

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 113
5646924

BETWEEN LUISA TOAISI
 Applicant

A N D FREE RANGE EGG AND
 POULTRY COMPANY LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Mark Nutsford, advocate for Applicant
 Dave Jaques, Advocate for Respondent

Investigation Meeting: 21 and 28 February 2017 at Auckland

Submissions Received: 13 March 2017 from Applicant
 14 March 2017 from Respondent
 17 March 2017 from Applicant

Date of Determination: 13 April 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mrs Toaisi was employed by the Free Range Egg and Poultry Company Limited (FRENZ) as a pack house worker under an individual employment agreement dated 23 May 2016.

[2] She was paid \$16 an hour and although her hours of work were stated to be from 8.00am–4.30pm in practice she often worked very long days, sometimes starting at 6.00 am and not finishing work until 6.00 or 7.00pm.

[3] Mrs Toaisi claims that she was unjustifiably dismissed from her employment on or around 14-20 September 2016 (the actual date the employment ended is in dispute). Mrs Toaisi claims that her dismissal was unjustified.

[4] FRENZ denies that Mrs Toaisi was dismissed. It says that she resigned of her own free will after an incident occurred near the end of her shift on 14 September 2016 which involved Mrs Toaisi becoming threatening towards a co-worker Mrs Nithy Dudleyheeth.

[5] The background to the incident is that the entire team had had a long hard day. An expensive new machine had been installed and the workers were working out how to work with it, so everyone was under considerable pressure. Mrs Toaisi had been working since 6.00am that morning and the incident occurred around 6.30pm.

[6] Mrs Toaisi says she told Mrs Dudleyheeth to "*clean up her mess*", meaning her work station, to which Mrs Dudleyheeth replied that she had already done so. Mrs Toaisi disagreed and the incident escalated to the point Mrs Toaisi ended up shouting at Mrs Dudleyheeth and following her around the workplace.

[7] Although Mrs Toaisi claims that Mrs Dudleyheeth had raised her voice back, that evidence was contradicted by other witnesses. After carefully considering all of the evidence I heard about this incident I find on the balance of probabilities that Mrs Dudleyheeth was scared of Mrs Toaisi so did not shout back at her but instead tried to move away from Mrs Toaisi.

[8] I accept Mrs Dudleyheeth's evidence that she became terrified at Mrs Toaisi's behaviour towards her and ended up in the toilets shaking and crying. The incident caused Mrs Dudleyheeth also asked the manager Mr Geethanponkalan (who was also her husband) if she could leave work early. Instead of allowing his wife to leave work early, Mr Geethanponkalan stepped in to try to calm the situation down.

[9] I consider that Mr Geethanponkalan handled the incident appropriately in the circumstances. He attempted to find out what the problem was, to separate the women, and to get them both to calm down.

[10] However the situation continued to escalate and despite being told to stay away from Mrs Dudleyheeth, Mrs Toaisi continued to follow her around in an

aggressive manner. At that point Mr Geethanponkalan decided it best to remove Mrs Toaisi from the workplace so she could cool down.

[11] Mr Geethanponkalan forcefully told Mrs Toaisi to “*go home*” more than once in an attempt to deescalate the situation. I accept Mr Geethanponkalan’s evidence that he told Mrs Toaisi to go home instead of allowing his wife to leave early because he wanted to appear impartial (and not favouring his wife).

[12] Mrs Toaisi told the Authority that she interpreted the directions to go home as advice that she was being dismissed.

[13] Mrs Toaisi accepts that after initially leaving work she went back onto the premises to collect her phone and jacket. Mr Geethanponkalan saw this and went over to her to find out why she had returned after he had directed her to leave.

[14] When Mr Geethanponkalan found out that Ms Toaisi wanted to collect some personal items he walked with her to collect those items and then walked her out the door again. Mrs Toaisi admits that as she re-entered the premises she became even more angry than she already was because she says she saw Mrs Dudleyheeth staring at her.

