

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 395
3028833

BETWEEN GARY MARTINSEN
Applicant

AND TARGET INTERNATIONAL
(NZ) LIMITED
Respondent

3030932

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(NZ) LIMITED
Applicant

AND GARY MARTINSEN
Respondent

Member of Authority: Vicki Campbell

Representatives: Benazir Din for Applicant
Blair Edwards and Madeleine Lister for Respondent

Investigation Meeting: 25 September 2018

Submissions Received: 3 and 15 October 2018 from Applicant
10 October 2018 from Respondent

Determination: 10 December 2018

DETERMINATION OF THE AUTHORITY

- A. Mr Martinsen’s dismissal was justified.**
- B. Target did not breach its statutory obligations of good faith.**

- C. Mr Martinsen did not breach his statutory obligations of good faith.**
- D. The application for damages against Mr Martinsen is declined.**
- E. Costs are reserved.**

Employment relationship problem

[1] Mr Martinsen was the Operations Manager for Target International (NZ) Limited. He was responsible for the management of Target's furniture warehouse. Between November 2016 and May 2017 he was engaged in the planning and implementation of the relocation of the warehouse. This was a major project and was undertaken in addition to his day to day activities in managing the warehouse operations.

[2] Mr Martinsen was assessed as unfit for work from 21 – 27 March 2017. That he was unwell was recognised by Mr Rob Bielby the Managing Director on 20 March when he emailed Mr Martinsen concerned that he was beginning to sound like he was burnt out. Mr Bielby recommended Mr Martinsen see his doctor.

[3] Concurrently with his sick leave Mr Martinsen wrote to Mr Bielby setting out concerns about how he and his team were treated. After Mr Martinsen returned from his sick leave he met with Mr Bielby where the two discussed Mr Martinsen's letter. Mr Bielby confirmed the discussion in writing which centred largely on the warehouse relocation and issues Mr Martinsen had with aspects of the move.

[4] In May Mr Martinsen raised concerns about another manager, Mr Kristian Reinbach. Mr Reinbach was employed by a related company but not Target International. His role was to manage the marketing and product teams. He was the main point of contact for retail stores regarding any issues.

[5] Mr Martinsen believed Mr Reinbach was interfering in the day to day management of his staff and that this contributed to the pressure he was under in his

role. Despite making a complaint nothing changed and Mr Martinsen became increasingly frustrated.

[6] Mr Martinsen expressed his frustrations to members of Mr Reinbach's team on 27 June. This was reported to Mr Reinbach who made a formal complaint that Mr Martinsen had made a threat of physical abuse against him.

[7] Mr Martinsen was suspended on 29 June pending an investigation into Mr Reinbach's complaint. During the disciplinary investigation further allegations relating to the sale of scrap metal arose. The disciplinary process resulted in Mr Martinsen being summarily dismissed on 17 July. Mr Martinsen challenges that dismissal which he says was unjustified and claims Target breached its statutory obligations of good faith.

[8] When Target lodged its statement in reply in response to Mr Martinsen's application it made counter claims which were not directly relevant to the claims made by Mr Martinsen and lacked particularity. I directed Target to lodge and serve its own statement of problem setting out its claims fully including the facts on which it wished to rely. Mr Martinsen lodged and served a statement in reply to Target's claims.

[9] By consent both claims were heard together.

Issues

[10] There are two matters for investigation and determination. In order to resolve Mr Martinsen's employment relationship problem I must determine the following issues:

- a) Was Mr Martinsen unjustifiably dismissed and if so what if any remedies should be awarded?

- b) Did Target breach its statutory obligations of good faith?

[11] To resolve Target International's claims against Mr Martinsen I must determine the following issues:

- c) Whether Mr Martinsen breached his statutory obligations of good faith and if so what if any penalty should be imposed?

d) Whether damages should be awarded against Mr Martinsen.

