IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 25
3014217

	BETWEEN	ANNETTE WILLIAMS Applicant
	AND	INDEPENDENT STEVEDORING LIMITED Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	A Webster, Advocate for Applicant S Grice, Counsel for Respondent
Investigation Meeting:	13 December 2017
Submissions received:	15 December 2017 from Applicant 15 December 2017 from Respondent and additional information provided on 22 January 2018
Determination:	25 January 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Ms Williams was unjustifiably dismissed by Independent Stevedoring Limited.

B. Independent Stevedoring Limited is ordered to pay to Ms Williams the following amounts within 14 days which sums take into account a reduction of 50% for contributory behaviour:

a. The sum of $9,507.55 gross for monies lost as a result of Ms Williams' personal grievance.

b. The sum of $6,000.00 gross pursuant to s 123(1)(c)(i).

C. Reinstatement is declined.

D. Costs are reserved with a timetable set for memoranda if an Authority determination of costs is required.

Employment Relationship Problem

[1] Independent Stevedoring Limited (ISL) is a company that handles bulk cargo on conventional vessels as well as containers on general and container vessels. In addition it provides drivers to the Port of Tauranga container terminal.

[2] Ms Williams was employed by ISL as a casual straddle driver in 2014. Her position was made permanent in November 2016.

[3] On 1 April 2017 Ms Williams was involved in an altercation with another employee whilst at work. Following meetings between the parties on 2 and 3 April 2017, Ms Williams tendered her resignation on 3 April 2017.

[4] Ms Williams claims that she was unjustifiably constructively dismissed. By way of remedy she seeks reinstatement. She also claims compensation for humiliation, loss of dignity and injury to her feelings, as well as for lost wages.

[5] ISL denies that Ms Williams was unjustifiably dismissed. It says her resignation arose during a disciplinary process where it had found that she had committed serious misconduct. It says it conducted a fair and reasonable process.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from Ms Williams and ISL but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[7] The issues to be determined are:

a) Was Ms Williams constructively dismissed?

b) If so, was this justified?

c) If Ms Williams was unjustifiably dismissed what remedies should be awarded?

d) If remedies are awarded, should they be reduced for blameworthy conduct by Ms Williams that contributed to the situation giving rise to her grievance?

e) Should either party contribute to the costs of representation of the other party?

Background against which issues are to be determined

The altercation on 1 April 2017

[8] On 1 April 2017 a dispute arose between Ms Williams and another employee, Priscilla Horne. The dispute concerned the allocation of a straddle machine. After realising she was in the wrong, Ms Williams attempted to apologise to Ms Horne. The apology took place during the ladies' break in the smoko room.

[9] Ms Horne did not accept the apology and told Ms Williams to shut up. This was not well received by Ms Williams. The two women began swearing at each other. Ms Horne was, at the time, buttering her toast. She began waving the butter knife at Ms Williams in what was described as a threatening manner. Ms Horne took a step towards Ms Williams saying something along the lines of "Don't f**k with me".

[10] What happened next is disputed. Ms Williams says Ms Horne punched her:

> My immediate reaction was push her away and stepped back, she then punches me in the side of my head and pulls my hair and head down. I tried to grab her hair and was telling her to let my hair go.

[11] Ms Horne's statement made to the respondent following the incident stated that Ms Williams punched her first:

> I told Billy [Ms Williams] to fuck up, then Billy shouted out I was like my fucking family, like my fucked up sister! I took a step towards Billy and told her to repeat what she had said. Billy then punched me on the right side of my face and took a step back. I took a slow reaction to the punch because I wasn't sure if I was supposed to feel something. Billy then punched my face a second time and that was it! I went into defence position. Billy tried to punch me a third time but I blocked it, and I punched her back. Billy then pulled my hair and scratched me wherever she could and so I pulled her hair and punched her.

[12] According to both ladies' statements Daryn Anderson then appeared and told the ladies to stop. At this point Ms Williams' statement records that she punched Ms Horne in the mouth.

[13] The fight then ended and Ms Williams walked away. As she was making coffee Ms Horne continued to verbally insult her. In reaction to these insults Ms Williams threw her cup of boiling coffee into Ms Horne's face and chest.