[15] Mrs Toaisi’s representative, Mr Nutsford described the situation as Mrs Toaisi “*seeing a red haze*”. Mrs Toaisi accepts that she shouted at Mrs Dudleyheeth “*why did you look at me, I’m going to kill you*”. Mr Toaisi says she did not mean it literally and was just letting off steam because she was so angry. However I accept that Mrs Dudleyheeth took that threat seriously and became very concerned about her safety. She also subsequently laid a complaint with the police.

[16] As Mrs Toaisi left the premises again she passed FRENZ’s CEO, Mr Rob Darby who was working in the area, who told her to, “*Listen to Dudley, he is your boss*”. Mrs Toaisi says that she told Mr Darby, “*Watch out for Dudley, he is a liar, but thank you for giving me the job*”. Mr Darby told the Authority that he did not think anything of that at time, but now in hindsight understands that Mrs Toaisi may have been saying good-bye by thanking him for giving her the job.

[17] Mr Darby told the Authority that he overheard the incident in terms of hearing raised voices but did not know exactly what was going on. Mr Darby said he could

see that Mr Geethanponkalan was dealing with the situation so he (Mr Darby) did not consider he needed to become involved.

[18] Mrs Toaisi is Tuvaluan from the island of Nui. English is her second language and she required an interpreter during the Authority's investigation meeting. Mrs Toaisi says that she has some difficulties understanding and reading English but that she can get by with general day-to-day conversational English. I consider that the language barrier likely played a role in the misunderstanding and miscommunication that occurred between the parties.

[19] Mrs Toaisi's account of leaving the workplace is that she was confused, humiliated, shamed, angry, and frustrated, and wondered why Mr Darby did not call her into his office to try to sort out the problem when he saw her leaving work. Mr Darby says he did not see any reason to become involved because Mr Geethanponkalan had the matter in hand.

[20] Mr Geethanponkalan's evidence was that he believed Mrs Toaisi was going home to cool off and that they would talk about the issue the following day when she had calmed down. Mr Geethanponkalan believed that Mr Darby was going to deal with Mrs Toaisi's concerns the next day while Mr Darby believed Mr Geethanponkalan had sorted the situation out.

[21] Either way, no arrangements were ever made for Mrs Toaisi to meet with Mr Darby to discuss the situation as she had requested when she left. Mrs Toaisi said she waited by the telephone on 15 September for a call to tell her to come in to work to sort the situation out but it never happened.

[22] I consider that Mrs Toaisi acted consistently with her belief that she had been dismissed because she contacted WINZ immediately to tell them she had been dismissed and to discuss what financial support was available to help her support her three dependent children when she had no job, so no income.

[23] No one from FRENZ contacted Mrs Toaisi on Thursday 15th or Friday 16th of September 2016 when Mrs Toaisi did not attend work. Mr Darby and Mrs Michelle Williamson, the Financial Administration Manager for FRENZ said that they did not consider it odd that Mrs Toaisi was not at work because often staff just fail to turn up to work.

[24] While that may be the case, I do not consider that an acceptable response in Mrs Toaisi's situation because there had been a heated incident occur the evening before Mrs Toaisi had been ordered off the premises, one of Mrs Toaisi's colleagues had made a complaint that she had been on the receiving end of a threat to kill, and Mrs Toaisi had thanked Mr Darby for the job as she left the workplace.

[25] Mr Geethanponkalan also accepts that Mrs Toaisi had said she wanted to talk to Mr Darby about her concerns and Mr Geethanponkalan response was that she could do that the following day. I therefore consider in these particular circumstances that FRENZ had an obligation to make inquiries with Mrs Toaisi to determine why she was not at work. Had it done so the miscommunication that appears to have arisen would have been discovered.

[26] Mr Darby thought that Mrs Williamson was managing the matter. Mrs Williamson thought that Mr Geethanponkalan was handling the matter. Mr Geethanponkalan was asked to contact Mrs Toaisi so he delegated that to one of his subordinates Mr Enosa Faiaki, who was apparently supposed to contact Mrs Toaisi immediately but who did not do so until Sunday. Mr Faiaki was Mrs Toaisi's Team Leader.

