

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 194
5366707

BETWEEN

WILLIAM TUHURA
Applicant

A N D

ACTION PLUMBING, GAS
AND DRAINAGE SERVICES
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: David Beck, Counsel for the Applicant
Martin Bell, Counsel for the Respondent

Investigation meeting: 15 May 2013 at Christchurch

Submissions Received At the investigation meeting. Further evidence received on 31 May 2013, final submissions from the respondent on 17 June 2013 and from applicant on 3 July 2013.

Date of Determination: 18 September 2013

DETERMINATION OF THE AUTHORITY

- A. William Tuhura has a personal grievance for unjustified constructive dismissal.**
- B. Action Plumbing, Gas and Drainage Services Limited must pay William Tuhura \$5,600 in compensation.**
- C. Action Plumbing, Gas and Drainage Services Limited must pay William Tuhura \$1,147.65 subject to any agreement between the parties to deduct the cost of mobile phone calls made by Mr Tuhura after he was dismissed.**

Employment relationship problem

[1] William Tuhura was employed by Action Plumbing, Gas and Drainage Services Limited as a drainlayer and began work in March 2009. Daniel Board is the managing director of Action.

[2] In September 2010 Mr Board dismissed Mr Tuhura, although the dismissal was revoked. The matter was settled by agreement and Mr Tuhura continued working for Action.

[3] On 28 November 2011 Mr Board located Mr Tuhura in his work truck while Mr Tuhura was en route home and demanded that Mr Tuhura hand over the truck, keys and work fuel card. Events culminated in Mr Board breaking the passenger window of the work truck in which Mr Tuhura was seated with the doors locked. Mr Tuhura drove away and called the police. Mr Board also called the police and followed Mr Tuhura as well as having him tracked by GPS to provide his location to the police.

[4] The police spoke to both parties and suggested that they follow Mr Tuhura home and allow him to unload his own tools from the truck and return the truck, keys and fuel card to Action. Kere Marshall, Action's foreman and Mr Tuhura's supervisor, oversaw that process and drove the truck back to the yard. Mr Board directed Mr Marshall to tell Mr Tuhura that he was suspended, which he did. Mr Tuhura has never returned to work at Action. He gained work with a new employer in December 2011.

[5] Mr Tuhura claims he has a personal grievance that he was unjustifiably constructively dismissed on 28 November 2011. He claims that he was unjustifiably disadvantaged in his employment and induced to resign.

[6] He also says that Action conducted a disciplinary process in breach of good faith by failing to properly complete an investigation. He claimed lost wages and compensation of \$15,000 for humiliation, loss of dignity and injury to his feelings.

[7] At the investigation meeting Mr Tuhura withdrew his claim for lost wages except for the amount of \$1,147.65 for the purchase of tools that was deducted from his final pay.

[8] Action considers that it justifiably suspended Mr Tuhura and acted justifiably to recover its property on 28 November 2011. It says it intended to carry out an investigation into its allegation that Mr Tuhura was dishonestly using diesel paid for on his fuel card for non-work purposes. However, Mr Tuhura failed to participate in the investigation and disciplinary process. Action says that Mr Tuhura was not constructively dismissed but that he abandoned his employment.

[9] In Mr Board's statement of evidence he listed a number of sums that he says Mr Tuhura still owes Action. At the investigation meeting Mr Bell clarified that there are no claims before the Authority against Mr Tuhura. Both counsel agreed that although Mr Tuhura had not specifically claimed that the \$1,147.65 had been wrongly withheld from his pay the Authority could consider and determine that issue as part of the lost wages claim, although no further amount is now sought.

[10] At the investigation meeting Action agreed to provide the records on which it based its calculation that Mr Tuhura owed it \$1,147.65 for tools purchased on his behalf. Mr Board also agreed to source and provide his mobile phone records for 28 November 2011.

[11] The telephone records, tool purchase records and further submissions on behalf of Action relating to the tools were provided to the Authority on 17 June 2013. On 3 July 2013 Mr Beck indicated to the Authority's support officer that he did not intend to respond to those submissions.