[14] Following the altercation Ms Williams tried to phone Richard May, ISL's internal Operations Manager, to advise him what happened. She also sent him a text message asking him to call her. Meanwhile, Michael Danen, ISL's Operations Manager, had been notified there had been an incident involving a knife. He said he contacted Vince Johnstone to ask him to investigate and report back to him.

[15] Mr Johnstone spoke to Ms Williams and Ms Horne and asked them to prepare a statement of events. He said someone from ISL would contact them the following day.

The first meeting - 3pm, 2 April 2017

[16] On 2 April 2017 Mr May sent a text message to Ms Williams:

> Morning Billy. Your shift for R&D has been cancelled tonight. Please attend a meeting with me in my office today at 1500. Thanks. Richard.

[17] Ms Williams attended the meeting and provided Mr May with a copy of her statement. She was provided with a limited opportunity to explain her account of events. The meeting concluded with Mr May advising that someone would be in touch with Ms Williams.

The second meeting – 2pm, 3 April 2017

[18] On 3 April 2017 at 11:36am Ms Williams received a text message from Mr May advising:

> Please attend a meeting today at 1400 in my office. There will be a surfside representative at the meeting too. Thanks. Richard. Please confirm you are coming via text.

[19] When Ms Williams arrived to the meeting a representative from the Surfside Union, Carol Greene, was waiting. The ladies spoke briefly, however, no advice or assistance was provided to Ms Williams by Ms Greene other than for her to tell the

truth. This was the only conversation which Ms Williams had with Ms Greene before the meeting.

[20] Present at the meeting were Mr Danen, Mr May, Ms Williams and Ms Greene. The meeting commenced with Mr Danen advising Ms Williams that the situation was serious. He referred her to the company rules – 3.1.11, 2.11 and 3.2.9. These rules provided:

> 2.11 Personal behaviour
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> You are expected to conduct yourself in a dignified, respectful and courteous manner and to maintain good relationships in the work environment. Fighting and use of violence will result in dismissal. Using threatening or abusive language and playing practical jokes which result in or have the potential to result in someone being injured, will also be viewed seriously.
>
> 3.1 Instant (summary) dismissal
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> The following are examples of types of (but not limited to) behaviour which could result in instant dismissal.
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> …
>
> 3.1.11 Assaulting another employee on company premises or job site, or at any company functions
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> 3.2 The following are examples are types of behaviour which could result in disciplinary action in the form of warnings, and ultimately dismissal:
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> …
>
> 3.2.9 Insubordination or use of abusive language.

[21] Ms Williams was then asked if there was anything else she wanted to add to her statement. Ms Williams advised that Ms Horne "has an attitude when at work". She also explained that she threw hot water at Ms Horne as she was carrying on and this was done in the heat of the moment. She explained that the matter had escalated because Ms Horne wouldn't accept her apology. She accepted that what she had done was wrong and advised that she wanted to apologise to Ms Horne for what had happened.

[22] The meeting concluded with Mr Danen advising Ms Williams they would be in touch later that day.

Events immediately after the 3 April 2017 meeting

[23] Following the meeting with Ms Williams, a meeting was held with Ms Horne. Ms Greene said that she attended this meeting as the union delegate. She formed the view, from attending the meetings, that Ms Williams was going to be dismissed.

[24] Ms Greene then spoke to Mr Danen. She said words along the lines of "it's not looking very good is it?" Mr Danen told her it wasn't. They then talked about the fight stopping and then the coffee being thrown by Ms Williams. Ms Green said she then enquired whether ISL would accept Ms Williams' resignation instead of her being fired. She said, after thinking on it, Mr Danen told her that ISL would accept Ms Williams' resignation.

[25] Ms Greene then contacted Ms Williams. She said she told Ms Williams that it looked like she was going to lose her job. She asked if Ms Williams would consider resigning instead of being fired so as to avoid getting a black mark against her name. Ms Williams was upset. Following this conversation Ms Williams prepared a resignation letter at the suggestion of Ms Greene.

Third meeting – 4:30pm, 3 April 2017

[26] There is a dispute between the parties as to how this meeting came about. Ms Williams says Ms Greene told her to attend this meeting. Ms Greene denies this. Mr Danen says he may have mentioned a 4pm meeting when they met at 2pm, but recalls being surprised when Ms Williams turned up that afternoon. Mr May says they told Ms Williams they would be in contact in the afternoon but did not organise a time for a meeting.