[27] FRENZ was not clear about what instructions Mr Faiaki was given and I find that FRENZ was also responsible for making assumptions about what had been discussed without checking with Mr Faiaki to find out exactly what he had told Mrs Toaisi.

[28] For example, FRENZ incorrectly believed that Mr Faiaki had contacted Mrs Toaisi on Friday 16 September but phone records show that he did not make contact with her until the evening of Sunday 18 September.

[29] Although Mr Faiaki provided an unsigned witness statement he did not attend either of the investigation meetings so his evidence could not be tested. The unsigned witness statement also contradicted Mrs Toaisi's evidence, which was given under oath and was subject to cross-examination. I have therefore preferred Mrs Toaisi's account of what Mr Faiaki told her over his unsworn witness statement.

[30] Mrs Toaisi said that Mr Faiaki just told her that she needed to come into work to sign for her pay. Mrs Toaisi says that advice confirmed her view that she had been dismissed on the evening of 14 September 2016. She was also under severe financial

pressure so understood that she would not be receiving her final pay unless she went in to work to sign for it. That is why she went into work on 20 September 2016.

[31] On 16 September 2016 WINZ had faxed FRENZ requesting earnings details for Mrs Toaisi. Mrs Williamson told the Authority that she found that odd because they had been expecting Mrs Toaisi to return to work.

[32] I consider that this should have alerted Mrs Williamson and FRENZ to the fact that there was a potential issue in terms of Mrs Toaisi's employment status which it then should have addressed. I consider it to be another failure that Mrs Williamson did not respond to WINZ until after she had met with Mrs Toaisi on 20 September 2016.

[33] On 15 September 2016, FRENZ prepared a draft disciplinary letter which it intended to give to Mrs Toaisi in person when she returned to work. The disciplinary letter was dated 15 September 2016 and it alleged that she had engaged in serious misconduct regarding her actions on the evening of 14 September 2016 which were categorised as "*yelling at and threatening a fellow worker*".

[34] Although this draft disciplinary letter was prepared it was never provided to Mrs Toaisi. However I consider it gives an insight into FRENZ's thinking at the material time and may explain its failure to adequately address Mrs Toaisi's non-attendance at work after the incident on 14 September.

[35] Mrs Toaisi turned up at the workplace on the morning of 20 September 2016. She met with Mrs Williamson because Mr Geethanponkalan and Mr Darby were apparently offsite when Mrs Toaisi turned up.

[36] There is a dispute about what was said and done in this meeting. Mrs Toaisi told the Authority she believed she was coming in to collect her final pay. She says Mrs Williamson told her she had to sign a letter that was presented to her before her pay would be released.

[37] Mrs Toaisi says she only signed the document Mrs Williamson gave her because she (Mrs Toaisi) believed she had to sign it before her final pay would be released to her. Mrs Williamson has a different account of their discussion. Mrs Williamson accepts that she had pre-prepared a written resignation for Mrs Toaisi which was dated 16 September 2016 (the previous Friday).

[38] Mrs Williamson claims she asked Mrs Toaisi if she wanted to see Mr Geethanponkalan, to which Mrs Toaisi replied that she did not.

[39] FRENZ accepts that there was no meeting scheduled nor was Mrs Toaisi told that she needed to meet with either Mr Geethanponkalan or Mr Darby to discuss her situation, despite Mrs Toaisi having stated on the evening of 14 September 2016 as she was leaving that she wanted to speak to Mr Darby about the situation.

[40] Mrs Williamson claims that on 20 September she asked Mrs Toaisi if she was coming back to work to which Mrs Toaisi replied “no”. Mrs Williamson says that she then asked Mrs Toaisi if that meant “*she was resigning*” and claims that Mrs Toaisi said “yes”. Mrs Williamson agrees that she was the person who raised the issue of resignation, not Mrs Toaisi.

[41] Mrs Williamson’s evidence is that she told Mrs Toaisi that if she was resigning FRENZ would need a resignation letter so that they could process her final pay. Mrs Williamson said the whole conversation took about five minutes. Mrs Williamson then presented Mrs Toaisi with the resignation letter Mrs Williamson had prepared the previous week.