[12] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Background

March 2017

[13] On 20 March Mr Martinsen wrote to Mr Bielby complaining about further delays in the move to the new warehouse. Mr Martinsen expressed his frustrations with managing the move while at the same time ensuring there was no detrimental effect on the daily operations at the existing warehouse. In his letter he expressed his dissatisfaction with decisions being made about facilities including car parking which affected his direct reports. In summary Mr Martinsen expressed to Mr Bielby that he and members of his team felt unappreciated.

[14] At Mr Bielby's suggestion Mr Martinsen took a period of special paid leave as a result of concerns Mr Bielby held about Mr Martinsen's stress levels.

[15] Mr Bielby met with Mr Martinsen after he had returned to work from special leave. Mr Bielby set out a summary of their discussion in a letter dated 31 March. According to Mr Bielby's letter he explained to Mr Martinsen the reasons for decisions made regarding facilities and advised Mr Martinsen that since their discussion he had negotiated for the requested improvements to be accommodated. Mr Bielby set out a full response to ally Mr Martinsen's concerns regarding the car parking.

[16] Mr Bielby expressed his concern that Mr Martinsen would ask for advice and instead of taking it constructively would take it out of context and treat it as a negative comment resulting in some form of protest from Mr Martinsen.

[17] Mr Bielby confirmed that during their discussion Mr Martinsen had discussed leaving his employment with his direct reports and told Mr Bielby that six members of the warehouse staff would leave with him. Mr Bielby advised Mr Martinsen that this type of behaviour was very concerning to him. Mr Bielby was also concerned that Mr Martinsen's had shared his letter with at least two warehouse employees to read before it

was sent to him. He advised Mr Martinsen that this approach was unprofessional and suggested they needed to consider a fair and appropriate way of communicating the outcome of their discussions to those employees.

Events leading to dismissal

[18] Prior to the warehouse relocation Mr Martinsen and Mr Reinbach worked at separate sites and for different companies. After relocation the warehouse was situated at the same site as Mr Reinbach and his team. The relocation was completed by 13 May.

[19] Mr Martinsen says he and Mr Reinbach would occasionally have professional disagreements but after the relocation Mr Reinbach became more involved in the warehouse operations to the extent that he was interfering in the day to day operations by giving instructions to members of Mr Martinsen's team. His team members had complained to Mr Martinsen and were also frustrated.

[20] On 18 May Mr Martinsen emailed Mr Bielby asking for a meeting outside of work as he wished to make a complaint. Mr Martinsen and Mr David Squire the Distribution Centre Manager met with Mr Bielby and discussed their concerns about Mr Reinbach's interference in the warehouse operations.

[21] By way of example Mr Squire told me at the investigation meeting that Mr Reinbach came into the warehouse and instructed the team on where to put stock. Mr Squire said they already had a plan for the location of stock based on the number and size of the racks and that plan was not in line with what Mr Reinbach was requesting. He found Mr Reinbach's involvement unnecessary and frustrating.

[22] Mr Bielby undertook to speak with Mr Reinbach which he says he did. I have concluded Mr Bielby did not raise Mr Martinsen's concerns about Mr Reinbach's interference in the warehouse operations. Mr Reinbach told me he did not have a conversation with Mr Bielby about complaints from the warehouse team and both Mr Martinsen and Mr Squire told me that instead of seeing less of Mr Reinbach in the warehouse his presence increased.

[23] Mr Martinsen attended Mr Reinbach's office on 27 June. Mr Reinbach was not present. Instead Mr Martinsen spoke to a member of Mr Reinbach's team and says he "let off steam" as a result of his frustrations.

[24] Later that day Mr Martinsen's comments were reported to Mr Reinbach by the two team members. He sent an email on 28 June to Mr Bielby setting out a formal complaint against Mr Martinsen recording what he had been told by his team members.

Mr Reinbach's complaint

[25] In his email on 28 June Mr Reinbach sets out the conversation his team members relayed to him which had occurred the previous day. In particular, Mr Reinbach records Mr Martinsen had attended the team's office and embarked on a rant about issues relating to the warehouse. The team members reported Mr Martinsen becoming increasingly angry and threatening to "deck" Mr Reinbach at least three times. Mr Reinbach says he was told Mr Martinsen had also commented that he knew where there were no security cameras recording in areas of the warehouse.