[27] Due to the passage of time, and the inconsistencies between the witnesses' evidence, I prefer the contemporaneous notes taken by Mr May immediately following the 4:30pm meeting. These notes record that Ms Williams was asked to attend this meeting. The notes record:

> After having time to consider Billy's responses during the disciplinary meeting which had taken place earlier in the day, Billy was asked to attend a further meeting to hear back from the company the outcome from the disciplinary meeting.

[28] Ms Greene did not attend this meeting with Ms Williams. Ms Williams was not told she could have a representative present. Ms Greene said she was not invited

to attend. Ms Williams was also not told the purpose of the meeting although I find it likely she knew it was to provide the outcome of the investigation.

[29] Mr May's notes also record:

> Mike went over the seriousness of the meeting and outlined that the allegations of serious misconduct and breach of company rules had indeed been proven.

[30] It is at this point that Ms Williams says Mr Danen told her that she was dismissed. Mr Danen and Mr May deny this. Mr May's notes record, that:

> Billy asked if the company would consider her resignation to which Mike asked 'Is that what you want to do'. Billy replied yes and that she had already written her resignation letter which she pulled from her handbag and presented to Mike. Mike read the letter first and then handed it to Richard to read. After taking a few moments to consider Billy's request, Mike accepted Billy's resignation. Mike stated that payroll would make up Billy's final.

[31] Ms Williams was paid by ISL up to and including 3 April 2017.

Overview of applicable law

[32] The legal principles relating to constructive dismissal are well established and are not in dispute.

[33] In *Auckland Etc Shop Employees Etc IUOW v Woolworths (NZ) Limited (NZ) Ltd*, the Court of Appeal stated that constructive dismissal included, but was not limited to, cases where: [1]

a) An employer gives the employee the choice of resignation or dismissal;

b) An employer follows a course of conduct with the 'deliberate and dominant purpose' of coercing an employee to resign;

c) A breach of duty by the employer leads an employee to resign.

[34] The present case concerns the third of these categories.

[35] In reference to the third category of case, the Court of Appeal in Auckland *Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* stated:[2]

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[1] 1985] 2 NZLR 372.
[2] [1994] 1 ERNZ 168 (CA).

> In such a case as this we consider that the first relevant question is whether the resignation has been caused by breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[36] If, after applying the above principles, the Authority concludes that there has been a constructive dismissal, it must then determine objectively whether it was justifiable in terms of the statutory test of justification under s 103A of the Act. To this end, ISL must satisfy the Authority that its actions were in accordance with what a fair and reasonable employer could have done in all the circumstances at the time.

[37] In reference to the concept of breach of duty, the Employment Court noted in *Rodkiss v Carter Holt Harvey Limited*[3] the Court of Appeal's observation in *Auckland Electric Power Board* that there were a number of duties of an employer which were potentially relevant in this field. It specifically affirmed the application of the implied term that "employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

[38] In *Hamon v Coromandel Independent Living Trust*[4] Judge Perkins confirmed that the duty of trust and confidence the Court of Appeal referred to in *Auckland Electric Power Board* is now encapsulated in s 4(1)(a) of the Act which requires the parties to an employment relationship to deal with each other in good faith. Section 4(1A)(a) specifically provides that such a duty "is wider in scope than the implied mutual obligations of trust and confidence". Section 4(1A)(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

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[3] Rodkiss v Carter Holt Harvey Ltd [2015] NZEmpC 34 at [89]
[4] [2014] NZEmpC 54 at [49]

Issue 1: Was Ms Williams constructively dismissed?

Was Ms Williams' resignation caused by a breach of duty on the part of ISL?

[39] Against the foregoing legal background, I turn to consider the first question posed by the Court of Appeal in *Auckland Electric Power Board*. Namely whether it can be said, after examining all the circumstances that Ms Williams' resignation was caused by a breach of duty on the part of ISL.