[42] I have accepted Mrs Toaisi’s evidence that she believed that she had to sign the resignation letter before she would be paid.

[43] I also accept Mrs Toaisi’s evidence that as a solo parent without any other income she felt under considerable pressure to do what was required to ensure she received her pay. I accept Mrs Toaisi’s evidence that she did not know she was signing a resignation letter and did not want to resign so would not have signed the letter if she knew what it meant. I accept that Mrs Toaisi genuinely thought she had already been dismissed and so had just signed the letter to get her final pay.

[44] I consider it significant that when giving evidence to the Authority Mrs Williamson said that she told Mrs Toaisi that she needed to sign the letter so that her final pay could be made up. I consider that advice was likely to have confirmed Mrs Toaisi’s view that she needed to sign the resignation letter before receiving her outstanding wages from FRENZ.

[45] I am not satisfied on balance of probabilities that Mrs Williamson made it clear to Mrs Toaisi that she was resigning and that the letter would extinguish the

employment relationship without any further communications about the incident on 14 September 2016. I was not satisfied from the evidence I heard that Mrs Williamson used the term “*resignation*” or that Mrs Toaisi understood the legal effect of the resignation letter that had been put in front of her to sign.

[46] Mrs Toaisi has English as a second language and I accept that her written command of English is not as strong as her ability to understand conversational English. FRENZ was obliged to ensure that Mrs Toaisi understood the legal implications of the resignation letter it had prepared before she signed it. I am not satisfied that occurred.

[47] I consider it significant that the resignation FRENZ prepared did not deal with the issue of notice. If it had been a genuine resignation then I consider it likely that notice would have been discussed, because there was a contractual obligation on Mrs Toaisi to give one weeks’ notice or for FRENZ to pay one week’s pay in lieu of notice. The absence of any discussion about notice period, or notice pay, also suggests that FRENZ was responsible for initiating Mrs Toaisi’s resignation because it ended her employment without notice.

[48] I also consider it significant that the next day (21 September 2016), Mrs Toaisi went to a legal representative and raised a grievance alleging that she had been unjustifiably dismissed when she had been told to go home and not been invited back into the workplace, without any explanation. That should have alerted FRENZ to the fact there was at the very least an apparent miscommunication around the ending of Mrs Toaisi’s employment. However instead of addressing the apparent miscommunication FRENZ’s maintained that Mrs Toaisi’s employment had ended because she resigned.

The issues

[49] The following issues are to be determined:

- (a) Was Mrs Toaisi dismissed?
- (b) If so, was dismissal justified?
- (c) Did Mrs Toaisi perjure herself at the Authority’s investigation meeting?

(d) If not, what if any remedies should be awarded?

(e) What if any costs should be awarded?

Was Mrs Toaisi dismissed?

[50] Mrs Toaisi bears the onus of proof of establishing on the balance of probabilities that her employment ended because she was dismissed. A dismissal in law occurs when a termination occurs at the initiative of the employer.

[51] If Mrs Toaisi establishes that her employment ended as a result of a dismissal rather than a genuine resignation then the onus shifts to FRENZ to prove on the balance of probabilities that her dismissal was justified.

[52] In this case Mrs Toaisi says that Mr Geethanponkalan's forceful instructions to her to go home on 14 September was a sending away which she says was a dismissal by FRENZ. I find that although Mr Geethanponkalan did not intend to summarily dismiss Mrs Toaisi on 14 September he nevertheless was very clear and direct in requiring her to leave the work place.

[53] I have accepted Mrs Toaisi's evidence that she was told to go home more than once and that Mr Geethanponkalan used hand gestures to emphasise forcefully that she was to leave the premises immediately. He also accompanied her to collect personal items then escorted her off the premises.

[54] I do not consider that there was anything wrong with Mr Geethanponkalan sending Mrs Toaisi home slightly before the other workers. This was a heated situation which Mr Geethanponkalan was attempting to manage. However, the way in which that occurred caused Mrs Toaisi to genuinely believe that she had been dismissed.

