

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 62
5434956

BETWEEN GILES TIMOTHY SERGANT
Applicant

A N D WESTERN MAILING
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: L Herzog, Counsel for Applicant
A C Schirnack/S Kopu, Counsel for Respondent

Investigation Meeting: 3 and 16 December 2013 at Auckland

Submissions Received: 25 November and 20 December 2013 from Applicant
25 November and 19 December 2013 from Respondent

Date of Determination: 21 February 2014

DETERMINATION OF THE AUTHORITY

- A. Giles Timothy Sergant was not unjustifiably disadvantaged by being suspended by Western Mailing Limited.**
- B. Giles Timothy Sergant's authorisation of capital expenditure of \$46,000 in excess of his delegated authorities was misconduct capable of justifying dismissal.**
- C. Giles Timothy Sergant was unjustifiably dismissed by Western Mailing Limited.**
- D. The Authority declines to grant reinstatement.**

- E. The Authority declines to award any remedy under s123(b) because Mr Sergant has not proven to the required standard he has lost remuneration**
- F. An order that Western Mailing Limited pay Giles Timothy Sergant compensation of \$3,500 including a reduction of 50% for his contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- G. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have a further 14 days to file and serve and reply. The matter shall be dealt with on the papers.**

Employment relationship problem

[1] Giles Timothy Sergant was employed as the Chief Executive Officer of Western Mailing Limited (WML) until he was suspended, then dismissed, on 20 September 2013. Mr Sergant submits the alleged conduct did not justify suspension or dismissal. He seeks reinstatement, lost remuneration of \$376,000 and \$50,000 compensation for hurt and humiliation.

[2] WML disagrees. It submits the decision to suspend and dismiss was substantively justified and procedurally fair.

Facts leading to dismissal

[3] Mr Sergant had previously been employed by WML as its CEO in 1998-2000. In early 2013, he was approached by Gary Gosling-Lewis, founder and principal shareholder of WML, to take up the role of CEO again.

[4] Mr Sergant received an offer of permanent full time employment by letter dated 29 April 2013. The letter attached several schedules, a copy of the employment agreement, position description and acceptable use policy. The letter stated "*if for any reason the terms and conditions of your employment agreement in this letter of offer and schedule should differ, the letter of offer and schedules will take precedence over the employment agreement*". He was asked to sign and initial each page of the letter, schedules, policies and employment agreement and return them to WML.

[5] Mr Sergeant signed the last page of the employment agreement on 8 May 2013 and returned this to WML. He did not sign and return the remaining documentation. He started work at WML on 1 August 2013.

[6] Prior to 14 August 2013, Mr Sergeant authorised capital expenditure of over \$46,000. This was in excess of his delegated authorities set out in the schedules attached to his letter of offer¹. Capital expenditure in excess of \$5,000 required the approval of Mr Gosling-Lewis, two Board advisers or a full Advisory Board meeting.

[7] Mr Sergeant was asked to attend a full advisory board meeting on 14 August 2013. The full advisory board consisted of Mr Gosling-Lewis, and two advisors, Phillip John Norman and Stephen Andrew Udy (the Board).

[8] During the meeting he called the Board “*embarrassing*” stated they were not acting as a Board, were creating issues and was “*nonsense*”. He accused Mr Udy of not reading the papers properly when he raised the issue of capital expenditure in excess of his delegated authority. He then told the Board if it thought it was going to “*micromanage*” him, “*it was not going to happen*”. Mr Sergeant then stated “*I’m going*” saying the Board could decide whether he was their man and left the meeting.

[9] On 15 August 2013 Mr Gosling-Lewis told Mr Sergeant he was disgusted by his behaviour at the Board meeting. He was asked to apologise to the Board. Mr Sergeant apologised to Mr Gosling-Lewis then said he would think about apologising to the rest of the Board. He did not apologise to anyone else.

[10] On 18 August 2013, Mr Sergeant sent Mr Gosling-Lewis a “shareholders’ report”. The report commented on members of the Board, employees and members of Mr Gosling-Lewis’ family. The report included the statements such as:

“An incompetent and dysfunctional board (trying to) remotely micro-manage with no apparently developed strategy”;

“The main shareholder’s son ... has neither the experience nor acumen ... he rarely articulates anything that makes sense; sounding like he knows what he’s talking about being his main priority”;

¹ Respondents Bundle of Documents (RBD) p.57 Schedule 3 delegated authority

“The current GM in Auckland ... [has] been promoted beyond capability, [and is] of questionable integrity”;

With reference to the finance functions, *“an outdated accounting package operated by an elderly accounts clerk”;* and

“Not one member of the current board has sufficient understanding of the company’s existing services”².

