

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 84
5386887

BETWEEN CARL TIERNEY
 Applicant

A N D SUNTRAP LOBSTER INN
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Mark Saunders, Counsel for Applicant
 Tony Robinson, Counsel for Respondent

Investigation meeting: 21 March and 9 April 2013 at Christchurch

Submissions Received 21 March and 9 April 2013

Date of Determination: 10 May 2013

DETERMINATION OF THE AUTHORITY

- A. Carl Tierney was unjustifiably dismissed.**
- B. Suntrap Lobster Inn Limited must pay Carl Tierney \$1,190 in lost wages.**
- C. Suntrap Lobster Inn Limited must pay Carl Tierney \$5,100 compensation.**
- D. Carl Tierney is not entitled to the bonus.**

Employment relationship problem

[1] Carl Tierney was employed by Lobster Inn as its Head Chef from 18 June 2011. Julie and Neil Pablecheque are the directors of the company and manage the business. On 13 April 2012 they were out of town for the night. Mr Tierney worked

that night. The second chef on duty was Aaron Pablecheque, Mr and Mrs Pablecheque's son. Mr Tierney sent Aaron Pablecheque home at about 8.30 p.m.

[2] The bar manager on duty was Aaron Reid. Aaron Reid made a complaint to Mr and Mrs Pablecheque about Mr Tierney's behaviour on 13 April 2012. He told them that Mr Tierney seemed either 'stoned' or intoxicated. He wrote a note stating that he believed Mr Tierney had been *under the influence while working*. Aaron Pablecheque told his parents that Mr Tierney had *arrived hypo* but then acted *like he hadn't been to sleep for 3 days – eyes half shut, spaced out ...picked on other staff – mean*. He said that Mr Tierney was *slammed or high*.

[3] The next day Mr Tierney was due to start the lunch shift at 12 midday. He did not turn up for work. Mrs Pablecheque called him on his landline and his mobile phone. Charlotte Blok, a Lobster Inn waitress and Mr Tierney's partner, had started her shift at 11 a.m. She tried to telephone him on the landline and his mobile phone but was unable to reach him at home.

[4] Mrs Pablecheque called Aaron Pablecheque in to do the shift. At 2.10 p.m., after Ms Blok had finished her shift and gone home, Mr Tierney rang Mrs Pablecheque to say that he was sorry to have missed his shift but that he had slept through his alarm. He asked if he should come in and Mrs Pablecheque told him to just come in for his evening shift.

[5] On 15 April Lobster Inn invited Mr Tierney to a meeting on 16 April to discuss allegations of intoxication while on duty, failure to turn up for his shift and his relationship with team members. He was advised to bring a support person and told that *the matters are extremely serious and termination of your employment with us is being considered*.

[6] Mr Tierney said *I don't drink 8 hours before a shift and I don't do drugs*. He offered to take a drug test and provided a urine sample on 16 April 2012. The respondent agreed to pay for the test. A follow-up meeting was scheduled to take place on 20 April 2012. However, after interviewing several staff the Pablecheques brought the meeting forward to 17 April. Mr Tierney was summarily dismissed that day for serious misconduct. The drug test results only became available on 18 April and showed that none of the drugs tested for were detected. Alcohol was not one of the drugs tested for.

[7] Mr Tierney enquired on what grounds he had been dismissed and was told he was dismissed for intoxication while on duty and for his relationship with team members. Mr Tierney believes that he was dismissed for drug use. He is insistent that he never uses drugs. He claims that the dismissal was substantively unjustified and procedurally unfair.

[8] Mr Tierney claims lost wages of \$1,400 for two weeks after the dismissal, compensation for humiliation, loss of dignity and injury to his feelings and the payment of a bonus of \$2,000 that he would have been entitled to under his employment agreement if he remained employed with the Lobster Inn on 18 June 2012.

Determination

[9] The issues I need to decide are:

- (a) whether Mr Tierney was unjustifiably dismissed,
- (b) whether Mr Tierney is entitled to the \$2,000 bonus for the completion of one year's service,
- (c) whether Mr Tierney is entitled to any remedies,
- (d) payment of legal costs.

[10] Lobster Inn denies that it unjustifiably dismissed Mr Tierney. It says that in coming to the decision to dismiss him it considered the April allegations and took into account all his actions over the whole period of employment. The Pablecheques had lost trust and confidence in Mr Tierney by then. Lobster Inn says that the \$2,000 bonus would only be payable upon completion of one year's full service and that since Mr Tierney was dismissed before he had worked a full year he is not entitled to it.