Issues

[12] The issues the Authority needs to determine are:

- (a) Does Mr Tuhura have a personal grievance arising out of Mr Board's actions on 28 November 2011?
- (b) Did Action conduct a disciplinary process in breach of good faith, by failing to complete an investigation into the allegation of theft?
- (c) Does Action owe Mr Tuhura \$1,147.65?
- (d) If Mr Tuhura has a personal grievance what remedies is he entitled to?

Determination

Was Mr Tuhura constructively dismissed?

[13] The facts of what happened on 28 November 2011 are generally agreed, with some minor exceptions. In early November 2011 Mr Marshall mentioned to Mr Board that he suspected that Mr Tuhura was taking or using diesel for his own use and not exclusively for the work truck he drove.

[14] Mr Tuhura habitually carried a 20-litre fuel container on the back of his truck. He had a fuel card that allowed him to purchase fuel for his truck for work purposes. His truck had a Navman GPS system that was able to provide information on the number of kilometres driven and locations the truck had been to.

[15] At least twice in November 2011, the final time being on the morning of 28 November, Mr Marshall told Mr Tuhura that he should no longer keep the fuel container on the back of the truck. The first time Mr Tuhura told him he needed it there and gave Mr Marshall a reason that he and Mr Board accepted as a plausible and work-related reason. There is a dispute about what reason Mr Tuhura gave on 28 November 2011, however, he did not remove the container. Mr Marshall maintained the suspicion that all was not right as far as Mr Tuhura's work-related diesel use was concerned.

[16] Mr Tuhura was on-call for one week out of every four. That meant that he could be called out at any time during that week after hours to clear drains. He took the truck to and from work every day but in his on-call week limited personal use was also permitted.

[17] Mr Tuhura has primary care of his 11 year old son. He picks him up every day at 5 p.m. from his after-school care programme. Mr Tuhura and his son live in Christchurch. Action's yard and office are in Kaiapoi.

[18] On Friday 25 November 2011 Mr Marshall lifted the fuel container on the back of Mr Tuhura's truck and found it full. Mr Tuhura was on-call that weekend and for the following week. On the morning of Monday 28 November 2011 Mr Marshall again tested the weight of the fuel container and found it empty. Later in the day he found the container had been filled again. Mr Marshall checked the Navman information about Mr Tuhura's truck's movements over the weekend of 26-27

November and found that Mr Tuhura had not been called out that weekend. He raised his concern with Mr Board that the fuel that had been in the container before the weekend may have been used for non-work purposes.

[19] Mr Board decided that Mr Tuhura should come to a meeting with him and Mr Marshall at the end of his work day. Mr Board intended to take the truck keys and fuel card off Mr Tuhura and made arrangements with another staff member to do Mr Tuhura's on-call duty and to take Mr Tuhura home. Although Mr Board's main focus was on the truck, the fuel card and the fuel container I find that he also intended to take the work mobile phone used by the on-call drain layer off Mr Tuhura that day too. Mr Board's written evidence was that he intended to advise Mr Tuhura:

... about the allegation and to set up an investigative/disciplinary meeting at a later suitable time.

[20] However, at the investigation meeting while giving sworn evidence Mr Board said that when he sought Mr Tuhura out he intended to put the allegation about the diesel to Mr Tuhura. He wanted to hear what Mr Tuhura would say and intended to suspend him then in order to carry out a full investigation and a disciplinary process.

[21] Mr Board and Mr Marshall asked another employee, Gareth, to tell Mr Tuhura when he got back to the yard that Mr Board and Mr Marshall wanted to meet with him. They instructed Gareth to block Mr Tuhura's truck in with another vehicle so that he could not leave without speaking to them.