[55] Mrs Toaisi was in a highly agitated state. She had been shouting and acting aggressively. English was also her second language and she had asked to see Mr Darby about the situation as she left work on 14 September.

[56] I therefore consider that FRENZ had an obligation to follow up Mrs Toaisi's failure to attend work the next three working days. I consider that FRENZ's failure to clarify Mrs Toaisi's work status in circumstances when it should have known that there was a question about it in Mrs Toaisi's mind together with the directives to her

to leave work immediately led Mrs Toaisi to genuinely believe she had been dismissed.

[57] Mr Geethanponkalan's actions in accompanying Mrs Toaisi as she returned to the workplace and the seeing her off the premises supported Mrs Toaisi's view that she was being dismissed, although I recognise that that was not Mr Geethanponkalan's intention.

[58] I also find that Mr Darby's acknowledgement that Mrs Toaisi thanked him for the job on the way out, also supports her view that she had been dismissed on the evening of 14 September.

[59] I also find that FRENZ's failure to communicate with Mrs Toaisi about her absences on Thursday 15th, Friday 16th, and Monday 19 September 2016 also supported her view that she had been dismissed.

[60] I further consider that the fact that WINZ faxed a request for information to FRENZ on Friday 16 September should also have alerted it that there may have been an issue regarding the employment relationship.

[61] No one in FRENZ management had direct contact with Mrs Toaisi until she attended the office on 20 September 2016, at which time Mrs Williamson presented her with a resignation letter to sign.

[62] I therefore find that the initiative for the ending of Mrs Toaisi's employment came from FRENZ and not from her. I accept Mrs Toaisi's evidence that she did not intend to resign and would not have knowingly resigned because as the sole income earner she relied on her wages to support her family because she had no other income.

[63] I consider the fact that the resignation letter was prepared by Mrs Williamson so therefore reflected her words and not Mrs Toaisi's together with the letter being dated Friday 16 September and not providing for the contractual notice or pay in lieu tends to support Mrs Toaisi's evidence that she was told she had to sign the letter in order to get her pay.

[64] Mr Faiaki's previous advice to Mrs Toaisi that she needed to go in to work to sign for her final pay also likely influenced Mrs Toaisi's view of what the document was that Mrs Williamson was asking her to sign.

[65] I do not accept Mrs Williamson's evidence that Mrs Toaisi was clear that she was resigning as opposed to just signing a document to enable her to obtain her pay because I find that was not adequately or appropriately discussed with her.

[66] Mrs Toaisi has English as a second language so I consider that FRENZ should have taken steps to ascertain what if anything Mr Faiaki had told Mrs Toaisi during the phone call which occurred on the evening of Sunday 18 September 2016. FRENZ should also have set an appointment time for her to come and discuss her situation with Mr Darby, as she had requested as she was leaving work on 14 September.

[67] I consider the onus was on FRENZ to clarify the status of the employment relationship. It was not acceptable for FRENZ to have presented Mrs Toaisi who does not read English well with a prepared resignation letter to sign on the basis that she had to sign it before she would be paid.

[68] I am satisfied that Mrs Toaisi has discharged the onus of establishing on the balance of probabilities that her employment ended as a result of a dismissal and not as a result of a genuine or voluntary resignation.

Was dismissal justified?

[69] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). A fair and reasonable employer is expected to comply with its statutory obligations.

[70] FRENZ rightly acknowledged at the beginning of the Authority's investigation meeting that it could not establish compliance with any of the requirements of s.103A of the Act because it had not intended to dismiss Mrs Toaisi, so it follows that it did not do anything to comply with the s.103A justification test or its s.4(1A) good faith obligations.

[71] I consider that was an appropriate concession to make in all of the circumstances. Accordingly I find that Mrs Toaisi's dismissal was procedurally and substantively unjustified.

Did Mrs Toaisi perjure herself at the Authority's investigation meeting?

[72] There was initially confusion over the quantification of Mrs Toaisi's actual loss. As already noted, English is Mrs Toaisi's second language and she was heavily assisted by an interpreter during the Authority's investigation meeting.