[11] Lobster Inn says if Mr Tierney was unjustifiably dismissed, which it denies, his conduct was blameworthy and directly causative of his dismissal. As such, it says any remedies should be reduced by up to 100%.

[12] I held an investigation meeting on 21 March 2013 at which all parties were present. I heard from Mr Tierney and Ms Blok, Mr and Mrs Pablecheque, Aaron

Pablecheque and Aaron Reid. There is a conflict of evidence between the Pablecheques and Mr Tierney about what was said at the disciplinary meetings.

[13] At the investigation meeting it became clear that there was a page missing from the typed notes of the disciplinary meeting on 16 April 2012. It also became clear that Mrs Pablecheque's original handwritten notes, from which she produced the typed notes, had not been exchanged. At the end of that meeting I issued a direction that the missing typed page should be provided and that the original handwritten notes must also be provided.

[14] It also became clear that Mrs Pablecheque viewed security camera footage on 17 April 2012 before Mr Tierney was dismissed. She formed the view that the footage showed that he was dishonestly drinking a bottle of soft drink he had taken from the Lobster Inn supplies. I also ordered that footage be provided to me and to Mr Tierney.

[15] The missing typed page and the security camera footage were supplied along with handwritten notes of the 16 April 2012. On 9 April 2013 I held a further investigation meeting. At that meeting Mrs Pablecheque's handwritten notes of the 17 April 2012 meeting were supplied. Mr Tierney responded to the further evidence. I also questioned Mr and Mrs Pablecheque. Counsel made further submissions.

[16] Mr Tierney questions the authenticity of the further written evidence produced. He alleges that the missing middle page and the hand written notes were created after the first investigation meeting to shore up the respondent's case. I reject that suggestion. I prefer the evidence of Mr and Mrs Pablecheque about the meeting notes to Mr Tierney's view. I accept the explanation for why the typed page was not presented earlier being that it was somehow missed in the photocopying process in Mr Robinson's office. I also accept the explanation that there was no intent to withhold or conceal evidence and the retention of the handwritten notes was inadvertent.

Was Mr Tierney unjustifiably dismissed?

[17] Lobster Inn says that it had a number of problems with Mr Tierney's behaviour and performance since he started work and that the complaints about his behaviour on 13 April 2012 were the last straw. Mr and Mrs Pablecheque say that

they acted under legal advice in conducting the investigation and disciplinary process, conducted a thorough investigation and acted fairly at all times.

[18] Mr and Mrs Pablecheque say that the drug test results were irrelevant as Mr Tierney was dismissed because of his behaviour on the evening of 13 April and not because he was on drugs or had been drinking before work. They also considered his relationship with other staff to be unacceptable.

[19] In a letter dated 7 May 2012 the respondent wrote:

Yes, Carl was fired for serious misconduct on counts 1 & 3...

Upon taking information on board that notified us that most drugs would be out of his system by one to two days, a drug test would be a waste of time. It was Carl who offered to do this test and we said if he decided to do so that we would pay for this unaware at that time of the above information.

We believe we followed procedure to the letter.

In our house rules it states abuse of a team member is serious misconduct.

3/ (sic) Charlotte Blok was one of many Carl was abusive to.

[20] After Mr Tierney's dismissal he offered to submit to hair analysis drug testing at the respondent's expense. He provided information to the respondent that a hair analysis test could detect illegal drugs for a period of a maximum of 90 days prior to the date of testing. The respondent did not take him up on the offer.

[21] The test of justification of a dismissal is set out in section 103A of the Employment Relations Act 2000. I need to look at whether the way that the respondent acted was what a fair and reasonable employer could have done in all the circumstances at the time.¹ It is not up to me to substitute my view of the employer's action but instead to objectively assess it.²

[22] I also need to consider the procedural considerations in s.103A(3). In this case I need to consider whether:

- (a) having regard to the resources available to the respondent it sufficiently investigated the allegations before dismissing Mr Tierney;

¹ Section 103A(1)(b)

² *Angus v Ports of Auckland* [2011] EmpC 160

- (b) it raised its concerns with Mr Tierney before dismissing him;
- (c) it gave Mr Tierney an opportunity to respond to its concerns before dismissing him; and
- (d) whether the respondent genuinely considered Mr Tierney's explanations before dismissing him.