[22] Mr Tuhura arrived back at the yard at 4.05 p.m. Mr Tuhura says that Gareth did tell him that that Daniel and Kere wanted to talk to him but it seemed to him to be said quite casually. It is not clear when Mr Tuhura was told that. Mr Tuhura decided it was inconvenient to go and see Mr Board and Mr Marshall because he had to go and pick up his son. Mr Tuhura asked Gareth to move the vehicle blocking his truck and left the yard in his truck at 4.43 p.m. He had not seen Mr Board or Mr Marshall. It is unclear where Mr Tuhura was between 4.05 and 4.43 p.m. but he did not go into the office.

[23] After he left the yard Mr Tuhura rang Mr Marshall and asked who wanted to see him. Mr Marshall told him that Mr Board did. Mr Tuhura asked what it was about. Mr Marshall said that he did not know. Mr Tuhura explained that he was on his way to pick up his son.

[24] Mr Tuhura also rang the office. He does not remember the conversation but I am satisfied he spoke to Nicholla Reid and asked who wanted to speak to him. He was told that Mr Board did and told Ms Reid to *tell Daniel to get f***ed*. He may well have also said that he was running late to pick up his son.

[25] After Mr Tuhura left the yard Mr Board sent him several messages on the Navman telling him to return the truck to the yard. He also rang and left messages and texts on Mr Tuhura's personal mobile phone.

[26] Mr Tuhura picked up his son and took him to his son's mother's house. They arrived there at 5.27 p.m.

[27] Back at the yard Mr Board asked Mr Marshall to come and help retrieve the truck. They tracked Mr Tuhura's truck using the Navman and pulled up alongside the truck while it was parked at Mr Tuhura's former partner's house with Mr Tuhura in the driver's seat. The driver's window of the truck and the passenger's window of the campervan, which Mr Board was driving, were only about 6 inches apart.

[28] There is conflicting evidence on what Mr Board said to Mr Tuhura from the driver's seat of the campervan through the vehicles' open windows. However, I am satisfied that Mr Board began with a demand that Mr Tuhura hand over the truck keys and the fuel card immediately. When Mr Tuhura asked why Mr Board told him that he suspected that he had been *stealing from me*. Mr Tuhura asked what he was supposed to have taken and Mr Board said *diesel*.

[29] Mr Board denied that he was angry with Mr Tuhura at all during this exchange and what followed. Mr Board denied shaking his closed fist at Mr Tuhura across in front of Mr Marshall.

[30] Mr Tuhura denied leaning his upper body out the truck window and in through the campervan window and trying to punch Mr Board. However, Mr Tuhura admitted that his arm and closed fist were put through the campervan window in front of Mr Marshall and that he was shaking his fist.

[31] I also satisfied that Mr Board was shaking his closed fist towards Mr Tuhura. I am satisfied that both Mr Board and Mr Tuhura were angry and aggressive towards each other. Mr Tuhura admitted saying *f**k off you wanker* to Mr Board when he was told of the suspicion of theft.

[32] Mr Board got out of the campervan and went around to the passenger side of the truck. Meanwhile Mr Tuhura had locked the truck doors. Mr Board repeatedly hit the passenger window with an open hand and repeatedly demanded that Mr Tuhura hand over the keys and the fuel card. Mr Tuhura did not do so and after about the sixth blow on the window Mr Board's hand broke the window and he reached inside to unlock the door.

[33] Although Mr Board initially denied that he intended to break the window he told me he fully intended to get his property, specifically the truck and the fuel card, returned to him that evening. He said he *supposed he must have intended to break the window because he intended to get inside the truck and take the keys from the ignition.*

[34] Mr Tuhura says that Mr Board was very angry and *nutting off* at him as he pounded on the window. He says that he does not know anyone who would have opened the door or window to Mr Board under those circumstances. He says he was afraid of what Mr Board might do. Once the window was broken Mr Tuhura drove the truck up onto the footpath and left preventing Mr Board gaining entrance to the truck.

[35] Mr Board denies shouting or swearing at Mr Tuhura while he pounded on the window and broke it. I do not accept that.

[36] Mr Tuhura's right arm was cut by flying glass from the window. Glass also went all over and inside Mr Tuhura's son's school backpack.