[26] Mr Bielby met with Mr Martinsen in the morning of 29 June at which time he was suspended. Following the meeting Mr Bielby interviewed Mr Reinbach's two team members. A copy of Mr Reinbach's 28 June email and the notes from the two interviews were sent to Mr Martinsen with a letter confirming the suspension and setting out allegations of serious misconduct on 29 June.

The suspension

[27] Mr Martinsen claims Target made a unilateral decision to suspend him on 29 June and claims the nature of Mr Reinbach's complaint did not warrant such a decision being made.

[28] The employment agreement between the parties includes a provision dealing with suspension in the following terms:

The Employer may suspend the Employee if necessary where serious misconduct is alleged or being investigated. The Employer will seek the Employee's input before suspension. Suspension will be on full pay.

[29] Target has set out the type of conduct which amounts to serious misconduct in its House Rules. It includes "insulting or abusive behaviour unacceptable to management."

[30] In his letter confirming the suspension Mr Bielby outlined the process used during the meeting held with Mr Martinsen on 29 June. Mr Martinsen has not challenged the accuracy of the contents of this letter which records that during the 29

June meeting Mr Bielby gave Mr Martinsen an outline of the complaint received from Mr Reinbach about the threatening conduct and gave Mr Martinsen an opportunity to respond to the proposal to suspend him. The 29 June letter confirms Mr Martinsen's acceptance of the proposal to suspend him.

[31] I find Target complied with the requirements of the employment agreement when it suspended Mr Martinsen. Target had a complaint which if proven could amount to serious misconduct and the complaint required investigation. Mr Martinsen was provided with an opportunity to respond to the proposal to suspend him and has, according to the uncontested letter from Mr Bielby confirming the 29 June discussion, agreed with the suspension.

The allegations

[32] There were two separate tranches of allegations of wrongdoing. The first was contained in the 29 June letter which alleges Mr Martinsen may have:

- a) Made undermining and inappropriate comments about Mr Reinbach to two of his subordinates;
- b) Made a threat of violence against Mr Reinbach; and
- c) Commented that he knew the places in the warehouse that were not covered by security cameras which implied Mr Martinsen would not be seen if he took the threatened actions.

[33] In support of the allegations Mr Bielby included a copy of Mr Reinbach's 28 June email and the statements from the interviews with the two team members.

Undermining and inappropriate comments

[34] In his email on 28 June Mr Reinbach sets out the conversation two of his team members relayed to him which had occurred the previous day. Mr Reinbach advises that Mr Martinsen had attended the team's office and embarked on a rant about issues relating to the warehouse.

[35] Mr Martinsen acknowledges he attended Mr Reinbach's office but denies the allegation of undermining and threatening behaviour. Mr Martinsen says he was

simply letting off steam. He spoke directly to one of the team members while the other was present.

[36] Both team members were interviewed by Mr Bieby on 29 June and both reported Mr Martinsen being angry. Mr Martinsen has acknowledged his comments to Mr Reinbach's team were inappropriate but denies they undermined him.

[37] In her statement to Mr Bielby one of the two team members records Mr Martinsen pointing to Mr Reinbach's office and in relation to not having received a list of contact people from him, called him "a little shit". That this comment was made was supported by the second of the two team members.

[38] Mr Martinsen denies calling Mr Reinbach "a little shit" but was not able to recall what he had actually said. Mr Martinsen did acknowledge that he may have called Mr Reinbach "a little shit" previously.

Threat of violence against Mr Reinbach

[39] In his email on 28 June Mr Reinbach states Mr Martinsen became increasingly angry and "...threatened to "deck" me or knock me out. He made this threat three times during his rant."