[23] I may also consider any other factors I consider appropriate³. I must not determine the dismissal to be unjustifiable solely because any defects in the process were minor and did not result in Mr Tierney being treated unfairly⁴.

[24] The full Employment Court in *Angus and McKean v Ports of Auckland*⁵ provided guidance on how the justification test should be applied in practice:

The legislation (in subss (3), (4) and (5)), although expressing this for the first time, continues the emphasis on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor, and to determine that this will not be fatal to justification. A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified.

[25] There are a number of aspects of the procedure leading to Mr Tierney's dismissal which concern me.

[26] The letter inviting Mr Tierney to the 16 April meeting did not specify *when* Mr Tierney was alleged to have been intoxicated while on duty and who had alleged that. The letter did not specify which team members Mr Tierney was alleged to have a poor relationship with. It did not specify that the respondent had been told by Aaron Pablecheque that on the evening of 12 April 2012 when Ms Blok came into the kitchen to collect dessert spoons Mr Tierney was so rude to her that Aaron told him to *pull his head in* and that Ms Blok stormed out of the kitchen.

[27] During the 16 April meeting Mr Reid's note was read to Mr Tierney. It said:

I believe Karl (sic) to be under the influence while working, from his body language & not making eye contact with other staff & general manner.

³ Section 103A(4)

⁴ Section 103A(5)

⁵ Ibid at [26]

[28] However, with such a serious allegation a copy of the note should have been attached to the letter inviting Mr Tierney to the disciplinary meeting to allow him to fully prepare to answer the allegation.

[29] In addition, at the 16 April meeting Mr Pablecheque told Mr Tierney *also other staff have verified this behaviour*. However, he was not told who the other staff were or exactly what they had said about his behaviour on 13 April 2012.

[30] Although one of the reasons for Mr Tierney's dismissal was an allegation about his attitude to other staff and specifically that he had been rude to or *got nasty with* Ms Blok the respondent did not interview Ms Blok about that allegation. The Pablecheques did not ask Aaron Pablecheque to be specific about what was said to Ms Blok so that could be put to Mr Tierney. Those were serious defects in the investigation process and mean that the Pablecheques were not able to tell Mr Tierney what he allegedly said to Ms Blok that was considered to have been abusive. The Pablecheques considered Mr Tierney's bare denial at the 16 April meeting that he *can't remember that* to have been an insufficient explanation. However, they had not given him any detail of what he was supposed to have said. Without knowing what had been said a fair and reasonable employer would not have decided that the allegation that he was abusive to Ms Blok was proved.

[31] Further investigation was carried out by Mr Pablecheque after the 16 April meeting. He spoke to the other staff members who had been working on the evening of 13 April. Some of them he spoke to for the second time in order to assess whether his view that Mr Tierney had been stoned or intoxicated was supported by their evidence. That further investigation was a fair way to respond to Mr Tierney's denial that he would ever drink within 8 hours of a shift and that he ever took drugs. However, none of the further information gathered was put to Mr Tierney in the second meeting on 17 April. The written statements from the staff were all collected after Mr Tierney was dismissed and had raised his personal grievance.

[32] The Pablecheques agreed to pay for a drug test and Mr Tierney provided the sample. However, before the results were available Mr Pablecheque rang a *particular police sergeant in the drug squad* and asked about how long various drugs remained detectable by urine sample. He was told that some drugs, specifically P, *would be out of your body within 24 hours* and formed the view that the drug test would not be very useful as the sample was taken 3 days after the evening in question. That was the main

reason the second meeting was brought forward from 20 April to 17 April. Mr Tierney was unaware that the Pablecheques relied on that information from the police officer. He was therefore unable to challenge that view. In addition, although the Pablecheques considered that Mr Tierney may well have been under the influence of alcohol or even been hung-over on the evening of 13 April they did not specifically put those allegations to Mr Tierney. In agreeing to pay for him to undergo a drug test the respondent contributed to Mr Tierney's view that he was being investigated for and had been dismissed for drug use; although the decision to dismiss was made before the test results were available.