[37] At the investigation meeting Mr Tuhura said, for the first time, that during the Northcote Road incident Mr Board yelled at him that he was fired. Mr Board denies that and says that he did tell him he was suspended while Action investigated the allegation of theft of diesel. Mr Tuhura has not previously alleged that he was verbally dismissed by Mr Board on 28 November 2011. I do not accept that Mr Tuhura was told he was fired by Mr Board.

[38] The whole sequence of events took less than five minutes as the Navman record shows that Mr Tuhura was only parked for 5 minutes. In that time his son had left the truck to go inside before Mr Board and Mr Marshall arrived. However, Mr Tuhura says that his son and his ex-partner witnessed the events and his ex-partner complained to him about the broken glass left on her driveway.

[39] The police met Mr Tuhura, Mr Board and Mr Marshall en route to Mr Tuhura's home. They arranged to follow Mr Tuhura home and to supervise while Mr Tuhura took his own tools off the back of the truck. Mr Board stood on the opposite side of the road and watched while Mr Marshall oversaw the removal of Mr Tuhura's tools. Mr Tuhura agrees that he was still very angry with Mr Board and yelled a number of obscenities across the road at him. He felt Mr Board was inflaming the situation by being there when the police and Mr Marshall were adequately dealing with the truck handover.

[40] Mr Board says that he told Mr Marshall and the police to tell Mr Tuhura to return all company property but that Mr Tuhura retained the phone until about 24 hours later. It is somewhat unclear whether the instruction to return all company property was actually given to Mr Tuhura. Mr Board also says that Mr Tuhura used the phone when he should not have because he was suspended and had no more work related calls to make. Mr Tuhura says that in the heat of the moment he forgot he still had the company phone in his pocket. He agrees that he should not have used it for personal use in the next 24 hours but says he had no phone of his own then and was shocked and confused about his employment status. He says *that's just what I do when I'm stressed; I ring around to get information*. He has offered to pay for the personal calls he made.

[41] Before driving away in the truck Mr Marshall told Mr Tuhura he was suspended but did not tell him why he was suspended.

[42] On 29 November 2011 Mr Tuhura raised a personal grievance alleging he had been unjustifiably dismissed by Mr Board's *outrageous conduct* of the previous day:

...you verbally abused him and smashed the window of the truck he was sitting in and you later pursued our client across town and only desisted from continued threatening behaviour when the police intervened to supervise our client returning your vehicle.

[43] On 30 November 2011 Mr Tuhura visited his doctor who lodged an ACC claim for an *open wound elbow/forearm/wrist* on his right arm. He told his doctor he had been *assaulted/cut by glass*.

[44] On 2 December 2011 Mr Tuhura made a complaint to the Police about Mr Board's behaviour which was characterised as assault. The Police did not lay any charges and issued warnings to both Mr Board and Mr Tuhura.

[45] On 2 December 2011 Mr Bell wrote to Mr Beck that Action disagreed that Mr Tuhura had been dismissed. Action said that there were *a number of allegations which Mr Tuhura faces ... and no finding(s) have been made.*

[46] Mr Bell advised that Action intended to carry out an investigation and invite Mr Tuhura to a meeting to allow him to answer the allegations. Mr Bell said that Action considered that Mr Tuhura's actions on 28 November 2011 breached his employment contract in several respects. Mr Bell asked Mr Beck to advise if Mr Tuhura was willing to attend a meeting with Action and that if he was Action would prepare *a list of the various allegations to be covered at the meeting* in addition to those that arose from Mr Tuhura's actions on 28 November.

[47] However, on 5 December Mr Beck wrote saying that Mr Tuhura did not accept that he had been legitimately suspended but considered that Mr Broad's actions on 28 November 2011 had *brought the employment to a premature end.*

[48] Mr Tuhura got another job on about 20 December 2011 and Action paid his last pay on 21 December 2011.