[11] Mr Gosling-Lewis emailed Mr Sergant on 21 August 2013 asking, amongst other things, that he not *“attack persons. It was not helpful or constructive for him as those people were his family and advisers”³.*

[12] On 22 August 2013, Mr Sergant emailed Mr Gosling-Lewis noting an agreement to remove his obligation to report to the Advisory Board and a six month notice period to be paid on termination of contract by either side⁴.

[13] On 25 August 2013, Mr Gosling-Lewis left the country on a vacation. Emails continued to be exchanged between Mr Gosling-Lewis and Mr Sergant regarding changing his terms and conditions of employment.

[14] In one email dated 31 August 2013, Mr Sergant raised Mr Gosling-Lewis’ lack of communication calling it *“an increasing pattern of avoidance”⁵.*

[15] On 7 September 2013, Mr Sergant advised he had been able to secure the return of a previous employee to a key position within WML. He then went on to state⁶:

“Before proceeding to an offer [I] will wait until I have your full responses on each and all of the proposed changes I am seeking your approval for under cover of my 6 September email.”

[16] The 6 September 2013 email referred to changes to his terms and conditions of employment.

² RBD pp.92-93 shareholders’ report

³ RBD p.94, email G Gosling-Lewis to G Sergant 21 August 2013

⁴ RBD p.100, email G Sergant to G Gosling-Lewis

⁵ RBD p.120, email G Sergant to G Gosling-Lewis 31 August 2013

⁶ RBD p.135

[17] Mr Gosling-Lewis returned to New Zealand on 16 September 2013. He discussed concerns about Mr Sergant's behaviour with a human rights consultant, Sarah Poore. He determined to hold a disciplinary meeting the following day.

[18] On 17 September 2013, WML invited Mr Sergant to attend a meeting. He was handed a letter setting out issues of concerns WML had with his behaviour. He was asked to comment on a proposal to suspend him on full pay until a further disciplinary meeting on 19 September 2013 could be held. The concerns were about his "*potentially volatile behaviour*" and given the seniority of his role, the business risk to be managed until they had completed the investigation and heard from him at the meeting on 19 September. WML asked for feedback on the proposal to suspend. The meeting was adjourned to give him time to reflect and take legal advice.

[19] Mr Sergant returned 40 minutes later. He confirmed he had read the letter and obtained legal advice. He submitted he did not want to be suspended but wished to work through the issues. He did not think the concerns were as grave as WML suggested and wanted to go through them. WML did not wish to engage in that discussion until the second disciplinary meeting.

[20] WML took a further adjournment to consider his feedback. The meeting was reconvened 10 minutes later and Mr Sergant was told he was suspended⁷.

[21] Mr Sergant then left the meeting and told other staff members he had been suspended.

[22] On 19 September 2013, WML and Mr Sergant met to discuss the issues of concern. Mr Sergant provided feedback. At the conclusion of the meeting, Mr Gosling-Lewis considered Mr Sergant's responses overnight prior to determining outcome.

[23] On 20 September 2013, WML terminated Mr Sergant's employment. Mr Sergant received payment of a sum equivalent to three months' base salary, \$25,000 for actual and reasonable costs arising from his repatriation to the United Kingdom and use of a company vehicle for six weeks.

⁷ RBD p.163

Issues

[24] The following issues arise:

- (a) What were the terms and conditions of Mr Sergant's employment?
- (b) Was Mr Sergant unjustifiably disadvantaged by the suspension?
- (c) Was Mr Sergant's alleged behaviour misconduct capable of justifying dismissal?
- (d) Was the process leading to dismissal how a fair and reasonable employer could have acted in the circumstances?
- (e) What remedies (if any) should be awarded?
- (f) Were Mr Sergant's actions leading to dismissal causative and blameworthy requiring a reduction in compensation due to contributory conduct?

Legal Framework

[25] The fact Mr Sergant's employment was terminated is accepted. The onus falls upon WML to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2)). In applying this test, the Authority must consider the matters set out in s.103A.