[33] The written statements gathered from the staff about 13 April once Mr Tierney raised his personal grievance contributed to Mr Tierney's post-dismissal belief he had been dismissed for drug use:

- (a) Aaron Pablecheque wrote Mr Tierney was *spaced out*.
- (b) Aaron Reid wrote his *eyes were bloodshot and semi closed, it looked like he was stoned to my opinion and his body language was saying the same*.
- (c) Melissa Guthrie wrote *he was acting very strange and zoned out, definitely not in a state to be in a workplace*.
- (d) Madison Baker-Flynn wrote *he also seemed a little dazed and out of it*.

[34] There is also evidence that on the night of 13 April Mr Reid described Mr Tierney to Melissa Guthrie as being *slammed*.

Were the Pablecheques entitled to take into account their view that Mr Tierney had stolen drinks?

[35] On 17 April 2012 before the last disciplinary meeting Mrs Pablecheque asked Mr Tierney if he knew where some small bottles of fizzy drink had gone which had been stored for a function that was to be on 20 April 2013. He told her he did not know anything about it but that he had seen Aaron Pablecheque drinking one of them a few nights earlier. What Mrs Pablecheque did not tell him was that she had reviewed some CCTV footage of the evening of 13 April which she considered showed him to be drinking a small bottle of fizzy orange which he had taken without permission and

without following the procedure for staff purchasing drinks⁶. She did not tell him that she was already aware Aaron had drunk one of the bottles but that he had paid for it.

[36] Mr Tierney had previously been spoken to about taking drinks without paying for them. Mrs Pablecheque's typed notes for the week ending 15 January 2012 record:

Drinking orange juice on the job from the bottle – not paying for it. Hiding it in his fridge. Checked fridge Sunday 15/1/12 another nearly empty bottle in fridge ... Returned to work Thurs 19th Jan – bottle of juice in fridge nearly all gone – taken from upstairs chiller

[37] Her notes from 15 February 2012 record:

Remind that only beverage that is free to staff is tea/coffee/water – all other is 20% staff discount as per house rules. Orange juice being drunk over the summer. Not acceptable.

[38] The Pablecheques took their view that he had wrongly taken drinks into account in making their decision to dismiss Mr Tierney. Mr Pablecheque says Mr Tierney:

...had consumed drinks without paying for them and actually concealed bottles he had wrongfully taken

[39] However, the existence of the footage and that they saw it as evidence that he was stealing was never put to Mr Tierney as part of the disciplinary process. Mr Tierney had no opportunity to view the footage. He was not told that the allegation that he had wrongly taken drinks was also being considered and therefore he could not respond to it. That was unfair.

Was the decision to dismiss already made before the 17 April meeting?

[40] Mr Tierney says that the respondent had already made up its mind to dismiss him before the 17 April 2012 meeting at which it asked him if he had anything further to say about *the intoxication*.

[41] The Pablecheques took advice during the disciplinary process from Mr Alan Sciascia of HANZ. In an e-mail to Mr Sciascia on 17 April 2012 at 12.06 p.m. (before the meeting with Mr Tierney) Mrs Pablecheque wrote a précis of the further investigation, including their findings after interviewing the staff, and that they had a discussion with the police about drug testing and with David Shovel from the Licensing Authority about Mr Reid's ability to judge if someone was 'under the influence'. The e-mail says:

⁶ Mrs Pablecheque's brief of evidence, paragraphs 23-25

We have reached a decision based on the following.

.... If he was on P the likelihood of drugs being detected would be virtually nil as it leaves the system 1-2 days after the event.

Based on the above information we feel we have no choice but to follow through with dismissal. He has shown irrational behaviour, been abusive once again to staff and behaved in a manner that is highly indicative that he is taking some form of drug/substance which is affecting his performance at work.

Attached is a letter which we will give him at the end of lunch service advising him of the meeting being brought forward to this afternoon as we have reached a decision. The formal letter of dismissal based on the template you previously sent through will be completed and issued to him at this meeting.

[42] At the investigation meeting Mr and Mrs Pablecheque say that e-mail should not be taken literally as they had written two different letters; that is, the dismissal letter referred to and another letter. The second letter would have been given to Mr Tierney if he gave them *an explanation in an honest and genuine way* for his behaviour and said that the respondent would undertake yet further investigation and reconvene the meeting for 20 April.

[43] Despite Mr and Mrs Pablecheque's evidence at the investigation meeting that the dismissal was not about drugs but was because of Mr Tierney's behaviour and attitude on 13 April it is clear that on 17 April 2012 they did consider that Mr Tierney was taking some kind of drug or other substance that affected his work.