Determination

[49] Mr Beck submits that Mr Board's behaviour on 28 November 2011 was a serious breach of the duty to maintain trust and confidence in the employment relationship. He says Mr Board's actions were out of proportion to the issue. There was no hurry to get Mr Tuhura's truck and fuel card back, and the diesel container only held what Mr Tuhura considers was about \$19.00 worth of fuel.

[50] In response to questioning Mr Board agreed that the container would not have held diesel to any great value. Instead, Mr Beck submits that it would have been reasonable for Mr Board to write Mr Tuhura a letter informing him of the allegation against him and inviting him to a meeting to hear his explanation and informing him his employment was potentially at risk and that he had the right to have representation at the meeting.

[51] Mr Beck says that during the telephone call with Mr Tuhura Mr Marshall did not tell Mr Tuhura why he was required to come back for a meeting when he asked. Mr Marshall should have done so. Mr Beck submits that Action knew that Mr Tuhura was going to pick up his son but that he had no idea of why Action considered it was

urgent for him to meet with Mr Board by the end of the day. Mr Beck submits that it only became clear to Mr Tuhura that it was Mr Board who wanted to see him once he had left work for the day.

[52] Mr Beck submits that the third category of constructive dismissal set out in *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ applies in these circumstances, that is; there was a breach of duty by Action which caused Mr Tuhura to resign.

[53] Mr Bell submits that Mr Tuhura was not dismissed constructively or in any other way by Action. Instead Action made it clear that Mr Tuhura was only suspended, and that it wished to begin an investigation into the allegation that Mr Tuhura had been wrongly using diesel but that he failed to participate in the proposed investigation and therefore abandoned his employment.

[54] In examining whether a constructive dismissal has occurred two questions arise. First, has there been a breach of duty on the part of the employer which has caused the resignation? Secondly, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation; that is, would there be a substantial risk of resignation?

[55] In *Wellington Clerical Workers IUOW v Greenwich*² the Employment Court observed that for this type of constructive dismissal:

*It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship*³.

[56] Mr Tuhura tried to find out why he was wanted but Mr Marshall did not tell him despite knowing what the issue was.

[57] I consider that the actions of Mr Board on 28 November 2011, particularly in breaking the truck cab window and demanding back the truck, keys and fuel card were a breach of the implied term of trust and confidence in the employment

¹ [1985] 2 NZLR 372 (CA)

² [1983] ACJ 965

³ Ibid at 975

agreement. The involvement of the police compounded things. Mr Tuhura had not broken any law. Mr Board's actions crossed the borderline from inconsiderate conduct to repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[58] Mr Board's behaviour was such that he should have foreseen that Mr Tuhura would be likely to resign as a result of his behaviour.

[59] Any action of an employer resulting in a dismissal must be assessed for justifiability under s.103A of the Act. The test requires the Authority to decide the question of justification objectively. The Authority may not substitute its opinion for that of the employer⁴, but in applying the test it must consider whether acted fairly in concluding it needed to follow Mr Tuhura and repossess the truck and fuel card in the way it did. In particular the Authority should assess whether, before deciding to do so in such an aggressive manner, Action,

- sufficiently investigated the allegation against him,
- raised its concerns with him,
- gave him a reasonable opportunity to respond to the concerns, and
- genuinely considered any explanation regarding the allegations⁵; and
- whether there are any other relevant factors.

[60] The s.103A(3) tests are not easily applied in a constructive dismissal case of this nature. However, I am satisfied that instead of Action sufficiently investigating the allegation against Mr Tuhura, reasonably raising it with him and allowing him a reasonable opportunity to respond to its concern Mr Board took serious action to repossess Action's property because of his suspicions against Mr Tuhura when Action had not gone through a fair process as required by the Act to investigate and raise that suspicion with Mr Tuhura. I have taken into account the fact that Action had requested Mr Tuhura to attend a meeting and that he had failed to do so. However, assessed objectively there was no greater urgency for recovering the truck and fuel card on 28 November 2012 than there had been on any previous day. Action could easily have embarked upon a reasonable process for investigating its suspicion, and put its concern to Mr Tuhura the following day.