[73] When asked by the Authority about what income she had earned since her employment with FRENZ had ended Mrs Toaisi initially provided an amount that did not include her income from casual short term employment because she had incorrectly believed the Authority was asking for information about income from full or part time ongoing work, which in her mind did not include short casual one off engagements.

[74] Mrs Toaisi voluntarily corrected that misinterpretation at the outset of the second day of the Authority's investigation meeting. She also provided documents to show all income including that earned from casual work.

[75] Despite that voluntary clarification, which arose at Mrs Toaisi's own initiative and not in response to any other action, Mr Jacques still submitted an application to the Authority requesting it to lodge (at its own initiative) a complaint of perjury with the police against Mrs Toaisi.

[76] After hearing evidence and legal argument about that application I declined it. I made a finding that I was not satisfied that Mrs Toaisi had perjured herself by giving deliberately false or misleading evidence to the Authority. FRENZ were reluctant to accept that ruling and maintained that criminal action needed to be taken by the Authority against Mrs Toaisi. I do not share that view.

[77] I again note my view (as stated during the investigation meeting) that it would be astonishing if the police decided to lay a criminal charge for perjury against Mrs Toaisi when I, as the decision maker who had heard all of the material evidence, had already made a finding that I considered it more likely than not that Mrs Toaisi had not committed perjury.

[78] Just to make it clear, I have accepted Mrs Toaisi's evidence that she did not deliberately try to mislead or deceive the Authority but was merely confused about what information she was being asked to provide. I specifically rejected FRENZ's

submissions that Mrs Toaisi was not confused but was deliberately perjuring herself because I did not believe Mrs Toaisi intended to mislead or deceive the Authority.

[79] Mrs Toaisi appears to have misunderstood what she was being asked because she did not think to include one off sporadic jobs in her total earnings since dismissal. I consider it significant that Mrs Toaisi herself corrected her evidence at the earliest opportunity, before FRENZ had raised its concern about her evidence.

[80] I consider that FRENZ's application for the Authority to lay a police complaint against Mrs Toaisi was a high handed and unnecessary way to deal with its concern over her post employment earnings, which I note were minimal.

[81] I accept Mr Nutsford's submission that FRENZ's actions appeared to be an attempt to intimidate Mrs Toaisi by seeking to convince the Authority that she had deliberately engaged in a crime. Mrs Toaisi was visibly shaken at the second investigation meeting.

[82] I consider it notable that FRENZ appeared to have obtained the information it sought to produce to the Authority about Mrs Toaisi's post termination earnings unlawfully in circumstances which strongly suggest Mrs Toaisi's privacy may have been breached.

[83] As I indicated at the investigation meeting, a breach of privacy claim is not within the Authority's jurisdiction so that claim if it is to be pursued would need to be taken up with the Privacy Commissioner.

[84] If FRENZ continues to maintain that a crime has been committed, notwithstanding the Authority does not share that view, then it would need to involve the police itself because the Authority will not be doing so.

[85] It is not uncommon for a witness in the Authority to correct, clarify or even change their evidence (or in some cases as occurred here a party may file additional and/or more specific information) during the course of an investigation meeting.

[86] I do not consider that Mrs Toaisi's actions in taking the initiative to identify an error in the evidence she gave on day one of the Authority's investigation and then proactively taking the initiative on day two of the investigation to correct her prior

evidence by filing further documents and explaining the reason for her changed evidence amounts to perjury.

What if any remedies should be awarded?

Mitigation of loss

[87] The Employment Court in *Wikaira v The Chief Executive of the Department of Corrections*¹ which cited the recent Employment Court judgment in *Xtreme Dining Ltd t/a Think Steel v Dewar*² refers to common law obligations to mitigate loss arising from a breach of contract, which Chief Judge Cogan in *Wikaira* confirmed applied to personal grievance cases as well.

[88] The full Employment Court in *Xtreme Dining*³ held that the party seeking damages does not bear the onus of proving that they took all reasonable steps to mitigate loss.