[44] In light of the lack of ambiguity in the e-mail to Mr Sciascia I consider that the outcome of the 17 April meeting was largely pre-determined in the Pablecheques' minds. This in itself renders the dismissal unjustified.

Were the Pablecheques entitled to take into account the entire period of the employment relationship in making the decision to dismiss?

[45] Mr Tierney concedes that he received a verbal warning on 6 September 2011 for how he spoke to a former staff member called Amber. He was reminded that he needed to communicate respectfully with other staff and to work as a team with them.

[46] He also received a written warning on 30 September 2011 for a poor relationship with senior management, a poor relationship with other staff, including verbal abuse, and poor performance with meals. He was told that two staff members had left because of how he treated them.

[47] The Pablecheques spoke to Mr Tierney in the week ending 19 February 2012 about him leaving the premises during his shifts, not cleaning the kitchen adequately, not writing up the waste book and falsifying entries in the diary recording the fridge temperature readings. Mr and Mrs Pablecheque say that this was a further verbal warning.

[48] Generally speaking an employer is entitled to take into account all relevant considerations in coming to a decision about a disciplinary outcome. In Mr Tierney's case that included the previous warnings, verbal and written, as well as other less formal discussions between him and the respondent about his ongoing performance. The Pablecheques were also entitled to take into account the fact that Mr Tierney failed to turn up for his lunch shift on 14 April, just hours after his alleged intoxicated appearance on 13 April. The Pablecheques say that they did not take that into account in coming to the decision to dismiss Mr Tierney because he told them he had slept through his alarm. They accepted that as a reasonable excuse.

[49] However, the breaches of the section 103A(3) minimum standards of procedural fairness render the decision to summarily dismiss Mr Tierney a decision a fair and reasonable employer could not make in all the circumstances at the time. Therefore, Mr Tierney has a personal grievance of unjustifiable dismissal.

[50] In this case the procedural failings also mean that the substantive finding that Mr Tierney was abusive to Ms Blok on 13 April was not one that a fair and reasonable employer could make in all the circumstances at the time. The finding that Mr Tierney was intoxicated in some way on 13 April is unsafe insofar as it suggests that Mr Tierney had been using illegal drugs. At the time of making the decision to dismiss Mr Tierney there was insufficient evidence that he was under the influence of illegal drugs on 13 April. It remains unclear what reason there was for Mr Tierney's demeanour and appearance that night.

Should Mr Tierney receive the \$2,000 bonus?

[51] Schedule A of Mr Tierney's individual employment agreement states:

*Wages \$20 per hour plus 3 yr bonus incentive after each years (sic)
completed employment, payable on the anniversary of each year:*

\$2000 after 1st year - payable 18th June 2012

[52] Mr Tierney says that if he had not been unjustifiably dismissed he would still have been working at The Lobster Inn almost 9 weeks later on 18 June 2012 and would have been eligible for the \$2,000 bonus.

[53] There were complaints made about Mr Tierney's lack of performance on the evening of 13 April. He also missed his next shift on 14 April. Had the investigation and disciplinary process been undertaken in a more robust way, and concerns about his performance in addition to or instead of allegations of intoxication or drug use been explored it is possible that Mr Tierney may have been dismissed in April anyway. The complaints made about his behaviour on 13 April were the latest of a number of issues over the course of his employment. The respondents noted that Melissa Guthrie, Aaron Reid, Aaron Pablecheque and the kitchen hands had complained to them of Mr Tierney's attitude towards them over the Easter 2012 period. Also in the 16 April meeting the Pablecheques raised some of their ongoing concerns:

[re] last meeting – cleaning – first 10 days good then all going downhill again – kitchen at a 5-6 – not consistent, food scraps lying around, not checking jobs done and in too much of a hurry to get out of here

[54] I do not accept that had he not been wrongfully dismissed on 17 April Mr Tierney would have remained employed as at 18 June 2012. I am not confident that even had the outcome of the disciplinary process been a further warning, rather than dismissal, that the relationship between employer and employee would have survived a further two months. Therefore, Mr Tierney is not entitled to the \$2,000 bonus.