⁴ *Angus v Ports of Auckland* [2011] EmpC 160

⁵ Section 103A(3)

[61] Mr Board's actions were not merely minor defects of process and affected Mr Tuhura unfairly.

[62] A fair and reasonable employer could not have decided to go ahead and get its assets back at any cost, even that of an aggressive confrontation culminating in breaking the truck window and using the police to recover the truck etc which, at least until confronted in Northcote Road, Mr Tuhura had possession of lawfully and reasonably as part of his employment. Therefore, Mr Tuhura was unjustifiably constructively dismissed. He did not abandon his employment and is entitled to remedies.

Did Action conduct a disciplinary process in breach of good faith by failing to complete an investigation into the allegation of theft?

[63] I have already decided that Mr Tuhura was unjustifiably constructively dismissed as a result of Mr Board's actions on 28 November 2011.

[64] It cannot be a breach of the employer's duty of good faith to fail to carry out an investigation into an allegation of theft *after* it had dismissed Mr Tuhura. Therefore, any failure to complete an investigation after that date could not have been a breach of Action's duty of good faith which ended with the end of the employment relationship.

[65] Action did not carry out an investigation into the allegation of diesel theft before Mr Board broke the truck window. However, the events of 28 November 2011 have overtaken any consideration of whether Action should have undertaken an investigation into the allegation of theft. Mr Tuhura has been unjustifiably dismissed and I do not need to make a determination on whether or not Action failed to complete an investigation.

Does Action owe Mr Tuhura \$1,147.65?

[66] Mr Bell submits Mr Tuhura owed Action \$1,147.65 over and above his \$25 per week for the purchase of tools.

[67] Clause 6.3 of Mr Tuhura's employment agreement read:

The Employee gives their permission to the Employer to deduct from final pay or holiday pay any amount that may be owing to the

Employer at the date of termination. The Employer will provide a written explanation for any deductions made under this clause.

[68] Action deducted \$1,147.65 from Mr Tuhura's final pay. At the time it did not provide him with a written explanation for the deduction.

[69] Clause 20 is about tools. The relevant portions read:

20.1 The Employee is to provide their own tool kit suitable for all general tasks associated with plumbing and gas fitting. ...

20.2 The Employer will provide the Employee with any specialist tools or equipment ...

20.4 The Employer agrees to pay a weekly tool allowance of \$25.00 per week to the Employee.

[70] Clause 25, entitled "Staff Privileges" says that with the employer's permission an employee may be allowed to purchase goods and services and charge those to a staff purchase account. Employees must obtain permission for any such purchases. Staff purchase accounts must be paid in full by the 20th of the following month unless the employer gives permission to the employee to pay off an account by weekly deduction from wages.

[71] Clause 31 provides that the employment agreement can be amended but only in writing; only after a period of consultation and only by agreement. If agreement is not obtained then any amendment can only come into effect if an employee is given at least 7 days' notice of the amendment.

[72] After the investigation meeting Action provided a print-out of a spreadsheet called "Tool Allowance provision – Willy". The spreadsheet includes weekly credits of \$25 which I am satisfied are credits of the weekly tool allowance that was payable to Mr Tuhura as required under clause 20.4 of his employment agreement. That is, the tool allowance was not paid to Mr Tuhura in line with clause 20.4 but retained by Action in a "Tool Allowance provision – Willy" account.

[73] Debits to the account are for some tools, items of personal protective equipment, payment of a parking fine and payment for a first aid course, payment for a two-day confined space course, payment for damage caused to a cable, the purchase of a tyre chain and the cost of renewal of Mr Tuhura's license from the Plumbers and Gasfitters Board.

[74] For the period for which I have seen records Mr Tuhura's account was credited with \$900, which would have been the correct amount for him to have been paid over those weeks by way of tool allowance. The balance of the account at the end of November 2011 was \$1,147.65 in debit; that is Action considers that Mr Tuhura had spent that much more than his \$25 per week tool allowance.

[75] Action says that it ran a system whereby the weekly tool allowance was credited to an individual account and employees were allowed to purchase their own tools through the work accounts. Any tools purchased through that account became the employee's property.