[26] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.⁸

What were the terms and conditions of Mr Sergant's employment?

[27] During hearing Mr Sergant raised an issue about his terms and conditions of employment. He signed the last page of the employment agreement but says he did not read, sign and return the remaining documentation. He submitted there was an oral employment agreement with Mr Gosling-Lewis that he would report to him only

⁸ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

and would have similar delegated authorities to him. Alternatively there was an agreed variation at a later stage for the same terms.

[28] Mr Sergant confirmed receiving by email in April 2013 the written employment agreement, letter of offer, schedules, CEO position description, house rules and acceptable use policy.

[29] On the last page of the employment agreement Mr Sergant signed there is a clause headed “terms of acceptance”. This clause sets out an agreement to accept employment “*on the terms and conditions specified in this agreement, my Letter of Offer and any associated documentation*” and that the signatory understood those “*terms represent a full record of the agreement entered into between the parties and supersedes any existing or written or oral agreements, understandings or customary practices being observed between the parties.*”⁹ The employment agreement contains other similar references to applicable policies and procedures.¹⁰

[30] Mr Sergant was an experienced CEO. At hearing he confirmed he was experienced in employment matters. The importance of reading and understanding his own employment agreement and documentation should have been well known to Mr Sergant. At hearing he accepted the employment documentation he received contained “*standard employer expectations*”.¹¹

[31] He did not raise any oral employment agreement or issues pertaining thereto prior to starting work at WML. He continued to accept the benefits afforded under the employment agreement until dismissal.

[32] The applicant produced expert evidence the remuneration offered was higher than normal for a CEO of a company of this size.¹² These benefits could evidence motivation to accept the position, irrespective of the terms and conditions.

[33] If the employment agreement governs this employment relationship, variations will not be binding unless mutually agreed and recorded in writing and signed by both

⁹ RBD p62

¹⁰ RBD p41clauses 2.1 and 4.1

¹¹ Oral evidence G Sergant 03/12/13

¹² Oral evidence Simon Monks 03/12/13

parties (clause 36.1)¹³. The alleged variation was not in writing and there was dispute about any agreement.

[34] The Authority determines the terms and conditions of Mr Sergant's employment are set out in the employment agreement, letter of offer, attached schedules, position description, house rules and acceptable use policy. Therefore the oral variation is not binding due to clause 36.1.

Was Mr Sergant unjustifiably disadvantaged by the suspension?

[35] Mr Sergant submits his suspension was unjustified because the issues involved in the case had been resolved and dealt with at the time they occurred. WML took no disciplinary action at the time and continued to employ and endorse Mr Sergant's continued leadership. He further alleges the letter of invitation to the disciplinary meeting to a pre-arranged meeting at WML's lawyers' offices two days later evidenced pre-determination of suspension.

Should the Authority determine the unjustified disadvantage claim for suspension as part of this matter?

[36] The unjustified suspension was raised for the first time at hearing on 3 December 2013. It had not been raised with the employer prior to hearing. The hearing date fell within the 90 day time limit for raising the grievance. It also relied upon the same evidence produced prior and at hearing.

[37] The Authority, as an investigative body, has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.¹⁴ Section 160(3) provides that the Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.

[38] The principles of natural justice were met by the fact the evidence of this claim was the same evidence filed for the unjustified dismissal claim. Both parties evidence already addressed the issue of suspension. The late formulation of the claim may give rise to costs implications, but the respondent was not prejudiced otherwise.

¹³ RBD p.51

¹⁴ Section 57 of the Act; *NZPPTA v Secretary of Education & Ors* [2013] NZERA Auckland 258 at [13]

If the Authority did not deal with this claim, a further adjournment would create more delay and cost.

[39] In the circumstances, the Authority is prepared to determine the unjustified disadvantage claim for suspension as part of this proceeding.

Was Mr Sergant unjustifiably disadvantaged by the suspension?

[40] At the start of hearing the parties agreed Mr Sergant's alleged behaviour was as set out in the invitation to the disciplinary meeting namely:

- Authorisation of capital expenditure of over \$46,000 (in respect of IT software and hardware) without seeking the WML Advisory Board approval;
- Behaviour at WML's Advisory Board meeting 14 August 2013;
- Request by Gary Gosling-Lewis to apologise ignored or overlooked;
- Shareholders report 18 August 2013;
- Disrespectful and critical tone in emails to Gary Gosling-Lewis 31 August;
- Pressure to change terms and conditions including questioning the integrity of Gary Gosling-Lewis.¹⁵

[41] The employment agreement contained a power to suspend "*when warranted by circumstances*" (clause 28). The agreement does not prescribe what those circumstances would be.