[89] Rather the onus is on the defaulting party in an action for a breach of contract or personal grievance to establish that damages should be reduced because a plaintiff has failed to take reasonable steps to mitigate loss, meaning that some or all of part of the loss due to the defaulting party's breach shall not be awarded.

[90] This places the onus on FRENZ to establish that Mrs Toaisi was unreasonable in not taking steps to obtain alternative employment with the former employer who she had worked for prior to starting work with FRENZ.

[91] I am not satisfied that FRENZ has discharged the onus of establishing on the balance of probabilities that Mrs Toaisi acted unreasonably in relation to her duty to mitigate her loss after her unjustified dismissal. I consider Mrs Toaisi had good reason for not wanting to go back to the former employer who she had worked for before FRENZ.

[92] The work Mrs Taoisi was doing at her previous employer was physically hard labour and Mrs Toaisi had sustained a shoulder injury since leaving there. She told the Authority that she was worried that returning to her former job would aggravate her shoulder injury and may compromise her ability to do the job properly.

¹ [2016] NZEmpC 175.

² [2016] NZEmpC 136.

³ Ibid 2. The Employment Court followed the Court of Appeal's position as set out in *Walop No 3 Ltd v Para Franchising Ltd* CA20/03, 23 February 2004.

[93] Mrs Toaisi could not afford to pay for medical visits or other treatments on her shoulder so did not want to do a job that would cause her shoulder injury to get worse.

[94] Mrs Toaisi also told the Authority that she was concerned about a loss of face because she had left that former employer to go to FRENZ so to then turn around a short time later and attempt to return was embarrassing for her.

[95] I am satisfied that Mrs Toaisi's actions in this regard were not unreasonable in all of the circumstances. It is important that the Authority does not take too stringent an approach to its expectations of Mrs Toaisi.

[96] I am also satisfied that Mrs Toaisi took proactive steps to attempt to mitigate her loss. She contacted WINZ at the earliest opportunity and she also attempted self-employment in a minor way by making pillowcases to sell at a friend's shop (although that did not result in any income). Mrs Toaisi also mitigated her loss by obtaining a series of short casual on call employment engagements with Allied Workforce.

[97] I do not accept FRENZ's view that Mrs Toaisi's attempts at mitigation were inadequate, or inadequately proved. I am satisfied that Mrs Toaisi has established that she did sufficiently mitigate her loss so I find that she is therefore entitled to recover her lost remuneration.

Lost remuneration

[98] In her Statement of Problem Mrs Toaisi sought \$8,320 lost remuneration being three months' wages at 40 hours a week at the rate of \$16 per hour. Mrs Toaisi's evidence was that she earned \$1,081.64 as a result of one off casual assignments for Allied Workforce Limited. So that amount needs to be deducted from the lost remuneration Mrs Toaisi is awarded.

[99] FRENZ is ordered to pay Mrs Toaisi \$7,238.36 under s.128(2) of the Act to compensate her for the remuneration she lost as the result of her unjustified dismissal. FRENZ is also ordered to pay Mrs Toaisi \$578.07 being the holiday pay component she would have earned on the lost remuneration had her employment not ended.

Distress compensation

[100] Mrs Toaisi gave evidence about the hurt humiliation and distress she suffered. She says that she felt sad and filled with shame because she had been told off in front

of everyone who was present at work when she was told to leave. Mr Nutsford also raised cultural issues, including shame and loss of status, associated with her feelings about her unjustified dismissal.

[101] I accept that it was incredibly stressful for Mrs Toaisi to lose her job because she was the sole breadwinner for the family and had three dependent children to care for because her husband had been deported from New Zealand a number of years previous, so was not around to provide any support.

[102] Mrs Toaisi told the Authority she went home and cried and tried (unsuccessfully) to hide her distress from her children who understood that “*something bad had happened*”. Mrs Toaisi said the whole family ended up crying together and what they were all very fearful about what would become of them as a result of Mrs Toaisi losing her job.

[103] Mrs Toaisi talks about feeling “*very depressed and shameful. Very sad.*” She said that she felt, “*it’s like I lost everything*”. Although Mrs Toaisi suffered from the impact of the dismissal she could not afford to seek medical assistance so attempted to deal with her issues as best as she could herself.