[76] Mr Bell submits that although the employment agreement was not varied in writing Mr Tuhura agreed with Action about the way the tool account operated so that his \$25 per week tool allowance could be used that way rather than paid to him weekly. Mr Tuhura has retained tools and other equipment bought through this account. If Action must pay Mr Tuhura the \$1,147.65 it withheld from his final pay it submits that Mr Tuhura must return all the goods purchased under the account. However, Action submits that would still be unfair because the tools and equipment will not be worth now what they were worth when they were purchased.

[77] In other words, Action submits that Mr Tuhura is estopped from claiming that he is entitled to the payment of the \$25 per week tool allowance, or that he does not owe anything to Action under the tool account. Action says that Mr Tuhura created a belief in Action that he agreed with the way the account operated, Action acted in reliance on that belief and expended money to its detriment so it would be unconscionable for Mr Tuhura to now go back on his word.

[78] Mr Bell also submits that if Action is required to pay Mr Tuhura the \$1,147.65 it will bring a claim against Mr Tuhura seeking to recover amounts it says he owes to it. However, there is currently no such claim before the Authority and I do not need to take that into account.

[79] Mr Beck submitted on Mr Tuhura's behalf that Action was not entitled to withhold the amount and had done so without Mr Tuhura's permission and that he doubted that clause 20.4 could be interpreted in the way that Action has done by operating the tool account.

[80] Action needed to amend the employment agreement in writing, as envisaged by clause 31, if it intended not to pay the \$25 per week tool allowance but to retain it and credit it to Mr Tuhura's tool purchases. However, it did not do so. Therefore, the system Action was operating was in breach of clauses 20 and 25 of Mr Tuhura's employment agreement. It follows that I do not consider that Mr Tuhura is estopped from claiming that Action was not able to withhold the amount that it did. Action's breaches of the employment agreement are not able to be retrospectively approved of by the Authority.

[81] I consider it significant that the major part of the amount withheld from Mr Tuhura's wages was not for purchase of tools or personal protective equipment that Mr Tuhura has retained. For example, he has been charged for training which Action presumably required him to have. There is nothing in Mr Tuhura's employment agreement stating that he would be charged for work-related training and that those charges would be deducted from his wages.

[82] In all the circumstances, clause 6.3 cannot be read to over-ride the other contractual provisions of clauses 20, 25 and 31. I consider that the employer was not entitled to withhold the \$1,147.65 from Mr Tuhura's final pay. I also consider Action breached clause 6.3 by not providing the required written explanation for the deduction when it made the deduction.

[83] Mr Board has presented evidence that Mr Tuhura retained the Action on-call mobile phone on 28 November 2011 and made a number of personal calls on it costing approximately \$99 including GST before he returned the phone at the end of the next day. At the investigation meeting Mr Tuhura said that he had not been asked to return it but agreed he used it for personal calls and offered to pay for those calls, including one to Australia to his brother. Because of Mr Tuhura's offer to pay for his personal calls I consider it useful for me to deal with the issue of the cost of the calls, which numbered approximately 51, after his call to the police at 5.34 pm on Monday 28 November 2011.

[84] Mr Board says that Mr Tuhura had no need to make any work related calls after he was told that he had been suspended by Mr Marshall. I agree that Mr Tuhura was not entitled to make personal calls on an Action mobile phone after he had been constructively dismissed by Mr Board's actions, as I have found he was. I note

Mr Tuhura's call to the police was a reasonable use of the phone in all the circumstances.

[85] Therefore, although I consider that Action should pay Mr Tuhura the \$1,147.65 withheld from his wages I leave it up to the parties to decide how Mr Tuhura is to repay Action for the phone calls he made; that is, whether their cost may be deducted from that amount or not. If no agreement can be reached on that point the parties may come back to the Authority for a ruling.