[42] There is no immutable rule that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so.¹⁶

[43] Mr Sergant accepted at hearing he was told about the proposed suspension by letter dated 17 September 2013, took legal advice and was given an opportunity to respond. Mr Gosling-Lewis then took time to consider his response prior to making the decision to suspend. This does not evidence pre-determination.

¹⁵ JBD p146

¹⁶ *Graham v Airways Corporation of New Zealand Ltd* (EMC, 14/07/05) at [105]

[44] Prior to suspension, an employer must have good reason to believe that the employee's continued presence in the workplace may give rise to some other significant issue or cannot be managed.¹⁷

[45] Mr Gosling-Lewis' evidence of the circumstances warranting suspension were concerns during the disciplinary process Mr Sergant may become resentful, could cause reputational damage and continue to undermine the Board and himself.¹⁸ There had been similar alleged behaviour towards the Board, directors and Mr Gosling-Lewis. There was an existing basis to be concerned he may continue to exhibit this behaviour if he remained in the workplace.

[46] There would have been practical difficulties managing Mr Sergant within the workplace given his position as CEO. His direct reporting lines were to the Board, directors and Mr Gosling-Lewis, all of whom had been subjected to Mr Sergant's alleged behaviour. There was no one within WML to whom he could report given his seniority. There were also concerns he may not comply with the terms of his employment agreement and could not have continued without close supervision. There were little if any alternatives to suspension available. None were suggested by Mr Sergant.

[47] Immediately after the decision to suspend, Mr Sergant went and told several employees he had been suspended. These employee's responses to his suspension ranged from sympathy to anger at the Board to employees offering to leave WML to work for him.¹⁹ This behaviour exemplified Mr Gosling-Lewis' concerns underlying the need for suspension. It shall impact upon any remedies.

[48] Mr Sergant was the most senior employee. His previous behaviour would have given rise to Mr Gosling-Lewis' concerns. Those concerns were significant. He could not be adequately managed in the workplace.

[49] In the circumstances the Authority determines Mr Sergant was not unjustifiably disadvantaged by being suspended by Western Mailing Limited.

¹⁷ *Munro v NS Security Ltd formerly known as Hibiscus Coast Security Ltd* [2012] NZEmpC 38 at [18] to [22]

¹⁸ Witness Statement G Gosling-Lewis para106

¹⁹ Reply Statement G Sergant p23 Response to Sarah Poole's witness statement

Was Mr Sergant's alleged behaviour misconduct capable of justifying dismissal?

[50] Mr Sergant submits the alleged behaviour did not warrant dismissal because there were no consequences of the authorisation in excess of his capital expenditure and the other behaviour needed to be seen in context. His comments were robust and challenging and did not create irreparable harm.

[51] The employment agreement provided for termination "*in the event of serious misconduct*" (clause 29.7). Clause 2 provided Mr Sergant was bound by WML's rules, policies and procedures including the Company Employee Handbook/House Rules.

[52] Serious misconduct is defined within WML's House Rules document²⁰ as "*behaviour which undermines the contractual relationship between the employee and the employer, and/or threatens the wellbeing of the Company, its employees, Customers or visitors*". Serious misconduct may result in dismissal. This behaviour included, amongst other things:

- Refusal to perform work assigned, refusal to obey a lawful and reasonable instruction, walking off the job without good cause
- Using abusive language, and aggressive or argumentative behaviour, which may cause offence to another person
- Inappropriate boisterous or irresponsible behaviour that results in injury or serious emotional abuse, or humiliation, including harassment or bullying (whether verbal, physical, written or electronic)
- Physical or serious verbal assault (including foul language, intimidation or threatening behaviour) on another person on Company or Customer premises or at Company or customer functions
- Continually failing to follow WML Policies and Procedures and rules

[53] WML's House Rules also included a definition of less serious misconduct that may result in a warning. This behaviour included:

²⁰ JBD p 18 ff

- Being discourteous, or not treating others with dignity, including lack of respect for other cultures or teams
- Not exhibiting a professional approach, to the best of their ability, including temper tantrums, backstabbing and cheating the system
- Disruptive behaviour that prevents employees from performing their duties
- Participating in conduct that is unbecoming to a member of staff, and is deemed to be unacceptable by normal community standards

[54] The authorisation of capital expenditure of over \$46,000 was well in excess of Mr Sergeant's delegated authorities. It was a serious breach of his employment agreement. Mr Sergeant's explanation he did not read the documentation does not mitigate the seriousness of the breach, especially given the seniority of his position. Even though there was no consequence, it did not mitigate the seriousness of the breach. This matter would have impacted upon an employer's trust and confidence in the ability of their most senior employee to operate independently and comply with the terms of his employment agreement and delegated authorities.

[55] Mr Sergeant's subsequent behaviour at the Board meeting on 14 August 2013 appears more likely to be less serious misconduct. Although his comments were aggressive and argumentative and did cause offence to the Board and directors, they were more likely discourteous, unprofessional, disruptive and unbecoming. His final comment before leaving could appear to be a refusal to perform work or to obey a lawful and reasonable instruction, and walking off the job without good cause. However he did return to work the following day despite this behaviour.

[56] The refusal or neglect to apologise indicated the above matters had not been dealt with and was also unprofessional.

[57] His subsequent behaviour does appear to be less serious misconduct. The comments in the shareholders report were discourteous and unprofessional. They were not robust or transparent as alleged by Mr Sergeant.

[58] The alleged disrespectful tone of emails and pressure to change terms and conditions of employment do not seem to be less serious misconduct at all. The emails simply refused to accept his behaviour was as offensive as Mr Gosling-Lewis

alleged. He was forceful in his requests to change his terms and conditions. Suggested changes to the terms and conditions were already being exchanged between the parties. There was a suggestion Mr Sergant was using the possibility of bringing another employee on board as a basis for leveraging changes to the terms and conditions. The employee he was headhunting was known to WML. WML were in a position to headhunt independent of Mr Sergant if they wished to do so. There seemed little (if any) leverage in the circumstances.

[59] The behaviour post Board meeting fell within less serious misconduct or was not misconduct at all. This behaviour on its own would not have justified dismissal. However it did not repair WML's trust and confidence Mr Sergant would comply with its policies or his employment agreement.

[60] Standing back and considering the evidence, the Authority determines a fair and reasonable employer could have determined Mr Sergant's authorisation of capital expenditure of \$46,000 in excess of his delegated authorities was misconduct capable of justifying dismissal.

Was the process leading to dismissal how a fair and reasonable employer could have acted in the circumstances?

[61] Mr Sergant submits the grounds for dismissal were historic and were considered at the time. It was unjust for the employer to seek to reopen disciplinary procedures at a later date.

[62] Given the above evidence of ongoing concerns leading up to the disciplinary meeting, it is unlikely these matters had been resolved. The apology requested had not been forthcoming. The concerning behaviour appeared to be continually repeating itself.

[63] The employers concerns had been raised with Mr Sergant by way of letter dated 17 September 2013. No issue was taken by the Applicant about this point.

[64] Mr Sergant was given an opportunity to respond to those concerns by way of a meeting on 19 September 2013. He was legally represented. He made submissions that he did not check the delegated authorities, admitted he had been challenging and angry, merely overlooked the apology to the Board, thought the shareholders report

was candid as opposed to inappropriate, and denied slighting Mr Gosling-Lewis or putting pressure upon him to change terms and conditions.²¹

[65] There is a concern about the genuine consideration of Mr Sergant's responses. The decision maker, Mr Gosling-Lewis, was one of the complainants about his alleged behaviour. Mr Gosling-Lewis' only consultation, besides his lawyer, was his wife and co-owner of WML. He had access to independent professional business advisors through the Board. He had access to human resources consultants. He did not utilise their advice to assist with his decision making.

[66] Despite concerns about the capital expenditure and Board meeting behaviour in August, Mr Sergant had remained employed as CEO until September 2013. Mr Sergant did not receive any disciplinary action for this behaviour. The impression given was that trust and confidence could have been repaired at that stage.

[67] His subsequent behaviour was either less serious misconduct or not misconduct at all. On its own this behaviour would not have resulted in dismissal. It would have resulted in a warning.