[40] The Act requires parties to an employment relationship to act in good faith. This includes not doing anything, directly or indirectly, to mislead or deceive each other. Where an employer is considering making a decision that will, or is likely to, have an adverse effect on the continuation of a worker's employment, the duty of good faith places two specific requirements on that employer. Firstly, the employer must provide the worker with access to information about that decision and, secondly, give the worker an opportunity to comment on the information before the employer makes its final decision.[5]

[41] Having carefully considered the evidence I have concluded, for reasons which will become apparent, that Ms Williams' resignation was caused by ISL breaching the principles of natural justice and its good faith obligations under s 4 of the Act.

[42] ISL did not advise Ms Williams prior to the meeting on 2 April 2017 that it had instituted a disciplinary process. It did not advise the possible outcome of that process or that she was entitled to have representation. Ms Williams was not informed that the matters addressed at the meeting would be used by ISL to make a disciplinary decision.

[43] The first time ISL raised the allegation that Ms Williams had breached the Company rules were during the second meeting on 3 April 2017. The rules were read out to Ms Williams but a copy was not provided. Whilst Ms Williams had received a copy of these rules when she started, this was in 2014. Ms Williams could not have reasonably been expected to respond in those circumstances.

[44] I do not accept Mr Danen and Mr May's evidence that an adjournment was provided during the second meeting to allow Ms Williams to speak with Ms Greene.

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[5] S 4.

Ms Greene and Ms Williams were adamant this did not occur. The notes which Mr May produced to the Authority, which recorded an adjournment took place, are unreliable in that they were prepared after the event and contain record of matters which Mr May accepted during questioning were not discussed.

[45] By the time of the second meeting on 3 April 2017 ISL had obtained signed statements from Ms Horne and Mr Johnstone. These statements were material in ISL reaching the decision that the allegation of serious misconduct had been proven. The statements were not provided to Ms Williams prior to the meeting and the contents were not discussed. Indeed, the first time Ms Williams saw these statements was well after she raised a personal grievance.

[46] I do not accept the submission that ISL intended to have another meeting to obtain Ms Williams' comments on these statements. The file note of the final meeting is clear that it was to provide Ms Williams with the outcome of the investigation. All parties agree that Ms Williams was told the allegations of misconduct had been proven prior to her tendering her resignation. Mr Danen said during questioning that if Ms Williams hadn't resigned they would have had another meeting and dismissed her. During questioning from Ms Webster over why the meeting proceeded Mr Danen said there was nothing new and he had made a decision.

[47] Mr Danen said he took into account Ms Williams' lack of remorse during the disciplinary process. This was also referred to by Ms Green and Mr May and formed part of the submissions made by ISL. This conduct was never raised as a concern with Ms Williams so that she could respond.

[48] It appears that Ms Williams' work history was also taken into account when ISL made its decision. ISL submits that Ms Williams had a history of aggressive behaviour which justified dismissing her and issuing a final warning to Ms Horne. Ms Williams' alleged aggressive history was not put to her during the investigation process to enable her to respond.

[49] The process which ISL followed was unnecessarily fast. There was no reason for the haste given that both Ms Williams and Ms Horne had been stood down. There was just over 24 hours between the first meeting with Ms Williams and the third "outcome" meeting. Ms Williams was notified of the first two meetings by way of a text message which simply told her the time to attend a meeting. She was only

provided with 2.5 hours' notice of the second meeting, despite her union representative being provided with double that notice. She was told that the union representative would be present at the second meeting but had insufficient time to take advice prior to, or during, that meeting. In addition, she was not told she was entitled to have a representative present with her at the outcome meeting. Ms Green did not attend.

[50] Taking these factors into account, combined with the fact that her union delegate failed to provide Ms Williams with any advice on the investigation other than to resign rather than be fired, I do not consider Ms Williams' resignation was genuine in all of the circumstances. I find Ms Williams' resignation was caused by ISL's breaches of the principles of natural justice and its good faith obligations under s 4 of the Act which were sufficiently serious.

Was Ms Williams' resignation reasonably foreseeable?

[51] I have concluded, for the reasons stated above, that ISL breached the principles of natural justice. I have also found that it breached its good faith obligations under s 4 of the Act and that Ms Williams' resignation was caused by those breaches. I now turn to consider the second question posed by the Court of Appeal in the *Auckland Electric Power Board case*, namely whether, having regard to the seriousness of those breaches of duty, a substantial risk of Ms Williams' resignation was reasonably foreseeable.