Remedies

Compensation

[86] Mr Tuhura claims compensation of \$15,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to his feelings. Mr Tuhura gave little evidence of humiliation etc:

The impact upon me has been significant and I am feeling constantly stressed. I have lost self confidence and I am very disillusioned with employers.

[87] However, some of that is as a result of what Mr Tuhura considers to have been Action's *bad-mouthing* him. Specifically he alleges that one of his post-Action jobs came to an end because of something Mr Marshall said about him to that employer. Mr Marshall denies having bad-mouthed Mr Tuhura to any of his subsequent employers. I do not consider that Mr Marshall's actions have had any bearing on any inconsistent work Mr Tuhura has had after being dismissed by Action. Therefore, I discount that in reaching a reasonable amount of compensation for Action to pay.

[88] Mr Tuhura also said that he was embarrassed and under stress as a result of the initial confrontation being in front of his son and his ex-partner and the truck being taken from him at his home in front of his neighbours using police involvement. I accept that and consider that Action should pay \$8,000 to Mr Tuhura in compensation.

[89] Having determined Mr Tuhura has a personal grievance, under s.124 of the Act I must now consider whether he contributed to the situation which gave rise to his disadvantage and if so reduce remedies accordingly. There is no evidence that Mr Tuhura was stealing diesel from Action and therefore I find that there is no

contribution to the situation giving rise to his personal grievance arising out of that issue.

[90] There are four aspects of Mr Tuhura's conduct on 28 November 2011 that I need to assess for blameworthiness and contribution to the situation leading to his personal grievance. The first is that Mr Tuhura did not remove the diesel container from the back of his truck when instructed to do so by Mr Marshall on the morning of 28 November 2011. However, while that may be blameworthy it is not so significant to have contributed to Mr Board's behaviour culminating in him breaking of the truck window.

[91] The second issue is whether Mr Tuhura's failure to go and meet Mr Board and Mr Marshall when asked to do so by Gareth is blameworthy and contributed to the situation giving rise to the personal grievance. Mr Tuhura was evasive about having a meeting and left it so late after getting back to the yard without going to meet with Mr Board that he was running late to pick up his son. That was blameworthy behaviour but considered alone is not sufficient to amount to contribution to the situation giving rise to the personal grievance. Mr Tuhura did not know why he was wanted for a meeting and whether there was any urgency about the meeting. Also after he left Mr Tuhura did call Mr Marshall and reception to find out who wished to speak to him and why. Unfortunately one of those calls gives rise to the third area of potential contribution.

[92] The language used in the message Mr Tuhura asked the receptionist, Ms Reid, to give Mr Board was abusive and offensive. I consider that to have been blameworthy and no doubt to have contributed to Mr Board's decision to go after Mr Tuhura and to retrieve the truck that evening.

[93] Mr Board had decided before Mr Tuhura's failure to come and meet with him to take the truck and all company property off Mr Tuhura before he went home that day. However, I do not consider that he had decided to retrieve the truck and fuel card etc. in such an aggressive and dramatic way prior to Mr Tuhura failing to meet with him, telling Ms Reid to tell him to *get f**ked* and then clenching his fist and putting it inside the cab of the campervan, swearing at Mr Board and refusing to hand over the keys and fuel card. In all the circumstances any swearing at Mr Board once in Northcote Road was understandable and not blameworthy but shaking his fist at his employer was a blameworthy act and I find that combined with the message via

Ms Reid and the evasion of the meeting with Mr Board and Mr Marshall before he left for the day contributed to the situation giving rise to Mr Tuhura's personal grievance.

[94] I consider that Mr Tuhura's remedy of compensation should be reduced by 30%.

Costs

[95] Costs are reserved. Mr Tuhura as the successful party is entitled to a reasonable contribution to his costs. The Authority usually awards costs on a daily tariff of \$3,500 per day of the investigation meeting. The meeting took one day. The parties are encouraged to agree on the payment of costs. If they are unable to do so Mr Tuhura may file a memorandum as to costs within 28 days of the date of this determination and Action may have a further 14 days to file a memorandum in reply.

Christine Hickey
Member of the Employment Relations Authority