[68] There did not appear to be consideration of alternatives to dismissal such as warnings, performance management and/or demotion. The requirement that an employer treat its employees fairly and reasonably, may arguably give rise to a duty to consider other alternatives before dismissing a worker.²² This is especially where the majority of the behaviour complained of is less serious misconduct.

[69] The Authority determines WML did not genuinely consider Mr Sergant's responses. This was not minor and did result in unfairness. Mr Sergant was unjustifiably dismissed in the circumstances.

What remedies (if any) should be awarded?

[70] Mr Sergant seeks reinstatement, lost future earnings of \$376,000 and \$50,000 hurt and humiliation compensation.

Is reinstatement practicable and reasonable?

²¹ Witness Statement G Gosling Lewis para 112.

²² Brookers ER103.04 Dismissal — procedural fairness para (6)

[71] Reinstatement is not the primary remedy for personal grievances. It may be ordered where it is practicable and reasonable to do so (s125(2)).

[72] If reinstatement was ordered Mr Sergant would have to report to Mr Gosling-Lewis and the Board. Mr Gosling-Lewis gave evidence he would have enormous difficulties working with him. At hearing Board members gave evidence they could not continue to work with Mr Sergant. Messers Udy and Norman no longer endorsed his continued leadership. Both would leave WML if Mr Sergant returned.

[73] Mr Sergant's conduct following suspension created dissent amongst WML employees against the Board, directors and Mr Gosling-Lewis.

[74] There was little evidence Mr Sergant could abide by the terms of his employment agreement or follow Mr Gosling-Lewis' or the Board's reasonable and lawful instructions if reinstated. His suggestion at hearing this could all be solved "*in a couple of sensible meetings*" is unrealistic and impracticable.

[75] Given the evidence of a high level of dissent, possible loss of Board members and difficulties managing Mr Sergant's return to WML, reinstatement is not reasonable or practicable.

[76] The Authority declines to grant reinstatement.

Has Mr Sergant lost remuneration (s.123(1)(b))?

[77] Given the finding he has a personal grievance, Mr Sergant seeks the exercise of the Authority's discretion for a greater award of lost remuneration equivalent to 1 year's salary (\$376,000) under s128(3).

[78] The evidence of Mr Sergant's lost future earnings is sparse. It primarily relies upon an expert opinion about the appropriate level of remuneration for his job and the likelihood of gaining new employment within six to nine months.²³

[79] Mr Sergant had an obligation to mitigate loss by seeking alternative paid employment.²⁴ An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order

²³ Applicant exhibit A produced by S Monk 3/12/13
²⁴ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

reimbursement.²⁵ In practice this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.²⁶

[80] There is no evidence produced of this detail by Mr Sergant. He also received three month's salary following termination.

[81] Accordingly the Authority declines to award any remedy under s123(b) because Mr Sergant has not proven to the required standard he has lost remuneration.

What award (if any) should be made under s.123(1)(c)(i)?

[82] Mr Sergant seeks an award of \$50,000 hurt and humiliation.

[83] The evidence is sparse and primarily about alleged reputational damage from the publicity surrounding his dismissal and its effect on future employment prospects.²⁷ Mr Sergant told WML employees about his situation immediately following suspension. He was partly the publicist and author of his own hurt and humiliation.

[84] The evidence would normally attract a modest award for hurt and humiliation of \$7,000 subject to any contributory behaviour.

Were Mr Sergant's actions leading to dismissal causative and blameworthy requiring a reduction in compensation due to contributory conduct?

[85] The Authority must consider the extent to which Mr Sergant's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded (s.124). Contributing behaviour is behaviour which is causative of the outcome and blameworthy.²⁸

[86] Mr Sergant's behaviour was causative and blameworthy. His conduct led to the disciplinary meeting, created dissent amongst WML employees and partly

²⁵ *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

²⁶ *Allen v Transpacific Industries Group Ltd (t/a "Mediasmart Ltd")* (2009) 6 NZELR 530, para 78

²⁷ Reply Statement G Sergant p 27

²⁸ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82

publicised his disciplinary matters. A reduction in compensation of 50% is appropriate.

[87] Accordingly there is an order that Western Mailing Limited pay Giles Timothy Sergant compensation of \$3,500 including a reduction of 50% for his contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

[88] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have a further 14 days to file and serve and reply. The matter shall be dealt with on the papers.

T G Tetitaha
Member of the Employment Relations Authority