[40] The statement from the team member with whom Mr Martinsen was primarily interacting told Mr Bielby Mr Martinsen was relaying a conversation he had had with him [Mr Bielby] after Mr Bielby had suggested they meet with Kristian for a coffee outside of work. Mr Martinsen told the team member that he told Mr Bielby he would not go for a coffee with Mr Reinbach not today, not tomorrow or the next day. He then told the team member that if he met Mr Reinbach for a coffee he would drop him. The team member reports her understanding that by drop him, Mr Martinsen meant "knock him out".

[41] This team member also relayed to Mr Bielby that Mr Martinsen had told her of a conversation he had previously had with one of his direct reports in relation to Mr Reinbach walking around the warehouse. When the direct report told Mr Martinsen that Mr Reinbach had walked around the warehouse the same way before the move Mr Martinsen asked him why he didn't "drop him" back then.

[42] The second team member who was present throughout the exchange reported to Mr Bielby that Mr Martinsen mentioned how he and others in the warehouse wanted to “drop” Mr Reinbach. The team member told Mr Bielby his understanding of what was said meant they wanted to knock Mr Reinbach out.

[43] Mr Martinsen does not recall exactly what he said but does not deny saying that he would drop Mr Reinbach.

Security camera coverage

[44] Both of Mr Reinbach’s team members reported to Mr Bielby that Mr Martinsen mentioned knowing where the dark spots in the warehouse were where there was no coverage by security cameras.

[45] Mr Reinbach understood that this acknowledgement by Mr Martinsen coming quickly on the heels of his comments about dropping him meant Mr Martinsen knew where he could take action and there would be no evidence of this on any security footage.

Escalating behaviours

[46] In his 28 June email Mr Reinbach recorded his opinion that Mr Martinsen’s behaviour had been escalating and was “increasingly unstable”. Mr Martinsen took offence at this comment and requested more information.

[47] Mr Bielby provided Mr Martinsen with copies of emails in which Mr Martinsen had responded to various people including customers and Mr Reinbach directly.

[48] By way of example Mr Martinsen, in an email conversation between him and Mr Reinbach on 13 June, states (verbatim):

What is Christchurch’s problem?
Total wankers

They questioned why I visited the store last year
Now they are questioning why I want a staff list

Sort them out please or I am going down there myself and do it [my emphasis]

[49] Mr Martinsen's explanation was that the emails including the one set out above were sent out of frustration. At the investigation meeting Mr Martinsen acknowledged his responses in the emails were inappropriate.

Target's conclusions

[50] A meeting was held on 4 July to give Mr Martinsen an opportunity to respond to the allegations. After considering Mr Martinsen's responses Mr Bielby met again with Mr Martinsen on 5 July. At this meeting Mr Bielby advised Mr Martinsen of his preliminary findings and decision.

[51] Mr Bielby concluded that Mr Martinsen's actions amounted to serious misconduct as set out in the house rules in that Mr Martinsen's conduct was insulting and abusive behaviour unacceptable to management. He told Mr Martinsen that his actions had seriously damaged the trust and confidence required in the employment relationship. Mr Bielby's conclusions were set out in a letter to Mr Martinsen dated 6 July.

The second tranche of allegations

[52] A second tranche of allegations was made at the 5 July meeting. These allegations were subsequently set out in the letter dated 6 July. Mr Bielby alleged Mr Martinsen may have:

- a) Taken cash from the scrap metal sales;
- b) Disposed of the receipts for the scrap metal sales; and
- c) Used the cash for unauthorised purchases, including a baby gift for another employee and beer for the warehouse team.

[53] It was common knowledge in the warehouse that scrap metal would be put into a bin and delivered to a scrap metal yard where it was sold for cash. The money was kept in an envelope in a drawer under Mr Martinsen's desk in his office in the warehouse. Attached to the envelope was a note of the balance of funds in the envelope. This system had been in place for about two years. The cash was given to either Mr Martinsen or Mr Squire. Both managers had access to the drawer.

[54] Mr Bielby says he first learned about scrap metal being disposed of when he went searching for a carpet rack and steel pillar guards on 4 July. He was told by Mr Squire that the items had been sent to the scrap yard.