[52] Ms Williams' resignation followed ISL concluding that the allegations of misconduct had been proven. It followed Mr Danen and Mr May's meeting with Ms Greene where they agreed to accept her resignation instead of her being dismissed. I do not accept in those circumstances that Ms Williams' resignation was unexpected or that it came as a shock as Mr May said.

[53] On balance ISL must have foreseen that, as a result of its serious breaches of duty, and its unjustified actions, that it was virtually inevitable that Ms Williams was going to resign. In these circumstances I find that Williams was constructively dismissed.

Issue 2: Was the dismissal justified?

[54] Having concluded that Ms Williams was constructively dismissed, it is necessary to now consider whether the dismissal was justifiable.

[55] Whether a dismissal is justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of ISL, 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.

[56] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, ISL sufficiently investigated the allegations, raised the concerns with Ms Williams, gave Ms Williams a reasonable opportunity to respond, and genuinely considered her explanation prior to dismissal.

[57] I conclude that the test of justification has not been satisfied. There were a number of serious defects in the process followed by ISL which resulted in Ms Williams being treated unfairly in terms of s 103A(5) of the Act. I have outlined some of these defects earlier in my determination. In addition to those matters ISL failed to sufficiently investigate the allegations against Ms Williams. For example,

a) Mr May said *"I felt Priscilla acted in self-defence and Billy was the aggressor"*. However the statement Mr May took from Mr Anderson, the eye witness, recorded that Ms Horne was the aggressor. He did not speak with Mr Anderson again to clarify this.

b) Mr Danen said he understood that Mr Anderson was present during the whole altercation. However, Mr Anderson's witness statement records that *"I walked into the smoko room .... and saw Billy and Cilla arguing*". Once again, ISL did not speak with Mr Anderson to clarify this.

c) During questioning Mr Danen said he didn't think Ms Horne was using the knife in a threatening manner. However this is inconsistent with Mr Anderson's statement that *"Cilla had a butter knife in her hand….and was using it as a pointer towards Billy during the argument. This looked threatening to Daryn. Billy did mention to Cilla about holding the knife, but*

Cilla continued waving it in billy's direction and said something along the lines of 'don't fuck with me'". ISL did not speak with Mr Anderson to clarify this.

d) ISL did not speak with another relevant witness, the team leader, who came into the room whilst the ladies were arguing and before the coffee was thrown.

e) ISL did not raise its concerns with Ms Williams concerning the discrepancies with her statement and Ms Horne and Mr Anderson's statements. Nor did it address her alleged lack of remorse or her history of aggression.

f) During the investigation meeting it became apparent that one of ISL's key concerns was that the fight had stopped and then Ms Williams threw the coffee at Ms Horne. This concern was not raised with Ms Williams.

[58] As ISL did not raise its concerns with Ms Williams she did not have an opportunity to respond to these matters before she was dismissed.

[59] I find ISL's failure to comply with the statutory requirements was not minor and did result in Ms Williams being treated unfairly. A decision to dismiss in all the circumstances known at the time was not one that a fair and reasonable employer could have made. Ms Williams was unjustifiably dismissed from her employment with ISL and is entitled to remedies.

Issue Three: Remedies

Lost wages

[60] Section 123(1)(b) of the Act provides for the reimbursement by ISL of the whole or any part of wages lost by Ms Williams as a result of her grievance. Section 128(2) provides that I must order ISL to pay Ms Williams the lesser of a sum equal to her lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.[6]

[61] In *Xtreme Dining v Dewar*[7] the full Court confirmed that where an employer puts mitigation in issue, an employee must provide relevant information as to the

[6] S 128(3
[7] [2016]NZEmpC 136

steps taken to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[62] ISL did not put mitigation at issue in its statement in reply. This was raised for the first time during the investigation meeting and in its closing submissions. I do not therefore hold a lack of documentary evidence of attempts to find work a factor justifying a reduction in remedies to Ms Williams. However, on Ms Williams' own evidence, she only applied for, at most, 6 jobs in the nine months between her termination and the investigation meeting. Ms Grice submits this shows a failure to mitigate loss. She also points to the evidence produced by Mr May of jobs available to someone with Ms Williams' skills and to the fact that Ms Williams has not registered with a recruitment agency to find temporary or casual work.