Remedies

Lost remuneration

[55] Under section 128 of the Employment Relations Act having found that Mr Tierney has a personal grievance I must order the respondent to pay him the lesser of the sum of lost remuneration or 3 months' ordinary time remuneration. Mr Tierney has applied for \$1,400 in lost wages; which equates to 70 hours of work. I am satisfied that he adequately mitigated his loss by moving to Christchurch and obtaining a new job a little over two weeks after his dismissal. Therefore, the amount claimed is the lesser of the two sums and is due to Mr Tierney.

Compensation

[56] Mr Tierney has applied for compensation under s.123(1)(c)(i) for hurt, humiliation and injury to feelings. His evidence was that he was very upset to be dismissed for what he understood to be allegations of drug use. He *felt depressed and had sleeping difficulties*. He provided a copy of his GP's notes from 27 April 2012 which shows that he reported *depression and stress from situation of dismissal*. He was prescribed sleeping pills and anti-depressants.

[57] Mr Tierney said that as soon as he got a new job in Christchurch he recovered and stopped taking the anti-depressants. He and Ms Blok moved to Christchurch on 4 May 2012 and he started his new job about 3 days later.

[58] Mr Tierney considers that the Pablecheques told Advanced Personnel that he had been dismissed for taking drugs. Mrs Pablecheque acknowledges that when she called Advanced Personnel looking for someone to replace Mr Tierney she said that he had been dismissed for serious misconduct. However, she denies having said anything about drug use. It is not proved that the respondent told Advanced Personnel that Mr Tierney had been dismissed for drug use.

[59] In all the circumstances I consider compensation of \$6,000 is warranted.

Contribution

[60] I need to consider whether Mr Tierney contributed to the situation giving rise to his personal grievance in any blameworthy way and if he did whether the remedies should be reduced⁷. Mr Tierney slept in and missed the next shift after the shift in which he was alleged to have been stoned or intoxicated. Despite the Pablecheques not relying on that as a reason for summary dismissal I consider that missing the shift did contribute to the situation giving rise to the personal grievance. I consider that to have been blameworthy behaviour.

[61] However, the evidence that Mr Tierney was affected by drugs or alcohol on 13 April is insufficient to conclude that he contributed to that aspect of the situation giving rise to the personal grievance. Despite Mr and Mrs Pablecheque's insistence at the investigation meeting that *intoxication*, with its implication of drunkenness, was relied on

⁷ Section 124

it is clear that at the time of deciding to dismiss Mr and Mrs Pablecheque considered Mr Tierney to have been affected by drug use rather than drunk or hung over.

[62] Video footage of Mr Tierney drinking a soft drink in the same shape bottle as those that had gone missing from the Lobster Inn's stores is insufficient proof that Mr Tierney stole from the respondent and then lied about it. In order to be proved an allegation of something that amounts to criminal behaviour must be proved to a high level; higher than the usual civil standard of more likely than not. The video footage takes that allegation to the 'more likely than not' level but no further. Therefore, I do not find that Mr Tierney contributed to the situation giving rise to the personal grievance through drinking a soft drink at work.

[63] There is no evidence of what Mr Tierney was alleged to have said to Ms Blok on the night of 12 April. When I questioned Aaron Pablecheque about it he was unable to recall the words used. Ms Blok denied that such an encounter happened. I consider that Mr Tierney's treatment of Ms Blok in no way contributed to the situation giving rise to the personal grievance.

[64] The witness statements from Mr Reid and Aaron Pablecheque about Mr Tierney's performance on 13 April show that Mr Tierney was perhaps under par but there was nothing so concerning about his behaviour that any of the staff thought to challenge him about it or to telephone Mr and Mrs Pablecheque for advice. There was no evidence that suggests Mr Tierney was acting dangerously in any way to himself or any other staff. There is insufficient evidence to conclude that Mr Tierney's behaviour on 13 April 2012 contributed to the situation giving rise to the personal grievance.

[65] Having considered all of Mr Tierney's behaviour over the relevant few days I consider that his remedies should be reduced by 15%.

Costs

[66] Costs are reserved. Mr Tierney is entitled to a reasonable contribution to his legal costs. The parties are encouraged to agree on costs. Generally costs in the Authority proceed on the basis of a daily tariff of \$3,500 for a full day of hearing.

[67] If the parties are unable to agree Mr Tierney may apply for costs within 28 days of this determination and the respondent may have 14 days in which to reply.

Christine Hickey
Member of the Employment Relations Authority