[55] As part of his investigation Mr Bielby interviewed Mr David Derbyshire, a storeman, on 6 July. Mr Derbyshire explained to Mr Bielby that the scrap metal money used to be given to Mr Wood when the accounts section was located at the same place as the warehouse. He told Mr Bielby that this changed when the accounts section was moved from the shared location to another location. At that time Mr Wood had told him to keep the money at the warehouse and use it for petty cash. He passed this instruction onto Mr Martinsen and that is how the cash was handled from that day forward.

[56] Mr Martinsen's explanation given on 11 July is entirely consistent with Mr Derbyshire's explanation.

Cash taken from the scrap metal sales

[57] Mr Bielby raised concerns that Mr Martinsen may have taken cash from the scrap metal sales. Mr Martinsen denied this. Mr Bielby acknowledged in his letter to Mr Martinsen on 10 July that the money held in the envelope accorded with the balance written on the outside of the envelope.

[58] At the investigation meeting I asked Mr Bielby why he maintained the view that Mr Martinsen had taken money from the scrap metal sales. All he could tell me was that he thought there should be more money in the envelope. No evidence has been produced to support his belief.

Receipt disposal

[59] Mr Bielby was concerned that receipts for the sale of the scrap metal had been disposed of. Mr Martinsen maintained during the disciplinary investigation process that the receipts were kept in a different cabinet and that they were separated from the cash to keep the envelope from becoming too bulky.

[60] There was no attempt to try and locate these receipts from the location described by Mr Martinsen.

Use of the scrap metal cash for unauthorised purchases

[61] Mr Bielby was concerned Mr Martinsen had spent more money than was approved for a gift for an employee who had a new baby, that he had been misled about the gift and that Mr Martinsen had used the scrap metal money to purchase beer and food for the warehouse staff.

[62] Mr Bielby had approved \$30 from company funds to be used for the baby's gift. When Mr Bielby interviewed him, Mr Derbyshire told Mr Bielby Mr Martinsen had given him money to purchase the gift which cost \$96. He told Mr Bielby that each of the warehouse staff had chipped in \$5 and he believed Mr Martinsen had taken the rest of the money out of the scrap metal money.

[63] Mr Martinsen explained to Mr Bielby that as well as the \$30 from Target each of the warehouse staff had chipped in \$5 and he personally made up the balance. He assured Mr Bielby that he had not used any money from the scrap metal sales.

[64] In relation to the payment for beer and food Mr Martinsen explained that he always personally paid for these items and would seek reimbursement from Target. He denied using any of the scrap metal money to make such purchases.

Target's conclusions

[65] Mr Bielby concluded Mr Martinsen had misled him with respect to the baby gift, and that Mr Martinsen had failed to retain receipts for the scrap metal sales and this impacted on the company's compliance with its tax obligations to Inland Revenue.

Conclusion

[66] Mr Martinsen was dismissed as a result of Mr Bielby finding that his conduct amounted to undermining and threatening behaviour and dishonesty. Mr Bielby found that his conduct individually and cumulatively amounted to serious misconduct and seriously undermined the trust and confidence he needed to have in Mr Martinsen as an employee.

[67] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine

whether Target's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[68] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d). These matters include whether, having regard to the resources available, Target sufficiently investigated allegations, raised the concerns with Mr Martinson, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[69] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Martinsen being treated unfairly.¹ A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

[70] I am required to assess whether Target had, on the balance of probabilities, convincing evidence to show it had a reasonable basis at the time of the dismissal for believing serious misconduct had occurred.²

[71] Mr Martinsen had raised concerns about Mr Reinbach on 18 May. No action was taken by Mr Bielby to resolve those concerns and as far as Mr Martinen was concerned matters escalated. When he attended Mr Reinbach's offices on 27 June his frustrations clearly got the better of him.