[63] Ms Williams' failure to mitigate her loss to any great extent is such that I decline to exercise my discretion to award greater compensation for remuneration lost than the equivalent of three months' lost wages being 13 weeks. A period of 13 weeks lost remuneration is reasonable, given the effects of the termination on Ms Williams.

[64] At the time of her dismissal Ms Williams was guaranteed a minimum number of hours per week of 32. It was agreed in her IEA that in each week of a four weekly period, ISL would pay the minimum hours agreed on a weekly basis. This was notwithstanding that the hours actually worked in any week were more than the guaranteed hours. Any hours worked in excess of the minimum hours would be paid at the end of the four week period. The wage records show Ms Williams worked an average of 52.92 hours per week over the duration of her permanent employment (November 2016 to April 2017). At her hourly rate of $27.64 this equates to a weekly sum of $1,462.70 gross. Multiplied by 13 weeks I reach a figure of $19,015.10.

[65] I have concluded, for reasons which will become apparent at issue four, that a 50% reduction should be applied to this sum for contribution.

[66] ISL is ordered to make payment to Ms Williams the sum of $9,507.55 gross for monies lost as a result of her personal grievance. Payment must be made within 14 days of the date of this determination.

Section 123(1)(c)(i) Compensation

[67] Ms Williams claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i).

[68] Mr Williams gave compelling evidence of the effects that the dismissal had on her. Ms Williams has been a widow since 2014. She has had legal custody of her three grandchildren since 2008. This was the first permanent job she had had and it meant everything to her and her family.

[69] Ms Williams spoke of the devastation she felt after being dismissed. She couldn't sleep or eat and worried about how she could pay her bills. She said she felt so embarrassed that it was some time before she told her family of her dismissal and approached WINZ for support. She said she avoided her work colleagues.

[70] I am satisfied Ms Williams suffered humiliation, loss of dignity and injury to his feelings. I consider the evidence warrants a moderate award of compensation under s 123(1)(c)(i) of the Act in the sum of $12,000.00. When setting the sum payable I have been mindful of the need not to keep compensatory payments artificially low. Recent cases reflect a discernible upswing in the quantum of awards for compensation under s 123(1)(c)(i).[8]

[71] I have concluded, for reasons which will become apparent at issue four, that a 50% reduction should be applied to this sum for contribution.

[72] ISL is ordered to make payment to Ms Williams the sum of $6,000.00 gross pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Issue four: Contribution

[73] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal

[8] *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [112]

grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded. [9]

[74] I am satisfied that Ms Williams' conduct contributed to her grievance. Ms Williams should have had more common sense than to indulge in a verbal and physical altercation with another staff member. Whatever the provocation, that is not the way to deal with an issue between two work colleagues. However, I am not convinced that her conduct is so egregious that it warrants a total deduction in the remedies that I have made as ISL submits.

[75] Ms Williams has succeeded in establishing a personal grievance on procedural grounds. However, on her own admission she punched Ms Horne after she put the knife down and threw hot water at her after the fight was over. ISL's Policy Manual made it clear that physically assaulting another person on company premises was regarded as misconduct and could result in dismissal. Ms Williams acknowledged that she had read and understood the company's rules, policies and conditions, which included the obligation just referred to, when she was employed.

[76] In all these circumstances, Ms Williams must accept substantial responsibility for her reaction. For this reason, in terms of deduction for contribution, I apply a 50% reduction to the remedies awarded for lost wages and compensation under s123(1)(c)(i).

Issue five: Reinstatement

[77] The remedy of reinstatement is provided for in sections 125 and 126 of the Act. Section 125(2) states that the Authority may provide for reinstatement if it is practicable and reasonable to do so.

[78] In *Angus v Ports of Auckland* the full Court explained the requirement of reasonableness as follows:[10]

> [65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of

[9] S 124.
[10] [2011] NZEmpC 160, (2011) 9 NZELR 40 at [25] at [65]-[66].

> the parties' cases so far as the prospective consideration of reinstatement is concerned.
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> [66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[79] In the present case I am satisfied that reinstatement is neither reasonable nor practicable due to the practical difficulties in reintegrating Ms Williams into the workplace.