[104] FRENZ is ordered to pay Mrs Toaisi \$7,000 under s.123(1)(c)(i) of the Act to compensate her for the hurt, humiliation, injury to feelings and distress she suffered as a result of her unjustified dismissal.

Contribution

[105] Having established that Mrs Toaisi has a personal grievance claim, s.124 of the Act requires me to assess the extent to which Mrs Toaisi’s actions contributed to the situation that gave rise to her grievance. Contribution denotes blameworthy conduct which must be proven on the balance of probabilities.

[106] I find that Mrs Toaisi did engage in blameworthy conduct which has been proven to the required standard and which contributed to the situation which gave rise to her unjustified dismissal.

[107] In terms of the conflict in the evidence over what occurred during the incident I have preferred Mrs Dudleyheeth’s account of the incident over Mrs Toaisi’s. I

consider that this is more likely to be correct as it was corroborated by other witnesses and Mrs Dudleyheeth acted consistently with her version of events.

[108] I also find that Mrs Toaisi was angry, upset and was acting in a highly agitated and inappropriately aggressive manner. I note that Mrs Toaisi explained this by admitting that she just “*saw red*”.

[109] I find that Mrs Toaisi raised her voice at Mrs Dudleyheeth, shouted at her in an aggressive manner and followed her around, and when was told to leave her alone and focus elsewhere did not follow that instruction from Mr Geethanponkalan but instead continued to engage with Mrs Dudleyheeth in a way that the latter perceived to be threatening and harassing.

[110] Mrs Toaisi also admitted to threatening to kill Mrs Dudleyheeth. This is also blameworthy conduct that requires a significant reduction in remedies. I do not consider that Mrs Toaisi’s threat to Mrs Dudleyheeth was a serious one (although I acknowledge that Mrs Dudleyheeth and her husband considered it was).

[111] I acknowledge that this inappropriate comment was said in the heat of the moment at the end of a long challenging day after Mrs Toaisi believed she had just been dismissed by Mrs Dudleyheeth’s husband due to Mrs Dudleyheeth’s complaint.

[112] Nevertheless I consider that had Mrs Toaisi not engaged with Mrs Dudleyheeth in the manner in which she did in the first place or had not then aggravated her initial unacceptable behaviour by returning to the workplace after being told to leave and then threatening Mrs Dudleyheeth this entire situation could have been avoided.

[113] I therefore consider that Mrs Toaisi is responsible for a high level of contributory conduct which needs to be reflected by a reduction in the amount of distress compensation she has been awarded.

[114] I also consider Mrs Toaisi was also to blame for not engaging with her employer to check her employment status and for declining the offer from Mrs Williamson to meet with Mr Geethanponkalan when she did attend the workplace on 20 September 2016.

[115] I find that Mrs Toaisi's distress compensation payment must be reduced by 50% to reflect her blameworthy conduct in starting the incident which gave rise to her unjustified dismissal. FRENZ is therefore ordered to pay Mrs Toaisi distress compensation of \$3,500 after the original award has been reduced by half to reflect her contribution.

What if any costs should be awarded?

[116] Mr Nutsford has asked the Authority to fix costs at the same time as substantively determining this matter. I decline to do so because FRENZ has not had an opportunity to be heard on the issue of costs and I want the benefit of any submissions they may wish to file before awarding costs.

[117] The Authority is likely to adopt its usual notion of daily tariff based approach to costs. The first investigation day notional starting point is \$4,500 for the first day and \$3,500 for the second day.

[118] Mr Nutsford has identified conduct which he says FRENZ engaged in which unnecessarily lengthened the course of the Authority's investigation meeting. FRENZ is invited to respond to that and to raise any additional matters which they say should result in the notional daily tariff being adjusted.

[119] FRENZ has seven days from the date of this determination to file its cost submissions or to advise the Authority that it does not wish to be heard on costs. Mrs Toaisi then has a further three working days within which to file any response to FRENZ's cost submissions.

Rachel Larmer
Member of the Employment Relations Authority