[72] Mr Martinsen told Mr Bielby during the disciplinary process that he was just letting off steam and that during the rest of that day he had at least two interactions with Mr Reinbach that were professional and cordial and Mr Reinbach did not appear to feel threatened. The first interaction took place in Mr Reinbach's office and the second in the warehouse.

[73] Mr Bielby did not accept Mr Martinsen's explanation that he was simply letting off steam. Mr Bielby found that Mr Martinsen did not comprehend the serious nature of the allegations and the impact his actions had on the workplace. He found Mr Martinsen's actions on 27 June met the threshold of insulting and abusive

¹ Employment Relations Act 2000 (the Act), s 103A(5).

² *Honda New Zealand Ltd v NZ Boilermakers Union* [1991] 1 NZLR 392 (CA) at 394.

behaviour unacceptable to management and his lack of comprehension seriously damaged the trust and confidence he had in him as an employee.

[74] Mr Martinsen could not recall what he told Mr Reinbach's team members on 27 June. The statements from each of the two team members are consistent in that both team members describe Mr Martinsen as being angry, that he spoke in a derogatory way about Mr Reinbach, he threatened to "drop" him and spoke about knowing where the dark spots in the warehouse were. Both team members were left with the impression that Mr Martinsen intended to deck or knock out Mr Reinbach and that if this occurred in the warehouse Mr Martinsen knew where his actions would not be captured on the security footage.

[75] Mr Martinsen's behaviour had been escalating and this was demonstrated through the emails which showed he had responded in a way that he accepted at the investigation meeting was completely inappropriate.

[76] Mr Martinsen was a senior manager for Target. When he attended Mr Reinbach's office and discovered he was not there he could have left. Instead he vented his frustrations to Mr Reinbach's team members. It was open to Mr Bielby to conclude that Mr Martinsen's conduct was undermining of Mr Reinbach as a manager and his comments amounted threats of physical harm. If Mr Martinsen was simply letting of steam as he said he was, there would have been no need for him to reference his discussion with a direct report where he questioned that employee about why he hadn't dropped Mr Reinbach earlier.

[77] However, I find there was no proper basis for Mr Bielby to have concluded that Mr Martinsen had been dishonest. There was no money missing from the envelope and Mr Bielby has produced no evidence to show Mr Martinsen was anything other than entirely truthful in his explanations about the gift and purchase of beer and food. Mr Bielby could have made contact with the scrap metal dealers to request copies of their receipts for the sale of scrap metal to check his belief that money was missing. He did not do that and Mr Bielby was unable to explain why he had formed the view that money was missing.

[78] Mr Bielby made a preliminary decision that dismissal was the appropriate outcome based on the first tranche of allegations. This was conveyed to Mr Martinsen

at the same time as the second tranche of allegations was raised with him. The preliminary decision was based on Mr Bielby's conclusion that Mr Martinsen's behaviour on 27 June amounted to serious misconduct.

[79] Mr Biebly conducted a full and fair investigation into the first tranche of allegations and honestly believed Mr Martinsen's conduct on 27 June amounted to serious misconduct. I am satisfied the investigation process was compliant with s 103A of the Act. Mr Biebly raised his concerns with Mr Martinsen and gave him a reasonable opportunity to respond and considered his explanations.

[80] I am satisfied Target has established on the balance of probabilities that dismissing Mr Martinsen was an action an employer acting fairly and reasonably could take in relation to Mr Martinsen's conduct on 27 June. In all the circumstances dismissal was within the range of reasonable responses available to Target. Mr Martinsen's dismissal was justified.

Breaches of good faith

[81] Although unclear in the pleadings I understand Mr Martinsen claims the following conduct by Target breached its statutory duties of good faith:

- a) Failure to provide Mr Martinsen with a reasonable opportunity to answer all the allegations levelled at him; and
- b) Failure to carry out a fair and reasonable disciplinary procedure.

[82] Mr Martinsen was provided with a full opportunity to answer all allegations. Following meetings with him, Mr Bielby interviewed other employees as requested and provided Mr Martinsen with copies of all interview statements.