[80] These difficulties arise firstly due to ISL's contractual arrangement with the Port of Tauranga. ISL submits that the Port of Tauranga has a zero-tolerance policy towards violence and will not allow people to work at the port if they have been fighting on site. Mr Danen said Port management had verbally confirmed to him that Ms Williams would not be allowed back on site. Whilst ISL has provided me with no documentation to support this evidence, an extract from the Terminal Services Agreement between ISL and the Port of Tauranga records the Port's right to refuse work for any ISL operator to operate any port owned equipment. In addition, Ms Williams' evidence was that she had been told by C3, another stevedoring company operating from the Port of Tauranga, that they *"were not hiring at the moment but even if they were he wouldn't be able to hire me because of what happened with ISL"*.

[81] I acknowledge Ms Webster's submission that Ms Horne remains employed by the Company and the Port has allowed her to continue working on its site. However, Mr Danen said he had concluded that Ms Williams had thrown the first punch. Then, when the fight was over Ms Williams threw scolding water on Ms Horne. In *Housham v Juken New Zealand Ltd*, the Court observed that there is a distinction between culpable and non-culpable conduct by employees involved in physical conflict in the workplace.[11] The following passage from that decision, with which I respectfully agree, is relevant in the present context:

> [23] There is a line of cases decided by this Court dealing with the difficult area of physical conflict between employees, especially in safety sensitive workplaces. Although an employer may properly regard assault, other physical aggression and fighting as serious misconduct upon appropriate

[11] Housham v Juken New Zealand Ltd [2007] ERNZ 183 (EmpC)

> proof of which employees involved might be dismissed, that cannot reasonably extend to every participant in such a confrontation under any circumstances.
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> [24] An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer [no] resistance at all, run away (especially if operating dangerous machinery), or meekly submit to the assault. Such an employee is entitled to take reasonable steps in all the circumstances to avoid actual or imminent assault. Such steps may include what would amount to a technical assault upon the aggressor, pushing the aggressor away, tackling the aggressor to prevent further blows, or the like. No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer.
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> [25] While a "zero tolerance" policy towards workplace violence is admirable in principle, the devil is, as always, in the detail of what is meant by a policy that has been sloganised. It cannot be a reasonable policy if it purports to be applied to any involvement in any physical altercation whatsoever. Nor can it be a reasonable policy or practice for an employer to dismiss summarily all the employees in any way involved in any physical altercation. While an employer is entitled to have a "zero tolerance" policy in the sense that employees engaged culpably in violence in a safety sensitive workplace should be liable to dismissal, that does not absolve that employer from the critical assessment of all of the relevant circumstances in which that employee may have been involved in the altercation. Such an analysis is especially important where there is a so-called "zero tolerance" approach that will see offenders dismissed.

[82] The practical difficulties of reintegrating Ms Williams into the workplace are further reinforced by the feedback which Mr May received from staff following Ms Williams' termination. Mr May said that after Ms Williams resigned he received feedback from staff that she had been putting the team leaders under pressure at pre-shift safety huddles. He said this was in regards to her machine allocations. He said they told him she could come across as aggressive. He expressed concern for the safety of staff if Ms Williams was to return to work now that her aggression was backed up by the threat of physical violence.

[83] I am satisfied that Mr May's concerns are warranted. This was not an isolated incident. The documentary evidence produced by ISL showed instances of verbal aggression by Ms Williams in March 2016 which were addressed with Ms Williams at the time. Mr May said that after Ms Williams' was made permanent in November 2016 he had to speak with her 3-4 times about her aggression and verbal abuse. Ms Williams denies speaking with Mr May. However, she accepted during questioning that she would often ask her team leaders to swap machines. She said that she would

keep on them to try and get her way but this was not done in an aggressive manner. This may have been Ms Williams' perception but was clearly not that of her supervisors and colleagues. It is noteworthy that it was the allocation of a machine which led to the altercation between Ms Williams and Ms Horne.

[84] In the above circumstances I decline to order reinstatement.

Issue Six: Costs

[2] The parties are encouraged to resolve costs by agreement. If that is not possible, then Ms Williams has fourteen days to file a costs memorandum. ISL has a further fourteen days to file its costs memorandum. Ms Williams then has three working days to file and serve a reply. This timetable will be strictly enforced.

Jenni-Maree Trotman
Member of the Employment Relations Authority