2005) at [93].

of it, and was sufficient, I find, to advise Ms Smith of her rights to representation at the suspension meeting.

(ii) Was the WDS investigation full and fair?

[13] The letter of dismissal dated 25 September 2012 sent to Ms Smith described WDS' decision to dismiss her as based on information gathered through "*a comprehensive investigative process*" and concluded that Ms Smith had:

- (a) wilfully failed to adhere to and uphold WDS Fraud Policy, code of conduct and her own employment agreement terms by scavenging; and
- (b) authorised scavenging by others; and
- (c) used her position with WDS to repay favours; and
- (d) treated staff in an inappropriate manner; and
- (e) compromised safety standards by her actions and inactions as site manager; and
- (f) removed items she considered were of value from the site for personal gain; and
- (g) defied an instruction not to contact other WDS staff or visit TPI sites while on suspension (which she did by going to the Whitford transfer station, texting or phoning other employees, and calling at the home of one employee).

[14] WDS submitted its investigation of the allegations against Ms Smith met the statutory standard of what a fair and reasonable employer could have done in all the circumstances because it:

- (a) carried out a thorough initial investigation of the complaints made by three employees to Mr Kennedy, which involved another TRI manager interviewing those employees and preparing a report of concerns about how Ms Smith was managing the East Tamaki site; and
- (b) provided Ms Smith advance notice of all meetings and detail of all the allegations against her and; and
- (c) was accommodating in terms of rescheduling meetings, delaying one meeting because Ms Smith's sister was ill; and
- (d) advised Ms Smith of the possible consequences of the process and her right to support and representation and she exercised that right by getting help from an experienced employment advocate; and

- (e) genuinely considered, through Mr Kennedy's deliberations, all of Ms Smith's responses; and
- (f) gave Ms Smith the opportunity to comment on both Mr Kennedy's factual conclusions (set out in a letter on 15 September) and his preliminary view that dismissal was the most appropriate outcome.

[15] However, even if those steps were carried out as described, the investigation did not meet the statutory standard. Rather, there were significant defects in what Mr Kennedy did that resulted in an insufficient investigation of the allegations by WDS (having regard to the resources available to it). Those defects were more than minor and resulted in Ms Smith being treated unfairly.² They were:

- A. Failure to interview all staff who were likely to have relevant information; and
- B. Failure to provide Ms Smith with all the relevant information available to WDS; and
- C. Failure to reveal who had made the complaints.

A. Not interviewing all staff with relevant information

[16] Central to Ms Smith's response to the allegations made about whether she had taken items left at the site or had allowed other staff to do so was the question of what her direct manager, WDS Whitford landfill operations manager Roger Jordan, had told her about what he thought was permitted.

[17] Ms Smith said Mr Jordan told her staff could take some items that were not otherwise valuable to the company provided they got permission, she recorded it and it did not become a habit. She said Mr Jordan had based what he said on what Mr Jordan told her was the view of his own direct manager, WDS Auckland regional landfills manager Carl Temm. The timing and context of Ms Smith's conversation with Mr Jordan about this topic was also important. She said it occurred on 22 June 2012, around the time or soon after she was involved in carrying out disciplinary investigations of two employees alleged to have 'scavenged' items from the refuse station. The employment of one of those workers (said to have taken scrap metal as well as food and cans of soft drink dumped at the site) was terminated soon after, but for abandonment of employment, not scavenging. The other was given a written warning by Ms Smith.

² Section 103A(3)(a) and (5).

[18] WDS's rule against employees taking items left by the public at the refuse station was part of its fraud policy. The policy defined fraud as "*theft, misappropriation and/or other fiscal irregularities*". It included "*scavenging of any item intended for disposal*" as one example. Mr Kennedy said this policy would have been reinforced by Ms Smith at regular 'toolbox' meetings with employees, although there was no direct evidence from any witness in the Authority's investigation of this occurring or what was actually said in such meetings about the policy. However there were some notes – which Mr Kennedy saw but did not give to Ms Smith – from an interview conducted by another TPI manager with one worker who had started work on 29 June 2012. Those notes recorded that worker as saying he was told when he first started work that staff were not allowed to scavenge but that then changed to "*depending on what it was*".

[19] WDS also had a policy for collecting items containing valuable metals (steel, aluminium, brass, copper and stainless steel) from amongst the refuse left at the site and keeping that material for sale to scrap metal merchants.

[20] However Mr Kennedy did not conduct any formal interview with Mr Jordan or Mr Temm about their interpretation or application of the rule about scavenging as part of his investigation of allegations about Ms Smith. He said he spoke to Mr Jordan by telephone and Mr Jordan confirmed Ms Smith's account of what he said, including that it was based on comments from Mr Temm. However, while Mr Kennedy did tell Ms Smith that Ms Jordan had confirmed her account, he discounted it as irrelevant as he considered Ms Smith should nevertheless have abided by Mr Kennedy's literal interpretation of the policy as not allowing any items to be taken. He also took no account of the time or context of Mr Jordan's comments to Ms Smith, believing it must have been some considerable time earlier and superseded by a more recent emphasis on a strict interpretation of the policy. He also made no direct inquiry of Mr Temm about his comments to Mr Jordan, when they occurred or what they meant.

[21] In that respect Mr Kennedy's approach resulted in unfairness to Ms Smith because he may well have acted on a mistaken view of just how recently Ms Smith's direct manager and her manager's manager had led her to believe that some items could be taken from the site. Her belief may have been mistaken but Mr Kennedy could not soundly draw the conclusion he did on the basis of his informal telephone discussion with Mr Jordan and his failure to

interview Mr Temm. If he had interviewed both, and given Ms Smith the opportunity to comment on the content of those conversations, the proper context could have been considered. This would also have tested Ms Smith's contention that her discussion with Mr Jordan about the interpretation of the limits on scavenging occurred in the highly relevant context of whether or not two employees should be disciplined for allegedly taking items from the station (although in both cases this was said to involve taking scrap metal which staff knew WDS regarded as valuable items to be collected and kept for sale).

[22] There were four other conspicuous absences from the employees interviewed by Mr Kennedy in his investigation. These were important because the evidence of Ms Kaur was that she was responsible for ensuring the investigation carried out "*all lines of enquiry*" which included "*interviewing the relevant parties*" and checking back with them to get clarification or confirmation on responses from Ms Smith.

[23] Mr Kennedy relied on interviews with Ms Smith, the three workers who complained about her, one contractor who worked at the site and the supervisor. The supervisor was also under disciplinary investigation at the time.

[24] However Mr Kennedy did not speak to or attempt to speak to two other men who worked at the station on relevant days, including one man who was the subject of two of the allegations. The latter man was engaged as a contractor for four days to drive a loader and was said to have been involved in an incident where he was allowed by Ms Smith to unsafely enter the refuse pit area to retrieve a weed eater. It was also alleged Ms Smith gave him the driving job to repay a favour to her. The other man was one of the workers who had earlier been subject to a disciplinary procedure and written warning from Ms Smith for allegedly breaching the scavenging policy.

[25] Mr Kennedy had no satisfactory explanation for not speaking to either man. He said he did not know how to contact the contractor but there is no evidence he made any attempt to do so. The man's contact mobile phone number was on the invoice he submitted to WDS for the hours worked.

[26] In respect of the other man, Mr Kennedy's oral evidence in the Authority investigation left the strong impression that he was not interested in hearing from anyone who

might not share the same views or simply confirm the accounts of the three staff who had complained.

[27] Neither did Mr Kennedy formally interview WDS health and safety advisors Adam Beadle and Rewi Forster who sometimes visited the site. They could have provided relevant information about whether Ms Smith acted properly in relation to getting safe work gear which two of the complainants said they asked for but were not provided and also what both advisors saw of work practices and staff interaction during times they were there.

[28] The resulting unfairness to Ms Smith of those four men not being properly interviewed, and her not being provided with the opportunity to comment on what they might have said, was that Mr Kennedy had not fully and fairly canvassed the prospect of different accounts or explanations for various events or conversations.

B. Not providing Ms Smith with all relevant information

[29] There are at least three clear instances of not providing Ms Smith with information relevant to the allegations made against her.

[30] Firstly, in relation to the allegation that she was unfair to staff, she was not shown any examples of timesheets where she was said to have refused to sign off for hours worked after 4pm. However in his oral evidence to the Authority Mr Kennedy said he had checked timesheets and the allegation was difficult to prove because some timesheets were signed off at 4pm and others at 4.15pm. Because Ms Smith was not given any specific examples, she did not have the opportunity to explain what had happened on specific occasions or, if the allegation were (as it appears to be) unsubstantiated by Mr Kennedy's review, to comment on how that might affect the reliability of other allegations made by the complainants about how Ms Smith treated them.

[31] Secondly, in relation to the allegation that Ms Smith tolerated unsafe work practices, she was said to have failed to take proper steps for the repair of a faulty door lock on a loader used in the refuse pit. The danger was that a worker might fall out into the pit. During the investigation Ms Smith had another employee get copies of the daily plant docket for the loader. Her analysis of those dockets, which she gave to Mr Kennedy, suggested the loader was taken out for repair on at least three occasions after a problem with the door lock was

identified during equipment checks. This was information Mr Kennedy could have had checked or provided himself but investigation meeting notes taken by Ms Kaur show he criticised Ms Smith for not asking him for the information and accused whoever provided copies of the dockets to her of stealing company property.

[32] Thirdly, Mr Kennedy did not provide Ms Smith with information or notes from interviews with the site supervisor who was also under disciplinary investigation. He described the information from the supervisor as verifying the complaints of other staff about Ms Smith and said it “*was used as back up*” in making his decision about her. Mr Kennedy’s evidence was that the supervisor agreed to provide information about Ms Smith if it was kept confidential from her.

[33] There is an inherent danger that a worker facing disciplinary action themselves but given a promise of secrecy may believe their own chances of a favourable decision from the employer will be improved by impugning another worker. Such danger is one of the reasons for the principles of natural justice applying to an employer’s disciplinary investigation, as expressed in the good faith provisions at s4(1A)(c) of the Act.

[34] As WDS was making a decision likely to have an effect on the continuation of Ms Smith’s employment, she was entitled to access to information relevant to that decision and the opportunity to comment on it before WDS made the decision. In this case, notes taken of the disciplinary interviews with the supervisor were available to Mr Kennedy and included the supervisor’s account of various events or interactions that also featured in the allegations made about Ms Smith. As Ms Kaur put it in her oral evidence: “*We kept it separate even though it intertwined*”.

[35] If WDS had treated her fairly Ms Smith would have known exactly and entirely what the supervisor had told her employer about events or interactions involving her so she then had the opportunity to endeavour to explain any negative aspects and to have the benefit of knowing anything he said that supported her case.

C. Not revealing the identities of the complainants

[36] WDS submitted that its decision not to reveal the identity of the three complainants to Ms Smith was justified by its protected disclosures policy; that Ms Smith was not prejudiced

by that decision; and, in any event, that could not be classed as anything but a minor procedural deficiency.

[37] The identity of the complainants is material to both the allegations made in a disciplinary investigation and the opportunity to respond to those allegations. Those identities may justifiably be withheld from the person being investigated only for good and exceptional reasons where the employer ensures that the process is fair in all other respects.³

[38] This was no such exceptional case. It was a commonplace case of some workers complaining to a senior manager about dealings with their direct manager. When they asked if Mr Kennedy would keep their complaints confidential, he responded by saying he would treat the allegations as coming under WDS' protected disclosure policy. However that policy expressly notes that an investigator may disclose the identity of an informant where the investigator reasonably believes to do so is essential to maintaining the principles of natural justice. On the facts of this case Mr Kennedy could not reasonably have believed otherwise given WDS's obligations to Ms Smith under s4(1A)(c) of the Act. Rather than promising confidentiality to the complainants he should have assured them of protection against any retaliation as a result of raising their concerns with him, a measure specifically provided for by the policy which said WDS would not tolerate any sanction or detriment against a person reporting serious wrongdoing. In that way he could have met WDS' obligations both to those workers and to Ms Smith.

[39] Mr Kennedy also suggested that his refusal to disclose and confirm the identity of the complaints to Ms Smith made no difference because she guessed who it was anyway given the small number of staff at the workplace. That demonstrated that his stance on confidentiality was futile and that he knew so at the time of his investigation.

[40] The effect of the position he took was that Ms Smith did not see notes that Mr Kennedy and TPI's preliminary investigator took in their interviews with those workers. Arguably that was not essential if the full substance of what the complainants said was disclosed to Ms Smith.⁴ However, in this case, there were aspects Ms Smith consequently could not comment on. What she might have been able to say if she saw that material is

³ *Goodman Fielder New Zealand Limited v Ali (No 2)* [2003] 2 ERNZ 656 at [34]-[35] and *Porter v Board of Trustees of Westlake Girls High School* [1998] 1 ERNZ 377 at 387-8.

⁴ See cases cited in *Porter* (above) at 387.

hypothetical but she could, for example, have usefully commented on Mr Kennedy's assessment that one of the workers was not motivated to complain because he was disappointed that he missed out on getting the supervisor's job and which he said went instead to a friend of Ms Smith. She could also have been better equipped to comment on the extent to which some of the allegations were based on what one of the complainants said he was told someone else saw (that is second hand reports). This lack of openness was more than a minor defect and resulted in Ms Smith being treated unfairly because she could not answer to all of the case against her in terms of what Mr Kennedy had in front of him when making his decisions.

(iii) Was the decision to dismiss justified?

[41] WDS submitted its decision to dismiss Ms Smith was substantively justified because she was the employee with primary responsibility for health and safety on the site but had allowed scavenging of materials intended for disposal which was unsafe because waste products were potentially dangerous and some instances of scavenging involved workers going into the refuse pit where heavy machinery was working. It also said she knew and applied the policy prohibiting scavenging but had admitted four instances where she appeared to have items set aside for herself and one instance where she allowed the supervisor to remove an item from site. It said her actions were not justified by her explanation that she had purportedly staged three of these instances as a means to 'flush out' some employees who were out to get her. Further WDS submitted Mr Kennedy was entitled to reject Ms Smith's explanation that Mr Jordan had authorised some items being retrieved or kept from the pit as she was expected to follow its clear policy without exception.

[42] However I have found WDS fell at the hurdle of justification for at least three reasons.

[43] Firstly, WDS's investigation was less than full and fair. Consequently Mr Kennedy's conclusions based on that investigation are subject to the following principle, as stated in *Singh v Sherildee Holdings Limited*:⁵.

Where an employer has failed to carry out a full and fair investigation, it will usually not be possible for that employer to show that the decision to dismiss was one which a reasonable and fair employer could have taken. That is because a

⁵ Unreported, EC, AC53/05, 22 September 2005, Judge Couch at [89].

reasonable and fair employer would not make a decision to dismiss other than as a result of a full and fair investigation.

[44] Secondly, a fair and reasonable employer could not have concluded Ms Smith had breached WDS's reasonable expectations of how its policy prohibiting scavenging would be applied without having properly and thoroughly examined what Mr Jordan (and through him, Mr Temm) had led Ms Smith to understand about what she should or should not do, both in respect of herself and what she allowed employees reporting to her to do.

[45] As noted by WDS in its submissions the Employment Court has held that an employee who has breached policies may nonetheless have been unjustifiably dismissed where there has been an "*element of permission in the past*" and no clear statement has been made by the employer about modifying or withdrawing that permission before strictly applying a different interpretation of the policy.⁶ I have not accepted WDS' submission that the principle expressed in that decision could be distinguished because the present circumstances were about a policy intended to ensure employee safety. The Court decision involved a health sector workplace where risk to patients was central to the question of how a particular policy (about sleeping on the job) applied, so there was a clear focus in that case on the underlying issue of safety in a workplace.

[46] Thirdly, there was a clear and unjustified disparity of treatment between how Mr Kennedy dealt with Mr Jordan and one of the workers who had complained (who both admitted instances of breaching the policy) compared to the approach and outcome he imposed on Ms Smith for not following how Mr Kennedy said the policy should be applied in every instance.

[47] Mr Jordan admitted allowing an employee to take an item from the worksite (which Mr Kennedy considered unsafe because it could have been contaminated with dangerous chemicals). The complainant worker also admitted he had got Ms Smith's permission to take home two items he found in the refuse - a dog bed and a PlayStation game. Neither man received any disciplinary sanction for their conduct, partly because Mr Kennedy said it involved only one instance apiece and both men were remorseful, compared to Ms Smith who Mr Kennedy considered was not remorseful and was involved in a number of instances.

⁶ *Otumarama Private Hospital v Bell* [1995] 2 ERNZ 491, 495.

[48] Mr Kennedy's argument was that Ms Smith should have known the policy was to be applied strictly and should have ignored anything her manager said to the contrary. That was not the standard he applied to the complainant worker who did not ignore what his manager (Ms Smith) told him but clearly 'knew' (as Mr Kennedy saw it) that it was outside the policy because that worker later complained to Mr Kennedy that Ms Smith breached the policy. Similarly Mr Jordan had not ignored what he said was Mr Temm's view of what was appropriate, instead repeating that view to Ms Smith.

[49] The result was that Ms Smith was treated differently from one person above her in the WDS hierarchy and one person below her and Mr Kennedy's explanation for doing so was inconsistent and inadequate.

[50] Accordingly, for the three reasons given, I found Ms Smith had a personal grievance for unjustified dismissal.

(iv) Remedies due to Ms Smith

[51] Ms Smith sought reimbursement of lost wages but gave evidence that she was on a sickness benefit from soon after her dismissal until the date of the investigation meeting. By definition – and assuming, as I must in the absence of evidence otherwise, that she was properly assessed by her doctor as being unfit to work and was entitled to the benefit she received – she was not able to work during that time so could not have lost wages she would otherwise have earned.

[52] Those circumstances also had an effect on Ms Smith's application for reinstatement. It was not practicable and reasonable for two reasons. Firstly, on her own oral evidence, although she wanted to go back to work, her doctor remained concerned that her medication regime was not as it needed to be for her to return to the workforce. Secondly, there was insufficient evidence that, on the balance of probabilities, she could practically return to work and restore sound working relationships with the small group of workers at the refuse transfer. This was made less likely because of Ms Smith's post-dismissal activities where she had made various accusations about two of the workers who had complained about her and because she had tried to get another of the workers removed from the site as soon as she heard of the complaints against her.

[53] Her evidence on the hurt and humiliation she suffered as a result of her dismissal did, however, support an award of compensation. She suffered from the stigma of having been dismissed for ‘fraud’ because WDS had included the prohibition against scavenging in its definition of fraud in its policy. The circumstances became widely known in her family and social circle, including a cosmopolitan social club where she served on the executive committee. Ms Smith said this resulted in her having to make declarations to the Department of Internal Affairs because of the club’s gaming machine licences and the department’s concern to check the background circumstances of anyone involved in club governance who supposedly had been found to have engaged in what WDS had called fraudulent activities. She was shamed in her social circle by having to go through that process and that increased her sense of humiliation.

[54] Considering the general range of compensation awarded and the particular circumstances of the case, I assessed \$7500 as being the appropriate amount WDS should pay Ms Smith under s123(1)(c)(i) of the Act to settle her grievance.

(v) Reduction of remedies for contributory behaviour

[55] Because Mr Kennedy’s investigation was faulty and inadequate I could not find Ms Smith contributed to the situation giving rise to her grievance on the basis of the accusations WDS made about her breaching its scavenging policy or her treatment of workers over safety and time sheet matters. No such conclusions could soundly be drawn.

[56] However the remedy awarded to Ms Smith has been reduced by one third due to the following three instances of blameworthy conduct by her:

(i) Calling the labour agency on 15 August to have one of the complainants removed from the site.

[57] Ms Smith accepted in her oral evidence to the Authority that her call was “*in part*” retaliation against that worker for his complaint about her. As such it was inappropriate. Whatever she thought of the complainant and his motives, she should have dealt with those issues through the investigation and not by using her position in an attempt to stop him working. Her action contributed to the situation giving rise to her grievance because it,

understandably, had an effect on Mr Kennedy's view of her (and which he properly raised by way of a further allegation in the investigation).

(ii) Breaching an instruction not to contact other WDS employees during the investigation.

[58] There was a clear written instruction given to Ms Smith by 3 September through an email Ms Kaur sent to Ms Smith's advocate at the time. Ms Smith accepted in her oral evidence that she had received the instruction. Despite this she subsequently visited one WDS worksite and spoke to Mr Jordan, visited the home of one worker and, probably, also spoke to the supervisor who was going through his own disciplinary process. Mr Kennedy and Ms Kaur suggested the instruction was given earlier, in their meeting with Ms Smith on 16 August, but it was not recorded in the letter given to Ms Smith later that day setting the terms of her suspension so I did not accept their evidence as more likely than Ms Smith's assertion that she was not so instructed at that meeting.

(iii) Engaging in what Ms Smith said was a "ploy" to make it appear that she was taking items from the refuse station.

[59] Ms Smith said she had staged apparent removal of several items after having been warned by two workers to watch out for another worker who was plotting against her and she wanted to "flush out" who she thought that was. Mr Kennedy did not accept that explanation. Ms Smith accepted in her oral evidence to the Authority that she understood now that her explanation sounded unlikely and not credible but said that was what she was thinking at the time. If what Ms Smith said about her motivation for her actions was true, her conduct fell short of her good faith obligations as a manager (and, as such, a representative of the employer to those employees). If she had a concern about one or some workers' attitude towards her, she should have addressed those openly rather than do something that, on her own account of it, was intended to mislead and deceive others. What she did backfired badly and contributed to the situation giving rise to her grievance. Section 124 of the Act required that she bore some consequence for it.

[60] As a result of this reduction, the compensation WDS must pay Ms Smith is \$5000.

(vi) Costs

[61] Costs are reserved. The parties are encouraged to resolve costs between themselves. If they are unable to do so, Ms Smith may lodge and serve a memorandum on costs within 28 days of the date of this determination and WDS will have 14 days from the date of service to lodge a memorandum in reply. No submission on costs may be made outside this timetable, unless prior leave has been sought.

[62] If the Authority were called upon to determine costs, it would likely do so (subject to the information and submissions in the parties' memoranda) on the basis of its usual daily tariff, adjusted appropriately for the particular circumstances of the case and the application of the general principles set out in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

Robin Arthur
Member of the Employment Relations Authority