[83] Mr Martinsen was provided with an opportunity at all times to have representation at the meetings and he was on notice that Target viewed the matter seriously and that dismissal was a possibility. Mr Bielby set out his findings on the two tranches of allegations including his preliminary views of the appropriate sanction.

[84] Mr Martinsen has not established his claim that Target breached its obligations of good faith and I can be of no further assistance to him.

Target's Counter-Claims

Alleged breaches of good faith by Mr Martinsen

[85] Target International claims Mr Martinsen breached his statutory obligations of good faith when he:

- c) Shut down the investigation and disciplinary process; and
- d) Refused to attend disciplinary meetings.

[86] Mr Bielby says Mr Martinsen refused to attend a disciplinary meeting to respond to the allegations with respect to the scrap metal money and that he responded by sending combative emails containing ultimatums for Mr Bielby.

[87] The allegations regarding the scrap metal money were made in a general way at the disciplinary meeting on 5 July. On Thursday 6 July Mr Bielby wrote to Mr Martinsen and among other things, set out the specific allegations in more detail. Mr Martinsen was invited to attend a meeting on the following Monday at 10.30am.

[88] On 7 July Mr Martinsen wrote to Mr Bielby requesting that he interview additional employees and responded in part to the allegations. The letter ended with Mr Martinsen setting out two options for Mr Bielby. To either issue a written warning in which case Mr Martinsen was happy to meet to discuss whether he was comfortable returning to work or dismissal on the grounds of serious misconduct in which case there was no need to meet any further.

[89] In light of Mr Martinsen's request Mr Bielby interviewed another employee and wrote to Mr Martinsen on 10 July attaching the statement from the further interview. Despite Mr Martinsen's request in his letter of 7 July that Mr Bielby choose one of the two options, Mr Bielby invited Mr Martinsen to a further disciplinary meeting.

[90] In his letter Mr Bielby sets out his concerns that Mr Martinsen was reluctant to meet with him and pointed out Mr Martinsen's obligations to be responsive and

communicative and that if he did not attend the proposed meeting it was possible his actions may constitute a breach of good faith and/or a failure to follow a lawful and reasonable instruction. Surprisingly given the claim against Mr Martinsen, Mr Bielby then invited him to provide written submissions if that was his preference.

[91] Mr Martinsen did prefer to make written submissions and did so within the timeframe provided by Mr Bielby.

[92] Target International (NZ) Limited has not established its claim that Mr Martinsen shut down the disciplinary process or refused to attend disciplinary meetings. Mr Martinsen communicated his responses to Mr Bielby's preliminary findings in writing with questions and a request for one further employee to be interviewed. He then took up the option Mr Bielby made available to him to respond to the final allegations in writing rather than attend a meeting.

Claim for damages

[93] Target claims Mr Martinsen was grossly negligent and/or dishonest in performing the duties and responsibilities of his employment when he disposed of fully functional company equipment to the scrap metal yard. The equipment referred to is the carpet rack and steel pillar guards Mr Bielby was told had been sent to the scrap metal yard. Target says Mr Martinsen breached his obligations of fidelity, by not acting in the best interests of the company when he:

- a) Authorised the disposal of the company equipment; and
- b) Failed to account for the cash received for scrap metal.

[94] Target International (NZ) Limited has failed to establish its claim for damages. There is no evidence it was Mr Martinsen who authorised the disposal of the carpet rack and steel pillar guards. Mr Derbyshire told me Mr Squire was in charge of the scrap metal disposal. Further, Mr Bielby was unable to tell me when the equipment was actually disposed of, that is, whether it was disposed of before or during Mr Martinsen's suspension.

[95] There is no evidence Mr Martinsen failed to account for the money received for the scrap metal. Mr Bielby acknowledged at the investigation meeting that all of the cash stipulated to be in the envelope was present when the money was counted.

Costs

[96] Costs are reserved. The parties are invited to resolve the matter. Both parties have been successful in defending the claims against them. If they are unable to resolve the issue of costs they shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Both parties will then have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[97] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority