IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 188
ARC 8/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MARGARET HARRIS Plaintiff
AND	THE WAREHOUSE LIMITED Defendant

ARC 10/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	THE WAREHOUSE LIMITED Plaintiff
AND	MARGARET HARRIS Defendant

Hearing:	25 and 26 August 2014 (Heard at Whangarei)
Appearances:	P Cranney and O Christeller, counsel for Margaret Harris P Swarbrick, counsel for The Warehouse Limited
Judgment:	3 October 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

A The Warehouse Limited dismissed Margaret Harris unjustifiably.

B The Warehouse Limited is to reinstate Margaret Harris to the role of Loss Prevention Officer or to one no less advantageous to her at its Kaikohe store in Northland or at the Warehouse Limited store closest to Kaikohe which has a relevant staff vacancy subject to The Warehouse Limited requiring Ms Harris to undertake on pay appropriate customer service and/or Loss Prevention Officer training before resuming her duties.

C **Any order that the Court may make subsequently for reimbursement of lost income (if any) is to be confined to Margaret Harris's remuneration losses during the period of three months immediately following her dismissal and any such amount is to be reduced by 33.33 per cent pursuant to s 124 of the Employment Relations Act 2000.**

D **The Warehouse Limited is directed to pay Margaret Harris the sum of $4,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 reflecting a reduction pursuant to s 124 of the Employment Relations Act 2000 to what would otherwise have been ordered.**

E **Leave is reserved for either party to apply for any further orders or directions in relation to remedies.**

F **Margaret Harris is entitled to orders for costs in both the Employment Relations Authority and this Court.**

G **The Court makes recommendations to The Warehouse Limited pursuant to s 123(1)(ca) of the Employment Relations Act 2000 concerning its employee misconduct investigation processes as set out in the Reasons for Judgment.**

REASONS

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Introduction

[1] This case is a challenge by the employee and a cross-challenge by the employer to a determination of the Employment Relations Authority.[1] It found that Margaret Harris was dismissed unjustifiably by The Warehouse Limited (TWL). However, the Authority concluded that such was the contribution by Ms Harris to the circumstances which led to her dismissal that she was not entitled to any remedies.

[2] Each party elected to challenge parts of the Authority's determination otherwise than by hearing de novo. TWL challenged the Authority's finding that its dismissal of Ms Harris was unjustified. Ms Harris challenged the Authority's conclusion that she was to be awarded no remedies for her unjustified dismissal. This meant that, combined, all issues that had originally been before the Authority for determination were again in issue in this Court. For that reason, on 12 May 2013 the Court directed in a Minute that there would be, in effect, a hearing de novo with TWL presenting its case first in justification for its dismissal of Ms Harris, with the latter to follow to establish her claim to remedies.

[3] Although occupying a hearing of only two days, the case raises a substantial number of fundamental and important personal grievance considerations which arise not only in the context of Ms Harris's dismissal but are of potentially broader effect in employment law. In addition to re-deciding whether Ms Harris was dismissed

[1] *Harris v The Warehouse Limited* [2014] NZERA Auckland 7.

justifiably and, if so, the remedies to which she may be entitled, these broader issues have been addressed in such a way as to assist both TWL, and employees and employers generally, when dealing with such situations.

[4] Ms Harris was dismissed because of her conduct towards a customer. Ms Swarbrick, counsel for TWL, reminded me correctly that it is not the Court's task to decide what happened between Ms Harris and the customer in TWL's Kaikohe store on 15 February 2013. Rather, part of the Court's task in assessing whether dismissal was unjustified is to ascertain what the employer knew or ought reasonably to have known about the relevant events and how it acted in reliance on that actual or deemed knowledge. That explains why a number of participants in these events, even central actors, did not have to and did not give evidence at the hearing.

Relevant facts

[5] I will summarise the events leading to and forming the grounds for dismissal, before setting out a more detailed account of the relevant events.

[6] TWL operates large general merchandise stores throughout New Zealand. This case concerns its store in Kaikohe. Ms Harris was employed in October 2011 as a Loss Prevention or store Security Officer. As such, Ms Harris's work brought her into situations of actual or potential conflict with customers and others, requiring a mix of skills and attributes including diplomacy, firmness, and assertiveness. It is common ground that there had not ever been a complaint by a customer or other complaint about Ms Harris's interactions with customers, other staff, or persons in connection with her job.

[7] The terms and conditions of her employment were contained in The Warehouse Limited and First Union Collective Employment Agreement August 2012-July 2013. These included being governed by TWL's "House Rules".

[8] The relevant collective agreement provisions were set out at cl 15 (Termination). Clause 15.2.2 provided: "If a team member is dismissed due to serious misconduct the dismissal would be effective immediately without notice."

[9] Clause 16 ("CONDUCT AND DISCIPLINE") provided:

> The Company has a set of "House Rules" which are included in the employment agreement to advise team members of the type of behaviour that is seen as unacceptable.
>
> Unacceptable behaviour is classified as either "serious misconduct" or "misconduct".

[10] Clause 16.1 ("Serious Misconduct") provided:

> Serious misconduct constitutes grounds for dismissal without notice. Any team member who violates the Company House Rules, or is guilty of other serious misconduct, may be summarily dismissed (i.e. without notice). A single instance of serious misconduct may result in dismissal, regardless of whether or not any previous warnings have been issued.

[11] Clause 16.2 ("Misconduct") provided:

> Misconduct in the workplace will normally result in a warning to allow a team member an opportunity to correct unacceptable behaviour. Misconduct includes, but is not limited to, breaches of the Company's House Rules.

[12] Clause 16.3 set out the collective agreement's "Discipline Procedure". This included a commitment to treat team members with "Dignity, Respect, Empathy, Consistency, Honesty [and] Fairness".

[13] TWL's House Rules included, as "serious misconduct" which was "totally unacceptable", a non-exhaustive list. This list of 26 behaviours included, relevantly:

> …
> 16. Threatening, intimidating, or interfering with another Team Member or anyone on Company premises.
>
> 17. Sexual or racial harassment or unlawful discrimination.
> …
> 24. Bringing the Company into disrepute.
> …

[14] The House Rules defined "misconduct" which might incur a warning, final warning or dismissal on notice if the employee had pre-existing warnings, a non-exhaustive list of 13 behaviours. Those relevant to this case include:

> 1. Offensive language or rudeness to customers, suppliers or Team Members.
> …

7. Substandard performance.

8. Failure to comply with Company policies or procedures.

…

[15] The company's House Rules also prohibited "[s]exual or racial harassment or unlawful discrimination". This provided for a range of sanctions if committed against team members or customers, including verbal written warning, transfer out of the complainant's area, counselling with therapy as a condition of ongoing employment, or dismissal.

[16] I conclude this initial outline of the dismissal with the following. Ms Harris was dismissed summarily on 8 March 2013 as confirmed by letter of the same date from TWL's Kaikohe Store Manager, Richard Bunce. The letter said that TWL had found Ms Harris to be guilty of serious misconduct in her employment. The letter did not say, directly, what TWL had concluded was Ms Harris's serious misconduct. Rather, it listed six topics which had been discussed at meetings with her on 6 and 8 March, summarised Ms Harris's explanations for those alleged behaviours or events, and recorded that TWL did not accept her explanations on five of the six issues. The issues were:

1) If the customer was asked to leave politely.
2) If you called across the shopfloor to the customers, in an aggressive manner, in full view of other customers.
3) If the couple involved were intimidated and embarrassed by this action.
4) If you walked away from the customers and made a derogatory remark about them that could be heard by the customers, other team members and other customers in the vicinity.
5) If your actions, after the customer had left the building, amounted to threatening behaviour when you told the customer you would call the police and issue a banning notice, even though no crime had been committed.
6) If you used Racist language to the customers.

[17] The letter continued:

> … your explanation on these matters was not acceptable on points 1,2,3,4 and 5. I do accept that on point 6 there was no evidence to suggest that racist language was used and I excluded this from my decision. I feel that you did use intimidating and threatening behaviour towards the customers involved and that your actions brought the company into disrepute.

[18] These findings constituted the reasons for Ms Harris's dismissal.

[19] Following that overview of the dismissal and the reasons for it, I now return to the start of relevant events. On the day in question, 15 February 2013, Ms Harris was engaged at TWL's Kaikohe store in the general duties of a Loss Prevention or Security Officer. She operated from what was described as a pedestal or a work station adjacent to the front entrance of the store, although she moved about both within it and occasionally outside.

[20] Customers now known as Jeff and Margo Pattinson were in the store. Mrs Pattinson was carrying a small dog. Ms Harris approached Mrs Pattinson requiring her to remove the dog from the store. Mrs Pattinson ignored Ms Harris, including by turning her back on the plaintiff, but the dog remained in the store contrary to Ms Harris's instruction. Despite the absence of signage prohibiting animals in the store, it was common ground that dogs (except for seeing-eye dogs) were not permitted on the premises.

[21] Ms Harris moved away from Mrs Pattinson but, upon seeing that she had not removed the dog from the store, approached her again demanding more assertively that she remove the dog. Two other persons, now known to be Te Makiukapa and Lovey Rakete joined in, offering their opinions of Mrs Pattinson's response and being generally supportive of Ms Harris. Ms Harris made her views about Mrs Pattinson's response known to other shop staff including by use of the word "arrogant" to describe Mrs Pattinson. Mrs Pattinson, who had been waiting for Mr Pattinson to complete his business at the store's counter, then moved out, carrying the dog, into a foyer area between two sets of doors and adjacent to the store's car park. Ms Harris followed Mrs Pattinson out and again remonstrated with her in that foyer area. Mrs Rakete did likewise. Mr Pattinson having concluded his business in the store, he and his wife then left.

[22] It is also common ground that Mr and Mrs Rakete were customers, or at least visitors to the store. It is now agreed that they probably made some of the remarks which Mrs Pattinson attributed to Ms Harris. Although these two people were described repeatedly as Maori Wardens, they were not in uniform at the time and it is

debatable whether they may have been exercising their powers as Maori Wardens in their interactions with Mrs Pattinson inside the store. The Pattinson complaint letter refers to the person now known as Mr Rakete having asserted that he had authority to tell Mr and Mrs Pattinson to leave despite not having then been in uniform. It is likely that Mr and Mrs Pattinson misunderstood, in these circumstances, that Mr Rakete was an employee of TWL, although he was not. Nevertheless, Mrs Rakete especially appears to have offered gratuitously her opinions about the presence of the dog in the store. Several of the witnesses who gave evidence about such incidents involving the store's Loss Prevention Officer said that locals present did not keep their opinions to themselves at such times.

[23] The first that TWL was aware of these events was several hours after Mr and Mrs Pattinson had left the Kaikohe store. At 9.07 pm on 15 February 2013 Mr Pattinson sent an email to TWL's customer service team complaining about "the appalling way" in which he and his wife were treated at the Kaikohe store at about 12.15 pm that day.

[24] The customer's email, although lengthy, is best left to speak for itself and continued as is set out in an appendix to this judgment.

[25] When the complaint came to his notice, Mr Bunce secured and copied CCTV footage covering the front of the store at relevant times.

[26] On 20 February 2013 Mr Bunce replied by email to Mr Pattinson. He wrote:

> I would like to apologise for the way you and your wife were treated on your recent visit to our store. The behaviour that you [describe] is totally unacceptable and I would like to have the opportunity to discuss the incident with you over the phone. This would be useful for me as I am going to hold a thorough investigation with the Team member involved.

[27] On 26 February 2013 Mr and Mrs Pattinson met with Mr Bunce and the store's Assistant Manager, Valerie McCoid. The record of this meeting, made by Ms McCoid, states that Mr and Mrs Pattinson confirmed the complaints made in their email, saying that:

- they felt they had been treated very poorly and were particularly annoyed by what they described as Ms Harris's intimidating manner and "racial language";

- she used the words "white arrogant"; and

- she spoke loudly, in an animated fashion to other people, and disrespectfully about Mr and Mrs Pattinson where other customers could clearly hear her.

[28] Mr Bunce then turned his attention to a disciplinary investigation of Ms Harris. TWL has a printed form for investigations such as Mr Bunce determined should be commenced in relation to the complaints against Ms Harris. This asked her to respond to specified allegations of serious misconduct:

> … that on the 15th February 2013 your actions resulted in 3 unacceptable aspects.
>
> 1) Asking the customer to leave the premises by using intimidating behaviour.
>
> 2) Using racist language directly at the customer involved and in conversation with other individuals.
>
> 3) Discussing the incident in a loud and animated fashion with other people so that other customers including the customers involved could hear what was being said.

[29] The applicable rules said to have "been breached" were specified as:

> 16) Threatening, intimidating or interfering with another team member or anyone on company premises.
>
> 17) Sexual and racist harassment or unlawful discrimination.

[30] At her first meeting with Mr Bunce and Ms McCoid on 27 February 2013, Ms Harris accepted that she would be suspended on full pay pending the outcome of TWL's disciplinary investigation. On that occasion, also, Mr Bunce gave Ms Harris a copy of the Pattinson complaint letter and recorded formally her suspension in another letter that was sent to her.

[31] Later that day, 27 February 2013, Mr Bunce interviewed two other store employees, September Eruiti and Jasmine Maunsell. By coincidence, Mr and Mrs Rakete were also in the store and Mr Bunce took the opportunity to interview them as well.

[32] Ms Eruiti, who had been a checkout supervisor and operator on that day, had been present at the customer services counter at times relevant to the incident and in the same vicinity as it took place. Ms Eruiti was shown the relevant CCTV footage and asked if she could recall any of the events that were portrayed. She said that she recognised Mr and Mrs Pattinson but had not heard the conversations between Ms Harris, Mrs Pattinson and Mr and Mrs Rakete, although she recalled that Ms Harris had told her (Ms Eruiti) and Ms Maunsell that Ms Harris had asked Mrs Pattinson to leave the store.

[33] Mr and Mrs Rakete told Mr Bunce that they recalled the incident on 15 February 2013 and said that Ms Harris had asked Mrs Pattinson "in a nice manner" to remove the dog from the store. Mr and Mrs Rakete said that Mrs Pattinson had ignored Ms Harris and she asked her a second time, saying that it was a health and safety issue. Mr and Mrs Rakete denied to Mr Bunce that Ms Harris had acted in an intimidating way towards Mrs Pattinson and they denied that there had been any racist epithets in what Ms Harris said. Asked about what was shown on the CCTV footage, Mr and Mrs Rakete said that they had been pointing out to Mrs Pattinson that the dog should not be in the store because of health and safety reasons. Mrs Rakete said that Mrs Pattinson had said nothing in response to Ms Harris's requests for her to leave.

[34] Mr Bunce did not believe what Mr and Mrs Rakete had told him because he considered it was inconsistent with what he had viewed on the CCTV footage. He attributed their untruthfulness to their sense of embarrassment about what had occurred. Mr Bunce and Ms McCoid concluded that Mr and Mrs Rakete were evasive and were trying to protect Ms Harris. Mr Bunce concluded that, although Mr and Mrs Rakete had told him that Ms Harris had not threatened Mrs Pattinson with a trespass notice or with calling the Police, Ms Harris had done so. He said that was because he believed that it was only TWL staff members who could issue

trespass notices. He also considered that it was unlikely that Mr and Mrs Rakete may have used this expression because they had no jurisdiction as Maori Wardens on TWL premises and were not staff members.

[35] As to Mr Bunce's interview with Ms Maunsell, she too had been working on the store's customer services desk at the time of the incident on 15 February 2013. Ms Maunsell told Mr Bunce that she remembered Ms Harris approaching Mrs Pattinson and asking her to leave and the customer's refusal. She told Mr Bunce that she considered that Mr Pattinson was being arrogant. Ms Maunsell recalled Ms Harris asking a second time that the dog be removed and Mrs Pattinson taking it into the foyer of the store at that stage. Ms Maunsell recalled Mr and Mrs Rakete being involved in the incident and that she had heard Mrs Rakete say: "If it was a Maori walking into your store then it would be a different story". Ms Maunsell confirmed that she had not seen or heard Ms Harris saying anything racist. She said that she did not consider that Ms Harris had behaved in an intimidating way towards Mrs Pattinson although she confirmed that Ms Harris had yelled at the customer "from the baskets" and told her to remove her dog. In response to Mr Bunce's inquiry whether Ms Maunsell had heard Ms Harris making any derogatory remarks as she walked away from the customer, Ms Maunsell told Mr Bunce that Ms Harris had said "arrogant prick" in the presence of the customers who would have been able to hear that and that Mr and Mrs Pattinson had looked at each other when it was said.

[36] Mr Bunce and Ms McCoid assessed Ms Maunsell to have been very clear and concise in her recollections and concluded that she had had a direct line of sight from where she had been standing at the customer services desk and so was well placed to observe these incidents.

[37] A first disciplinary meeting with Ms Harris was held on 6 March 2013. The plaintiff was accompanied by a union official and another support person. Before the meeting Mr Bunce had provided the union official with notes of all interviews which had been held and the CCTV footage. Ms Harris denied making racist or rude comments about the customers. She told Mr Bunce that she had been at the checkouts and had seen the customer with the dog. Ms Harris said that Mrs Rakete had complained to her that there was a dog in the store so she went over to the

customer to tell her that dogs were not allowed for health and safety reasons. Ms Harris explained that the customer had turned her back on her, whereupon Ms Harris repeated politely her requirement that the dog be removed from the store. Ms Harris said that she had been close to the customer when she did so.

[38] Mr Bunce was immediately sceptical about the explanation because, in his view, the CCTV footage portrayed a much shorter period of this interaction than would have allowed for such a conversation.

[39] Ms Harris was upset during the interview, more particularly because of the tone and content of the complaint letter and a number of adjournments were taken to allow her to compose herself. Ms Harris was adamant, however, that she had been polite to the customer, although she conceded that the situation had blown up after she returned to the security podium, and inferred that Mrs Rakete had a role in this. Ms Harris conceded that if she had yelled at the customer, as had been alleged, the customer would have felt uncomfortable and such conduct by a TWL employee would have been inappropriate. Mr Bunce put to Ms Harris Ms Maunsell's account of her use of the phrase "arrogant prick" but Ms Harris denied making any such derogatory remarks about Mrs Pattinson. She also denied that she had ever threatened the customer with a trespass notice or calling the Police.

[40] Following the conclusion of the 6 March 2013 disciplinary meeting, Mr Bunce interviewed Ms Maunsell again. The latter confirmed both that Ms Harris had "yelled" at the customer (which Ms Maunsell illustrated by raising her own voice) and had used the "arrogant prick" remark loudly enough for the customer to have heard it.

[41] Mr Bunce initially discounted any benefit in interviewing Cheryl Coster, who had also been working on the checkouts. That was because the CCTV footage appeared to him to show her to be engaged with a customer at the time of the incident. He nevertheless decided after the 6 March 2013 meeting to interview her. I deal in more detail with this significant interview subsequently in this judgment.

[42] There was a second meeting between the parties on 8 March 2013, attended by Mr Bunce and Ms McCoid for TWL. Ms Harris had her union representative present again. Mr Bunce told her what had happened since the meeting on 6 March 2013 but omitted any reference to his discussions with Ms Coster. When Ms Maunsell's accounts were again put to Ms Harris, she denied either shouting or yelling and using the phrase "arrogant prick" but did admit that she had said to colleagues that Mrs Pattinson had been arrogant. There were further denials of racist comments, an assertion by the union representative that Mr and Mrs Rakete had aggravated the situation, that Ms Harris had not intended the customers to overhear her comment about Mrs Pattinson's arrogance, and a proposal was made on Ms Harris's behalf that she would write a letter of apology to the customer.

[43] The meeting was then adjourned to enable Mr Bunce to take advice by telephone from a TWL Human Resources Officer, including to confirm his assessment that there had been serious misconduct and that dismissal was in order. Having received that endorsement by telephone, Mr Bunce prepared a written statement of his preliminary decision which he read out when the meeting resumed.

[44] In his "Preliminary Decision" delivered to Ms Harris on 8 March 2013, Mr Bunce concluded that she had not asked Mr and Mrs Pattinson politely to remove their dog from the store. Mr Bunce concluded that Ms Harris had not explained the company's policy about dogs to Mr and Mrs Pattinson because she could not have done so in the short length of time of the initial interaction between Ms Harris and Mr and Mrs Pattinson which Mr Bunce calculated from the CCTV footage to have lasted three seconds. Mr Bunce concluded that Mrs Pattinson considered justifiably that she had not been asked to remove her dog in a polite and appropriate manner because the company's policy had not been explained to her.

[45] Next, Mr Bunce advised Ms Harris that he considered she did call across the shop floor at Mr and Mrs Pattinson. He concluded, from his repeated viewings of the CCTV footage, that Ms Harris commenced to do so as soon as she stood up from the security desk as shown by her gesturing animatedly with her arms and hands. Mr Bunce concluded that Ms Harris's body language was not passive. He concluded that if Mr and Mrs Pattinson could have heard Ms Harris's remarks from the other

side of the store, then numerous other customers present would also have heard them, increasing the feeling of intimidation of, and embarrassment by, Mr and Mrs Pattinson, which caused Mrs Pattinson to leave.

[46] Mr Bunce concluded that Ms Harris did walk away from Mr and Mrs Pattinson, loudly making the derogatory remark "arrogant prick" although Mr and Mrs Pattinson claimed to have only heard the phrase "how arrogant". Mr Bunce concluded that this insult ("arrogant prick") was said sufficiently loudly that other people could hear, which remark would have been intimidating and embarrassing to Mr and Mrs Pattinson, and was totally unacceptable.

[47] Mr Bunce decided that Ms Harris's actions, after Mrs Pattinson had left the shop, were "totally excessive" in that Ms Harris threatened Mrs Pattinson with calling the Police and issuing a trespass notice. This action was also threatening and intimidating in Mr Bunce's view. He concluded:

> I believe your actions did intimidate the customer and the way in which you did it, in front of other customers, has brought the company into disrepute. There were individual acts of unacceptable behaviour and the sum of these results in a very unpleasant situation hence the strength of the customer's letter. In terms of racist comments, I believe there were racist comments made but I believe they might not have come from you. So I have discounted this accusation from my decision.

[48] In these circumstances Ms Harris was told that she was to be dismissed summarily.

[49] There was a further adjournment of the meeting of 8 March 2013 after Mr Bunce had read out his preliminary decision, to enable Ms Harris to consider it. When the meeting reconvened after a short time Ms Harris's union representative advised Mr Bunce that she had nothing further to add. Mr Bunce then confirmed his preliminary decision that Ms Harris was to be dismissed and confirmed this formally in writing by a letter later the same day. Ms Harris's employment was terminated summarily on 8 March 2013.

The Authority's determination

[50] Although heard effectively de novo, each challenge was brought as one alleging particular errors of fact and law on the part of the Authority. It is, therefore, appropriate to refer briefly to the Authority's determination and reasoning.

[51] First, the Authority concluded TWL's investigation and decision making process had been justifiable, that is that it had met the statutory requirements of procedural fairness under s 103A of the Employment Relations Act 2000 (the Act). In spite of this, however, the Authority concluded that the decision to dismiss was not one that a fair and reasonable employer "would have made in all the circumstances". As Ms Swarbrick submitted, correctly, this conclusion appears to have applied the wrong statutory test to the decision for justification. "Would" was the operative statutory word before 1 April 2011 but these events having all occurred after that date, the applicable standard is set by the word "could". That connotes a test that gives an employer a broader discretion: that is, if the finding of unjustified dismissal was within a range of reasonable conclusions that the employer could have reached in all the circumstances, then the Authority was entitled, as the Court decided in *Angus v Ports of Auckland Ltd*, to find the dismissal justified.[2] As the *Angus* judgment discloses, however, that broader employer discretion is by no means unconstrained.[3]

[52] It appears from the Authority's determination that its decision to find dismissal unjustified was based on a conclusion that a fair and reasonable employer in all the circumstances would have taken into account Ms Harris's previously unblemished record of good work performance in a difficult store security role. That, too, appears to have misstated the s 103A test by use of the word "would". Further, the Authority considered that Ms Harris should have been given another chance of continued employment at the store rather than dismissed summarily.

[53] Turning to the Authority's determination that it would not award Ms Harris any remedies whatsoever for unjustified dismissal, Mr Cranney submitted that the

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[2] *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466 at [23].
[3] At [24].

Authority Member failed to apply correctly the provisions of s 124 of the Act. In any event, counsel submitted that it was enigmatic that, on the one hand, an employee could be found to have been dismissed unjustifiably whilst, on the other, her conduct which contributed to the situation which gave rise to the grievance was so absolute (100 per cent) that no remedies should be awarded.

[54] At [106] and following of the Authority's determination, it considered whether summary dismissal was the appropriate consequence for Ms Harris's serious misconduct which TWL had found following a fair and reasonable investigation of that issue. It recorded TWL's professed lack of trust and confidence in Ms Harris to deal appropriately with customers. It said that although Ms Harris had acted inappropriately on 15 February 2013, there had been no previous similar incidents in her employment and that TWL had no concerns about her performance otherwise. The Authority recorded that Ms Harris considered herself to have been acting in the course of her duties by asking the customer to remove the dog from the store. It accepted that this was TWL's policy. The Authority then expressed its brief conclusion thus:

> [111] I consider that the fair and reasonable employer would have taken these factors into consideration when considering the appropriate outcome, and would not have made a decision to dismiss Ms Harris.
>
> [112] I determine that Ms Harris was unjustifiably dismissed by The Warehouse.

[55] As to remedies, the Authority said that it was "… required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded."[4] It reiterated its conclusion that Ms Harris had acted inappropriately with Mr and Mrs Pattinson and that this, together with the interventions of Mr and Mrs Rakete, had resulted in the initial situation "blowing up". The Authority was critical of Ms Harris having taken no steps to defuse that escalating situation at the time. It reiterated its finding that TWL had lost trust and confidence in Ms Harris to ensure appropriate treatment of all customers. It concluded that this was emphasised by Ms Harris's non-acceptance of any responsibility for what had occurred, at least until the second meeting with management on 8 March 2013. Ms Harris then acknowledged

[4] At [113].

that she had said that Mrs Pattinson was "arrogant" and offered, through her union representative at the meeting, to apologise in writing to the customer.

[56] The Authority noted the paramount importance to TWL of customer service, that Ms Harris had received training in customer service, and that she would have been fully aware of TWL's expectations of her in that regard. The Authority said that "[e]jecting a customer from a store is a process which needed to be handled with delicacy to avoid offence, and Ms Harris had failed to handle this situation appropriately."[5] In these circumstances, the Authority assessed "Ms Harris's contribution to the situation in which she subsequently found herself to be … 100%, and accordingly [awarded] her no remedies."[6]

The employee's grounds of challenge and defence

[57] First, Ms Harris challenges the fairness of, and the justification for, the investigation of the misconduct alleged against her. In particular, she says that Mr Bunce:

- disregarded evidence which assisted her;
- preferred, without valid or rational reason, evidence which did not assist her;
- did not disclose to her Ms Coster's account to the investigators that although she had observed the incident in the store on 15 February 2013, she had not heard Ms Harris yelling;
- did not take Ms Coster's evidence into account in Ms Harris favour;
- made findings which were not based on a fair consideration of the available evidence;

[5] At [118].
[6] At [119].

- wrongly concluded that there had been serious misconduct as that term is defined in law;

- misconstrued the defendant's House Rules about serious misconduct; and

- dismissed the plaintiff in circumstances where a fair and reasonable employer could not have done so.

[58] The plaintiff says that the Authority made a number of errors in law. These include that it:

- failed to identify or apply the proper legal test for the reduction of remedies under s 124;

- misconstrued the defendant's House Rules on serious misconduct and applied this erroneously to its conclusion under s 124;

- concluded that TWL's investigation was fair and then ignored that conclusion by its application of s 124;

- failed to identify correctly the meaning of the phrase "the personal grievance" in s 124(a) and failed to apply correctly that phrase;

- failed to identify correctly the meaning of the phrase "the situation that gave rise to the personal grievance" in s 124(a) and failed to apply correctly that phrase;

- failed to identify correctly the meaning of the phrase "the extent to which the actions of the employee contributed" in s 124(a) and failed to apply correctly that phrase;

- concluded wrongly that "the extent to which the [plaintiff] contributed to the situation that gave rise to the grievance" was 100 per cent;

- failed to identify the remedies that "would otherwise have been awarded" within the meaning of s 124(b);

- failed to consider whether the plaintiff's actions required a reduction from those remedies and, if so, the extent of such reduction;

- failed to consider the test for reinstatement in s 125(2) and failed to apply that test;

- adopted and applied the notion of a 100 per cent contribution without providing reasons for excluding other contributions to the dismissal including its own conclusion that the defendant dismissed Ms Harris unlawfully and without justification; and

- disregarded erroneously the unlawful act of the defendant in dismissing the plaintiff as a very significant contribution to the situation that gave rise to the personal grievance.

[59] As to errors of fact allegedly made by the Authority, the plaintiff submits that:

- TWL's investigation was not fair including all factual conclusions relied on;

- there was not serious misconduct including all factual conclusions relied on; and

- the Authority wrongly accepted the evidence of Mr Bunce and Ms McCoid based on their experience to the effect that Ms Coster would not have heard yelling by the plaintiff because she (Ms Coster) was too busy at the time.

TWL's grounds of challenge and defence

[60] These are set out in TWL's statement of claim filed on 7 February 2014. It says that the Authority erred in law in finding that Ms Harris's dismissal was unjustified because TWL had not taken into account that it had no previous performance concerns with her. It says that having found the occurrence of serious misconduct being conduct which justified dismissal, the presence or absence of any previous performance concerns was not relevant.

[61] Next, TWL says that the Authority erred in law in finding that the dismissal was unjustified because it concluded that Ms Harris believed herself to have been acting in the course of her duties by asking a customer to remove the dog from the store. TWL says that having found that serious misconduct occurred, this was not an issue relevant to whether termination of employment was the appropriate outcome.

[62] Third, TWL says that the Authority erred in law when it applied the wrong test of justification at [111] of its determination. TWL says that the Authority used what is known colloquially as the "would" test under the previous version of s 103A of the Act, whereas the current test, which substitutes the word "could" for "would" and adds other criteria, was appropriate to this case.

[63] That issue can be decided immediately. TWL is clearly right and Mr Cranney did not attempt to argue otherwise. In determining the justification for Ms Harris's dismissal, the Court will apply the post-1 April 2011 ("could") test to its deliberations.

[64] Finally, TWL says that the Authority erred in law when, in determining that the dismissal was unjustified, it failed to consider whether dismissal was one of a range of outcomes upon which a fair and reasonable employer could have decided. As with the decision about the correct test in the last paragraph, it follows that this submission is likewise correct so that the Court will have to determine whether, in all the circumstances as it finds them to be, dismissal was within the range of reasonable outcomes on which TWL could have settled.

What to do with the complaint letter?

[65] Mr Cranney submitted that it was unfair for TWL to have accepted Mr and Mrs Pattinson's letter, without adverse comment to them and/or stipulation that it would not act on the complaint as expressed unless and until it was modified by Mr Pattinson. Although counsel did not go so far as to say that TWL's actions meant that Ms Harris's subsequent dismissal was unjustified, Mr Cranney did submit that the manner in which the Pattinson complaint was handled by TWL contributed to disadvantaging Ms Harris which, in turn, meant that she was so upset throughout the company's investigation process that she was unable to do justice to her own case.

[66] I have already set out Mr Pattinson's letter of complaint in its entirety and I consider that it is better left to speak for itself rather than to attach to it a series of pejorative adjectives as counsel did at the hearing. It can, however, be summarised as making a number of complaints, not only against Ms Harris personally but against other TWL staff, other persons in the store at Kaikohe at the relevant time, and against the Kaikohe store and, by implication, its management.

[67] The receipt by TWL of the Pattinson complaint put it and Mr Bunce in a difficult position. The letter contained elements of serious complaint, including against Ms Harris, which he could not reasonably ignore and felt obliged justifiably to investigate. Equally, the tone and content of other parts of the Pattinson letter should have alerted TWL to the need to examine critically, even sceptically, the substance of the complaints about Ms Harris's conduct.

[68] The Pattinson letter sought an apology from the staff member concerned (Ms Harris) and advice about what TWL proposed to do in response to the complaint. It is noteworthy that, despite Mr and Mrs Pattinson's request and Ms Harris's offer to write a letter of apology, that was not arranged by TWL. Further, there is no evidence of advice to them about the outcome of their complaint, apart from an initial emailed response apologising for the conduct of which Mr and Mrs Pattinson complained. Nor, on the evidence, does TWL appear to have done anything about Mr and Mrs Pattinson's complaints against other employees or against TWL itself

about its Kaikohe store. I am left to infer that Ms Harris was the person who alone bore the consequences of more widespread complaints by Mr and Mrs Pattinson.

[69] As Mr Bunce accepted in evidence, and TWL should have assumed and said it did conclude, Mr Pattinson would have been unlikely to have omitted from his complaint any further egregious conduct alleged against Ms Harris. I agree that he would not have omitted, played down or sanitised any of the detail of the misconduct that he alleged against Ms Harris. That will become a relevant consideration when I come to examine the important question whether, on the one hand, Ms Harris referred to either Mr Pattinson or Mrs Pattinson as an "arrogant prick" loudly enough to be heard by either or both of them or, on the other hand, referred to Mrs Pattinson as "arrogant" in a voice that was intended to be heard only by a staff colleague to whom it was directed.

[70] TWL, and Mr Bunce in particular, cannot be criticised for supplying a full copy of Mr Pattinson's letter to Ms Harris, despite the upsetting effect it had on her. She was entitled to know what had been said about her and not simply in a sanitised or acceptably revised form. That seems to be the implication of Mr Cranney's submission that TWL ought to have responded to Mr Pattinson that it would not accept a complaint in the form originally submitted and would only act on one expressed in civil and moderate terms. Further, I consider that Mr Bunce acted appropriately in all the circumstances by inviting Mr and Mrs Pattinson to meet with him so that he could gauge for himself, face-to-face, the significance of the tone and content of the original letter sent in haste and anger. Whether Mr Bunce brought to his subsequent investigations a sufficiently critical, detached and open-minded investigation of those allegations, is another question that is in issue in the case.

What is serious misconduct?

[71] Mr Cranney says that this is a universal concept which has been defined by court judgments from which the defendant should not be entitled to depart unilaterally, whether in its assessment of the allegations against Ms Harris or, indeed, by defining serious misconduct in its House Rules and/or the collective agreement.

[72] If the assertion is that a definition of "serious misconduct" is not able to be fashioned by parties to a collective agreement or an individual employment agreement unless it conforms to previous judicial definitions of serious misconduct in other cases, then I disagree. Collective agreements and individual employment agreements have long contained such definitions which are designed to address the particular employment. What might amount to serious misconduct for one employee of a particular employer might be simply misconduct or even irrelevant for another employee of another employer.

[73] In this case, TWL's House Rules were incorporated expressly into the collective agreement which governed Ms Harris's employment, so that the definitions of serious misconduct in those Rules can be said to have been agreed to expressly by those employees through the union that represented them in bargaining. In any event, any definitions of misconduct or serious misconduct contained in house rules or policy manuals, or unilaterally promulgated codes of that sort, are always subject to scrutiny by the Authority or the Court as to their fairness and reasonableness. They will only be enforceable to the extent that they are lawful, fair and reasonable in all the circumstances. In this case there has been no challenge to the propriety of categorising as serious misconduct such conduct as threats or intimidation. I do not consider that there could be. Rather, what the case concerns is the definition of such conduct in practice and, second, whether the employer could reasonably have concluded that Ms Harris was guilty of such misconduct or serious misconduct as so defined.

"Good faith" obligations and personal grievances

[74] Mr Cranney for Ms Harris submitted that a relevant consideration in determining justification for a dismissal under s 103A is whether, in doing so, the employer has complied with relevant contractual and statutory obligations. In particular, counsel submitted that the statutory obligations include compliance with s 4 of the Act which sets out minimum standards of good faith behaviour between parties to employment relationships in a number of circumstances including, pertinently, where the dismissal of an employee may be the outcome.

[75] Ms Swarbrick for TWL did not disagree with this submission in principle but said, rather, that her client had complied with its relevant contractual and statutory obligations including those under s 4 of the Act. Counsel submitted, however, that to the extent that the Court might find that there had been non-compliance by TWL with those statutory and contractual obligations, this would be minor and did not result in Ms Harris being treated unfairly. That reflects s 103A(5) which provides:

> (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
> (a) minor; and
> (b) did not result in the employee being treated unfairly.

[76] Mr Cranney did not argue against that limited exception to his general proposition that non-compliance with contractual or statutory obligations and, in particular, those under s 4, would cause the dismissal to have been unjustified.

[77] I agree with those propositions of law advanced and accepted by counsel.

[78] The relevant parts of s 4 ("Parties to employment relationship to deal with each other in good faith") include the following:

> (1) The parties to an employment relationship specified in subsection (2)—
> (a) must deal with each other in good faith; and
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
> (i) to mislead or deceive each other; or
> (ii) that is likely to mislead or deceive each other.
> (1A) The duty of good faith in subsection (1)—
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (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; and
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.
> …

(2) The employment relationships are those between—
(a) an employer and an employee employed by the employer
…
(4) The duty of good faith in subsection (1) applies to the following matters:
…
(b) any matter arising under or in relation to a collective agreement while the agreement is in force:
…
(5) The matters specified in subsection (4) are examples and do not limit subsection (1).
…

A breach of s 4(1) of the Act?

[79] Was TWL's failure to tell Ms Harris and/or her union representative that it had interviewed Ms Coster, and what Ms Coster had said to the TWL Managers about events relevant to the dismissal, a statutory breach or other unfairness that may cause the dismissal to be unjustified? My preliminary view, in the course of submissions by Mr Cranney, was that there may have been no obligation on TWL to tell Ms Harris of aspects of its investigation which favoured her position, at least so long as TWL took those considerations into account and gave them due weight. There has never been any doubt that unfavourable accounts of an employee's conduct must be made known to the employee, but this was not such an account. I was, however, persuaded by Mr Cranney to alter this preliminary view on the following argument.

[80] The evidence about Ms Coster's interview by Mr Bunce and Ms McCoid conflicted. I prefer the account given by Ms Coster who impressed me as a straightforward and honest witness with a good recollection of events and who was unbiased as between the parties. That is not to suggest that Mr Bunce and Ms McCoid were dishonest. Rather, I consider that they were both mistaken and had downplayed the significance of Ms Coster's interview after they had prematurely and erroneously concluded that it was of no value to their investigation. That was probably contributed to also by their failure to record the interview with Ms Coster, unlike the interviews of other witnesses.

[81] Ms Coster told Mr Bunce and Ms McCoid that she recalled the events of the day but neither saw nor heard any altercation between Ms Harris and Mrs Pattinson.

Ms Coster also said, importantly, that even although she may have been engaged with customers, she would have heard Ms Harris had the plaintiff shouted at Mrs Pattinson as Ms Maunsell had said. Ms Coster said that similar events in the past had come to her attention in this way. However, when Ms Coster told Mr Bunce and Ms McCoid that she had neither heard nor observed anything untoward involving Ms Harrison that day, the Managers lost interest in interviewing her further.

[82] Ms Harris was not informed about TWL's interview with Ms Coster which disclosed that she did not hear Ms Harris shouting or yelling at Mrs Pattinson across the shop floor in circumstances where Ms Coster would have heard such shouting or yelling, had it occurred. Counsel submitted that this deprived Ms Harris of a valuable opportunity to make or reinforce a submission to TWL (as she was invited to by it) that Ms Coster's evidence corroborated Ms Harris's account of events and contradicted that of another employee witness. That other witness's (Ms Maunsell's) account of Ms Harris's shouting and yelling was accepted by the employer and relied on significantly in reaching its conclusion of serious misconduct.

[83] It is not possible to say, with certainty, what might have happened if Ms Coster's account of events had been relayed by TWL to Ms Harris. However, that was a valuable opportunity lost to Ms Harris because, as the evidence discloses, when Mr Bunce read out his preliminary decision to Ms Harris and her representative, which included the findings and the consequences which were subsequently confirmed by her dismissal, Ms Harris and her representative said, in response, that there was nothing more that they could add. Had TWL told Ms Harris of Mr Bunce's interview of Ms Coster and what it disclosed, this would have provided the basis for a persuasive submission of corroboration of Ms Harris' account of these important allegations. In my assessment, Ms Coster's account of events was not one which TWL could have either ignored or disbelieved, and it would have been significant in TWL deciding whether what Ms Harris did was serious misconduct.

[84] Assessing this omission in terms of s 4, I conclude that this failure on the part of TWL misled or deceived Ms Harris, or was at least likely to have misled or deceived her, into believing that her account of events was unsupported by that of

any other person when in fact it was not. That amounted to a breach of good faith by TWL in dealing with Ms Harris. It was a statutory breach that I assess was not saved by s 103A(5): it was not a defect in TWL's process that was both minor and did not result in Ms Harris being treated unfairly. In these circumstances, and in reliance on Ms Swarbrick's acceptance that non-compliance with statutory and contractual obligations would invalidate (make unjustified) a dismissal, this conclusion contributes to an overall finding that Ms Harris was dismissed unjustifiably.

A credible complaint?

[85] Mr Bunce emphasised the credibility of Mr and Mrs Pattinson's emailed complaint, the contents of which were confirmed by them at their subsequent meeting with him. In addition to finding Mr and Mrs Pattinson credible and consistent complainants, Mr Bunce considered that their complaints were corroborated both by other witnesses and especially by the CCTV records.

[86] However, Mr Bunce conceded that in one significant respect he did not subsequently find Mr and Mrs Pattinson to be credible. This related to their allegation that it was Ms Harris who had made what they described as "racist" comments about them that:

> … I heard the original woman state loudly, "how arrogant!" and then she continued to discuss it loudly with her co-workers, saying something like, "if they were Maori they wouldn't be like that …. And she said something else about white people .." and they agreed with her.

[87] There was a subsequent reference by Mr and Mrs Pattinson to the use of the phrase "white arrogant" when they met with Mr Bunce, which appears to have been attributed by them to Ms Harris. Although not explored in evidence, and I do not therefore speculate about it, is it not difficult to see how 'quite arrogant' for example may have been misheard as "white arrogant".

[88] Whilst, for reasons that I will set out subsequently, Mr Bunce could have reasonably accepted that Ms Harris used the words "how arrogant" about Mrs Pattinson in Mr Pattinson's hearing, the subsequent allegations were not only not corroborated by any other witness but were contradicted by others. Indeed, Mr

Bunce accepted that those words were not attributable to Ms Harris and that they or similar words were most probably said by one or other of the two Maori Wardens present at the time, Mr and Mrs Rakete.

[89] That was the allegation that founded the Pattinson complaint of the use of racist language by Ms Harris to Mr and Mrs Pattinson. Although, in his dismissal letter, Mr Bunce accepted that these things had not been said by Ms Harris, and so were not incidents of serious misconduct by her or could constitute grounds for her dismissal, Mr Bunce's continued assertion in evidence that all of the Pattinson complaints were corroborated was wrong and was an unsafe basis for his decision-making on other allegations made by Mr and Mrs Pattinson but denied by Ms Harris and/or contradicted by other witnesses.

"How arrogant!" or "arrogant prick!"

[90] Mr Bunce concluded that Ms Harris had described, in a loud voice ("shouted" or "yelled") and in the presence of others including Mr Pattinson, that either Mr or Mrs Pattinson was an "arrogant prick". Had that occurred, it would have been misconduct (even serious misconduct) so to describe a customer, loudly and in the presence of others. I do not accept, however, that a fair and reasonable employer could, in all the circumstances, have reached the conclusion that Ms Harris said those words. That is for the following reasons.

[91] Mr Pattinson did not himself ever assert that Ms Harris used those words about him and/or his wife. He did say that Ms Harris used the words "how arrogant!" and that she subsequently described Mrs Pattinson as being "arrogant". Mr Bunce accepted in evidence that Mr Pattinson, in his emailed complaint, would have been unlikely to have pulled his punches in either describing what Ms Harris had said and done, or in making clear his views about that. If Ms Harris had used the phrase "arrogant prick" in a loud voice (shouted or yelled these words) in Mr Pattinson's presence and in relation to him or his wife, I am confident that he would have included this in his letter of complaint. He did not do so.

[92] The only reference to that phrase came from another employee in the store at the time (Ms Maunsell) who asserted that Ms Harris used it in those circumstances. Ms Harris denied doing so although she accepted that she had said to another employee or employees, albeit not so publicly, that Mrs Pattinson had been arrogant and for which Ms Harris accepted that she should apologise to the customer. Mr Bunce and other TWL witnesses accepted at the hearing that the other employee was unreliable in her accounts of events and, in particular, inconsistent in her accounts about these events given to Mr Bunce and subsequently to the Authority. Mr Bunce's conclusion on the use of this phrase by Ms Harris was unsupportable objectively: a reasonable employer in all the circumstances could not have so concluded. The yelling or shouting of this epithet about Mrs Pattinson to, or within the hearing of, Mr Pattinson and other customers, was a mainstay of TWL's conclusion of serious misconduct by Ms Harris, resulting in her dismissal.

[93] Nor is it insignificant that the words "arrogant prick" were said apparently in relation to Mrs Pattinson. As one witness pointed out, the derogatory insult of "prick" is usually used of males, whereas all the evidence points to Ms Harris's issue being with Mrs Pattinson. It is implicit in Mr and Mrs Pattinson's written complaint that Ms Harris used the phrase "how arrogant!" in relation to Mrs Pattinson and Ms Harris herself accepted that when she used the word "arrogant" when she spoke to other staff, this related to Mrs Pattinson. Indeed it is doubtful whether, at the relevant times, Ms Harris appreciated the association between Mr and Mrs Pattinson and there is no suggestion that she had any interaction at all with Mr Pattinson. That is another factor which ought to have weighed with the TWL managers in considering whether Ms Harris used the phrase "arrogant prick". They failed to take account of the inherent improbability of the use of that phrase by Ms Harris in relation to Mrs Pattinson which, in turn, would have reinforced a conclusion that Ms Maunsell was mistaken in her recollection.

[94] This ought to have been weighed by Mr Bunce in Ms Harris's favour but it was not. The use of these words, the circumstances in which they were used, and the volume of Ms Harris's voice when doing so, were all significant factors in Mr Bunce's decision to dismiss the plaintiff.

A non-observant witness?

[95] Another (and particularly significant) erroneous conclusion reached by Mr Bunce related to the observations of Ms Coster who was in the vicinity of these events when they occurred. Although I alluded earlier to Mr Bunce's interview of Ms Coster, I now examine it in more detail.

[96] Ms Coster was the subject of a very brief interview by Mr Bunce and Ms McCoid about these events. Remarkably, no record was kept of that interview, although the managers later claimed that this would not have made any difference because of what they said was the inconsequential nature of Ms Coster's observations. It also seems remarkable that Ms McCoid's evidence was that she had forgotten to take pen and paper to the interview with Ms Coster, in contrast to all the other staff interviews in which both she and Mr Bunce made their own brief notes and then subsequently constructed a more detailed account of what had occurred from those notes.

[97] Ms Coster recalled the incident involving Ms Harris and Mr and Mrs Pattinson on 15 February 2013 but said that she had no recollection of Ms Harris shouting or yelling at Mrs Pattinson in an intimidating or threatening manner. The significance of Ms Coster's account was that if Ms Harris had done what was alleged against her in these circumstances, Ms Coster would probably have heard and noticed such conduct on Ms Harris's behalf. That she did not do so in circumstances in which she would have been expected to if those events had occurred, ought to have been a significant aspect of the investigation by TWL. Mr Bunce failed to appreciate the significance of Ms Coster not noticing the events about which others had spoken. As I have already concluded, Ms Coster impressed me as a credible witness including as to her account of her interview with Mr Bunce.

[98] So it follows from Ms Coster's account of not noticing such events that this supported Ms Harris's version of events and contradicted that of Mr and Mrs Pattinson and others. On the evidence presented to the Court of the witnesses and the CCTV records, it seems compelling that if the events alleged by Mr and Mrs Pattinson and others had occurred, Ms Coster would have heard, noticed and recalled

these, but she did not. Mr Bunce failed to take into account her evidence that should properly have been a significant feature in support of Ms Harris's account of what happened.

TWL's apology to the complainants

[99] Mr Cranney was critical of TWL's first response to the Pattinson complaint. This was to write to Mr Pattinson apologising for the treatment of him and his wife including, by implication, for Ms Harris's conduct. Mr Cranney submitted that it was inappropriate for Mr Bunce to do so and at that time. Counsel also submitted that, so far as justification for dismissal was concerned, this immediate apology was indicative of an inappropriate approach by Mr Bunce to his necessarily objective task of determining whether serious misconduct had occurred, if not being indicative of bias in favour of Mr and Mrs Pattinson and against Ms Harris.

[100] As with the tone and content of the complaint letter too, Mr Bunce was faced with a difficult task in this regard. On the one hand, he had to undertake a fair investigation into very serious allegations of misconduct by an employee and to do so with an open mind. On the other hand, he was faced with clearly irate customers whose mood had gone beyond irrationality and invective and had manifested itself in racial prejudice and hurtful gratuitous insult, not only about Ms Harris but about other staff and the management of the Kaikohe store.

[101] A fair and reasonable employer could have both placated and assured the complaining customers and yet still have ensured the appearance of impartiality and open-mindedness required of it in determining whether Ms Harris was guilty of serious misconduct. There was no need for an immediate fulsome apology to Mr and Mrs Pattinson including an implicit acceptance of the guilt of Ms Harris. TWL at Kaikohe was not at risk of the loss of their custom because the complaint letter clearly indicates their established dislike of that store and its other staff. By the same token, Mr and Mrs Pattinson were clearly contented customers of other TWL branch stores in the far north and there is no suggestion that they would either relinquish their patronage of TWL altogether, or that they would publicise their experiences at the Kaikohe store.

[102] Mr Bunce's email of acknowledgement in response to their dissatisfaction could have both expressed concern about the seriousness of their allegations and assured Mr and Mrs Pattinson that steps were being taken to investigate and rectify the situation and, on the other hand, could have avoided any reference to a concluded view about the accuracy of those complaints.

[103] The Court should not be seen as being too critical of Mr Bunce in this regard. He had to make a difficult decision without apparent Head Office support or advice, but the wording of his reply to Mr and Mrs Pattinson does tend to indicate a premature and adverse view of the conduct of the employee complained about, who was very soon identified as Ms Harris. This is not a decisive factor in the decision of the case but contributes to it. It identifies the need for balance and open-mindedness that must be exercised in such situations.

Notes of interviews

[104] TWL relied significantly on notes made by the Assistant Store Manager, Ms McCoid, of interviews and other significant events during its investigation into Ms Harris's alleged misconduct and leading to her dismissal. The notes were themselves evidential exhibits at the hearing. The process by which those notes were made has both caused some general concern about this important element of disciplinary inquiries by employers and was the subject of criticism of their accuracy in some pertinent respects.

[105] The evidence was that Mr Bunce and Ms McCoid each made their own rough handwritten notes during most interviews and other important events which were referred to as "bullet point" notes. Following the conclusion of each event, Mr Bunce and Ms McCoid then conferred and recreated, from their bullet point notes and recollections, what they both remembered being said. They then destroyed their original bullet point notes on each occasion. It was unclear whether this practice was standard within the company, although it would be surprising if it was so. The subsequently recreated account of events was incomplete and in some instances so incomplete and brief, when compared to the periods taken up by the actual interviews, that the notes' value as accurate and complete records is questionable.

[106] It must have been known to the TWL managers that the interviews and other events that took place and were recorded might have led to Ms Harris's dismissal and thereby to a challenge to that dismissal in which the records of what happened during crucial meetings would be closely examined. At the very least, these were likely to lead to a formal employment warning. It is surprising, therefore, that the original or bullet point notes were routinely destroyed. If nothing else, that practice left the managers open to the criticism that their recreated notes did not record accurately what had been said.

[107] Further, unlike in other cases involving similarly large employers of staff with sophisticated human resources systems,[7] there was no suggestion that the persons being interviewed were asked to check the accuracy of the notes that had been made and to sign them as correct. There were subsequent disagreements about what was said in at least one of these interviews which could have been avoided by the adoption of this approval process after interviews.

[108] One example of the application of this policy in practice may reinforce the point. As noted elsewhere, Mr Bunce and Ms McCoid interviewed Ms Coster. All three gave evidence about the interview. It was common ground that no record of that interview was created by the managerial representatives, not even a bullet point summary in the manner described. Ms McCoid thought that she may even have omitted to have brought a pen and paper to the interview but I prefer Ms Coster's evidence that Ms McCoid did have these instruments on hand but did not use them.

[109] As already noted, a dispute arose in evidence about what Ms Coster told Mr Bunce and Ms McCoid. Ms Coster said that she did not hear and subsequently see any such yelling by Ms Harris. She said that she told this to Mr Bunce during her interview. The production of even TWL's bullet point notes might have assisted in resolving this dispute about a crucial piece of evidence because Mr Bunce and Ms McCoid denied that Ms Coster said so to them. Mr Bunce told the Court that he decided not to make a record of their interview with Ms Coster. That was because he considered she had nothing valuable to add to the accounts of other witnesses.

[7] About 9,000 employees across TWL's operations in New Zealand.

However, Mr Bunce did not tell Ms Harris that Ms Coster had been interviewed, or what she had said.

[110] In all the circumstances, the Court is not satisfied that a fair and reasonable employer could not have kept and preserved accurate records of important interviews. I am satisfied that Ms Coster's evidence of what she said to Mr Bunce and Ms McCoid was accurate and that the managers were mistaken or did not recollect Ms Coster doing so.

Reliance on CCTV footage

[111] Soon after Mr and Mrs Pattinson's emailed complaint was received by the store's management, steps were taken by it to attempt to preserve relevant video records from two fixed cameras covering the time periods referred to in Mr and Mrs Pattinson's complaints. One camera was mounted in the ceiling area of the foyer entrance to the store between two sets of doors and captured images of persons both immediately inside the entry to the store and, to a very limited degree, in the foyer area between the two sets of doors. The other fixed camera was also ceiling-mounted behind a customer service area and looked across that part of the store entry encompassing the customer services desk, the security pedestal, part of the area immediately inside the doors and, less clearly, part of the foyer area between the two sets of doors. The cameras were fixed in the sense that they only recorded what came within their fields of view. There was no sound recorded of incidents portrayed by the cameras. Ms Harris knew of the existence and locations of the cameras because her security station at the front of the store was one of two places from which the cameras' images could be viewed, and viewing them was part of her duties.

[112] It was appropriate for TWL to have preserved and used this footage. However, how it interpreted the footage is an important element of the case. The store's management relied very significantly on its interpretation of what the manager saw in the CCTV recordings which enabled him to reach conclusions about Ms Harris's behaviour which, in turn, led to her dismissal.

[113] The CCTV images were incontrovertible about where persons were at specific times and even, for the most part, were an accurate representation of their actions. More problematic, however, were Mr Bunce's interpretations of what he described as people's "body language" and his conclusions that they had said things by his reference to hand gestures and indistinct lip movements. Whilst it was safe for Mr Bunce to assume that Ms Harris had spoken, perhaps even animatedly by reference to hand gestures, the difficulty with some of Mr Bunce's evidence came when he purported to confirm the content of what was allegedly said by her and the volume at which Ms Harris said it, by reference to the silent CCTV records.

[114] In particular, TWL relied very significantly on the content of the CCTV footage to confirm when and how Ms Harris had addressed Mrs Pattinson and the content of what she said. What the footage also shows, however, and which I conclude TWL either ignored or wrongly discounted, was the recorded reactions (or lack of them) of others in the immediate vicinity at those times. A uniformed shop employee shouting or yelling at a customer in a rude and unprofessional manner would likely have attracted the attention of at least some persons in the immediate vicinity. At those times when TWL says that the CCTV footage confirms that Ms Harris was yelling or shouting in objectionable terms at Mrs Pattinson, it is remarkable that others in the vicinity are not shown to be reacting as one would expect, that is by looking towards Ms Harris and/or Mrs Pattinson, being distracted from their other activities, stopping to watch, or the like.

[115] That was a factor which, objectively, tended to corroborate Ms Harris's denial of shouting or yelling at Mrs Pattinson. This factor was not given any consideration, let alone credence, by the TWL investigators who were attempting to ascertain where the truth probably lay between two different accounts of the same event. No reasonable employer in the circumstances at the time could have ignored or discounted, as I am satisfied TWL did, this visual assessment of the reactions of independent witnesses. Although this was in no way a conclusive consideration: nor was it immaterial in the assessment of Ms Harris's conduct.

[116] Whilst the footage does include a digital clock (the accuracy of which was not in question) and shows identifiable people moving into, within, and out of its

fixed field of view, not all of its images are equally clear. So, for example, although in a clear image someone identifiable as Ms Harris can be shown appearing to speak animatedly with the use of hand gestures, another more distant and indistinct shot of an identifiable Ms Harris does not show lip movement consistent with speech. And, of course, the most significant constraint on reliance on the CCTV footage is the absence of any sound, especially in a case such as this where the allegations relate to what was said rather than done.

[117] So, whilst the footage can corroborate the presence of a person in a particular place at and for a particular time and can corroborate that the person was speaking and even perhaps the degree of animation of that person while speaking as indicated by hand gestures, it cannot reasonably corroborate other allegations about what was said and, in most cases, to whom. TWL was wrong to have used it in this way, to the extent it did.

"Intimidation" and "threatening behaviour"

[118] These are both descriptions, in the House Rules and the collective agreement, of conduct which will amount to serious misconduct and for which the sanction may be dismissal. When asked in evidence to define what he understood was meant by the word "intimidation", Mr Bunce said that it meant what someone, who considered that he or she had been intimidated, considered had happened. This purely subjective definition of serious misconduct in employment cannot, in my assessment, have been what TWL's Rules intended. As was put to Mr Bunce, no TWL employee could be confident whether his or her behaviour would amount to intimidation if that decision was based entirely on the subjective perception of the person allegedly intimidated. Although Mr Bunce asserted, in response to this proposition, that it was really over to the application of commonsense by TWL to determine whether intimidation had occurred, this too ignores what must be the necessity for an objective assessment of the conduct complained of in determining whether it amounted to the serious misconduct of intimidation.

[119] Similarly, Mr Bunce defined "threatening" behaviour (also a serious misconduct as defined in the House Rules) subjectively: that was whether the person

allegedly threatened considered that the behaviour was threatening. I consider that this also was a misinterpretation by Mr Bunce of the company's intention in defining conduct that would be serious misconduct, and for which the sanction of dismissal might be available to TWL.

[120] Both words ("intimidation" and "threaten") have particular meanings in law but I consider that, consistent with the context in which they were used, TWL intended them to bear non-technical, common parlance meanings. Their meanings are also to be gleaned by reference to the context of TWL's retail environment.

[121] To intimidate a customer means more than to upset or to make him or her annoyed or even very angry. It is more than the use of offensive language or rudeness, not only in common usage but also because those are behaviours which are defined separately in the House Rules, and as "misconduct" rather than "serious misconduct".

[122] The Shorter Oxford English Dictionary defines the verb "intimidate" as "to render timid, inspire with fear; to over-awe, cow …" and, more recently in time, especially "to force to or deter from some action by threats or violence". "Intimidation" is defined as "the action of intimidating or making afraid". "Intimidating", being the "serious misconduct" set out at para 16 of the House Rules' definition, must also be read and applied in association with the other behaviours linked to it, "threatening" or "interfering with … anyone on company premises".

[123] The Shorter Oxford Dictionary defines the verb to "threaten" as "to try to influence (a person) by menaces; to utter or hold out a threat against; to declare (usually conditionally) one's intention of inflicting injury upon or to menace". Likewise in this case, "threatening" also takes its meaning from the accompanying words "intimidating or interfering with … anyone on company premises".

[124] Applying these definitions to assist in determining what the collective agreement and the House Rules intended to mean in this case, can it be said that TWL could reasonably have concluded that what Ms Harris did amounted to intimidation or the threatening of Mrs and/or Mr Pattinson? Taking, first, the

Pattinson emailed complaint, I do not consider that TWL could have concluded reasonably that the Pattinson account of Ms Harris's dealings with Mrs Pattinson amounted to "intimidation". Nor did Mrs Pattinson's conduct in response to Ms Harris's dealings with her indicate that she had been intimidated. The CCTV footage, on which TWL relied significantly, showed Mrs Pattinson remaining visibly unmoved by Ms Harris's initial interaction with her and, subsequently, leaving the shop floor area apparently calmly, at a normal walking pace, and not visibly affected by the treatment to which she had been subjected by Ms Harris. The response by Mrs Pattinson of ignoring Ms Harris, including turning her back on her, might arguably have been a response to intimidating behaviour. However, I consider it more likely that Mrs Pattinson would have responded otherwise had she been the subject of intimidating behaviour by Ms Harris.

[125] Nor could TWL have considered reasonably that what it described as Ms Harris's "body language" was "intimidating". Although animated, including gesticulating on occasions towards Mrs Pattinson, Ms Harris's gestures were neither in close physical proximity to Mrs Pattinson nor consistent with intimidation. They were more consistent with someone who gesticulates, probably unconsciously, to reinforce a point. It is notable that at times when giving evidence, Ms Harris gesticulated while speaking to reinforce points strongly made. This was in the same way as she is shown on the CCTV footage to have done when speaking to Mrs Pattinson.

[126] Nor do I consider that TWL could have concluded reasonably that Ms Harris's interactions on the shop floor amounted to threatening Mrs Pattinson. However, if TWL had been entitled reasonably to conclude that Ms Harris told Mrs Pattinson, after the latter had left the shop floor and was standing in the internal foyer, that she (Ms Harris) would call the Police and/or issue Mrs Pattinson with a trespass notice, this may have amounted to a threat or threats against Mrs Pattinson. The Pattinson complaint did contain an allegation of a threat:

> My wife then pointed out that she was no longer in the shop, but this was not satisfying to your employee.
>
> Then this woman threatened to call the Police and to have my wife served with a [trespass] notice!

[127] Could TWL have concluded reasonably that Ms Harris did so? This requires answers to two questions:

- whether such threats were made to Mrs Pattinson in those circumstances; and

- if so, whether it was Ms Harris who said that to Mrs Pattinson and not another person or persons, more particularly Mr and/or Mrs Rakete.

[128] Ms Harris denied telling Mrs Pattinson that she would call the Police or issue her with a trespass notice. There was no other witness to the interaction between Ms Harris and Mrs Pattinson that clearly, from the CCTV footage, took place in the foyer area outside the main shop floor. It is clear, also, that Mrs Rakete was present for at least the latter part of that time and appeared also to be speaking, although what she said and to whom is not discernible.

[129] In view of Ms Harris's denial of Mrs Pattinson's allegation and in the absence of any corroborative evidence from anyone who may or may not have heard what occurred in the foyer area, Mr Bunce relied heavily on the CCTV footage to believe Mrs Pattinson's allegation and to find Ms Harris untruthful. Could a reasonable employer, in all the circumstances, have reached that conclusion on that basis?

[130] Although the CCTV footage shows Mrs Pattinson leaving the interior or shop floor area of the store, it does not depict her in the foyer when TWL says that Ms Harris spoke threateningly to her. There is clear footage of Ms Harris moving to, and standing in, the foyer and speaking and gesticulating to someone else out of camera shot who, it can be reasonably assumed, was Mrs Pattinson. There is no dispute that Ms Harris did speak to Mrs Pattinson in that area. Ms Harris says that she attempted to explain to the customer the basis for excluding her dog from the store because Mrs Pattinson had apparently refused to acknowledge Ms Harris's instruction to remove the dog from the store previously. Mrs Pattinson's account is of a conversation with Ms Harris. Mrs Pattinson said that Ms Harris required her to remove the dog completely from the store although Mrs Pattinson said that she told Ms Harris that she was already outside the store. Ms Harris's gesticulating is as

consistent with her account of what she said there to Mrs Pattinson as it is with Mrs Pattinson's account of this.

[131] Finally, there is the clear evidence that Mrs Rakete moved out to stand beside Ms Harris in the foyer area and was talking to somebody there other than Ms Harris. Although Mrs Pattinson complained that it was Ms Harris who threatened her with the Police and a trespass notice, in one other important respect TWL accepts that Mrs Pattinson was mistaken in attributing to Ms Harris what was said by someone else, probably Mrs Rakete. It was therefore possible, in view of Ms Harris's denial, that someone else, possibly Mrs Rakete, made the threat to call the Police or to issue a trespass notice.

[132] Although Mr Bunce discounted this possibility because he said that only Ms Harris could have had the authority to issue a trespass notice on behalf of TWL, that overlooks the complaint of Mrs Pattinson that someone now known to be Mr Rakete had earlier asserted that although he was not "in uniform", he had authority to require Mrs Pattinson to leave the shop. It is therefore possible that Mr and/or Mrs Rakete were purporting to have authority as Maori Wardens to assist Ms Harris to enforce TWL's requirements, even if the legal basis of doing so was dubious.

[133] This situation should have caused Mr Bunce to consider carefully whether it was indeed Ms Harris who threatened Mrs Pattinson with the Police and/or a trespass notice. I am satisfied Mr Bunce did not do so, and that had he done so, he could not but have been left in significant doubt about whether it was Ms Harris who made those threats to Mrs Pattinson.

[134] I have no doubt that TWL, as a fair and reasonable employer, could reasonably have concluded that Ms Harris was rude, and even verbally aggressive, towards Mrs Pattinson who was a customer of the store. At its worst, Mrs Pattinson's misdemeanour in having her dog in the store did not warrant the sort of conduct that TWL could reasonably have concluded Ms Harris exhibited towards Mrs Pattinson. But TWL could not, in all the circumstances, have concluded reasonably that Ms Harris intimidated or threatened Mrs Pattinson. So, while TWL could reasonably have concluded that Ms Harris misconducted herself in these

interactions, it could not reasonably have concluded that this amounted to "serious misconduct" as it had defined this conduct then.

Bringing TWL into disrepute

[135] TWL also concluded that Ms Harris's conduct brought it into disrepute. Bringing the company into disrepute was a specified serious misconduct under cl 24 of the House Rules' list of "serious misconducts". I accept that what TWL could reasonably have concluded Ms Harris did in relation to Mrs Pattinson did bring the company into disrepute, at least in the prejudiced eyes of Mr Pattinson. But bringing a commercial entity into disrepute to the extent that it amounts to serious misconduct for which dismissal could be justified, is not a simply defined and thereby concluded circumstance. Rather, it is a matter of degree in the particular circumstances of each case. Those circumstances include the nature of the business, its reputation, and an objective assessment of the culpability of what was said and/or done which may have brought the company into disrepute. In the circumstances of this case, it could not have been concluded that Ms Harris brought TWL into disrepute in a way that constituted serious misconduct simply because Mr and Mrs Pattinson considered she had done so, or even because Mr Bunce agreed with Mr and Mrs Pattinson's assessment.

[136] From their emailed complaint, it seems that Mr and Mrs Pattinson already held TWL, or at least its Kaikohe store, in low regard generally, even before the incidents with Ms Harris. It might even be said that what Ms Harris did could not have brought the TWL store in Kaikohe into any more disrepute than that in which Mr and Mrs Pattinson already held it. But that is not the test. It must be an objective assessment that takes into account the nature of both the conduct complained of, and the response of reasonable customers to it. Some conduct bringing disrepute to TWL might fall at the minor end of a scale of seriousness and therefore could be categorised as misconduct. At the other extreme, some disreputable conduct by a staff member representing TWL could be so serious in its effect on the company's reputation that it would be serious misconduct for which dismissal might be the appropriate sanction under the House Rules. Where, on this continuum, could TWL have reasonably concluded Ms Harris's conduct lay?

[137] It is convenient to determine this question by examining in turn each of the four interactions between Ms Harris and Mrs and/or Mr Pattinson. What happened on each occasion is defined by what the Court has concluded that TWL could reasonably have attributed to Ms Harris.

[138] Addressing the first interaction from the basis of the Pattinson complaint, TWL could reasonably have considered that Ms Harris approached Mrs Pattinson and told her that the dog was not allowed in the store. Upon being ignored by Mrs Pattinson, Ms Harris insisted that she remove the dog from the store. By Mr and Mrs Pattinson's account, Mrs Pattinson's response to Ms Harris's request that they not bring the dog into the store again was equivocal and enigmatic, perhaps even uncooperative. By Mr and Mrs Pattinson's written account, her reply was: "Yes, you can ask". That would tend to indicate that the request from Ms Harris which elicited that response may have been along the lines of: "Can I ask you not to bring the dog in again?" or something of that sort. That would have been more consistent with Ms Harris's account than with the conclusion reached by TWL that she addressed Mrs Pattinson rudely and aggressively from the outset.

[139] Although Ms Harris's communications with Mr and Mrs Pattinson on this first occasion may have been curt, summary, and even impolite or uncivil in their briefness and directness, I do not consider that TWL could have assessed that they brought the company into disrepute at that point. There is no indication that Ms Harris's requests or requirements of Mr and Mrs Pattinson were overheard by others and Mr and/or Mrs Pattinson's responses as reported by Mr Pattinson would not have assisted in resolving the matter in a low key and civil fashion. If Ms Harris then brought TWL into disrepute at all, this could only have been in a very minor way.

[140] The next interaction complained of by Mr and Mrs Pattinson was Ms Harris's second approach to Mrs Pattinson after she remained in the store with the dog while Mr Pattinson was waiting to be served at the checkout. TWL could reasonably have concluded that Ms Harris was more insistent and less polite on this second occasion, having apparently been ignored previously by Mrs Pattinson, who did not comply with the request to remove the dog.

[141] Although part of Mr and Mrs Pattinson's complaint about this second incident attributed significant criticism for misconduct to Ms Harris, as TWL concluded and I agree, the rude behaviour shown towards Mrs Pattinson was not that of Ms Harris but, rather, of Mr and/or Mrs Rakete. TWL also concluded that Ms Harris was at fault for not reprimanding Mr and Mrs Rakete, requiring them to cease their involvement in an issue which was not their concern. That, together with an expectation that she should continue to deal professionally with Mrs Pattinson if such a failure on Ms Harris's part did bring TWL into disrepute, was at the less serious end of that scale just described.

[142] The next interaction complained of (and found by TWL) was the loud or shouted comment by Ms Harris about Mrs Pattinson's arrogance. I have determined that TWL could only reasonably have concluded that Ms Harris said to other staff that Mrs Pattinson was "arrogant". This was overheard by Mr Pattinson although not intended by Ms Harris to be. Can that comment by Ms Harris be said to have brought TWL into disrepute? To the extent that I accept that it may have, it was nevertheless again, in all the circumstances, misconduct at the lower level of seriousness as that was defined.

[143] Fourth and finally, there was the interaction between Ms Harris and Mrs Pattinson in the foyer area of the store after Mrs Pattinson had taken the dog away from the shop floor and out the first set of doors. Even allowing for the probability that the threat to call the Police and to issue a trespass notice emanated not from Ms Harris but from Mrs Rakete, Ms Harris's continued assertive or even aggressive pursuit of, and remonstration with, Mrs Pattinson was unwarranted. It could reasonably be said to have brought the company into disrepute. Mrs Pattinson had removed the dog from the shop floor area and although she may not technically have left the store, she was nevertheless in an area in which there was no food merchandise, and then only temporarily while she waited for her husband to join her after completing his purchase.

[144] I accept that Ms Harris berated Mrs Pattinson unnecessarily in a public way even if she did not threaten to call the Police or issue a trespass notice. Ms Harris's conduct in doing so, as a clearly identified representative of TWL, brought it into

disrepute. This was in more than the more minor ways of the previous encounters with Mrs Pattinson although not at the extreme end of seriousness.

[145] Standing back and assessing whether Ms Harris's actions, as outlined above, which brought the company into disrepute, amounted to serious misconduct, the offence caused to the customers or the level of rudeness exhibited by Ms Harris must be such that what she did was more serious than the prohibited behaviours under number 1 of the House Rules' definition of "misconduct", that is the use of offensive language or rudeness to customers, exhibiting substandard performance of her duties, or failure to comply with company policies and procedures. I consider that a fair and reasonable employer could only have concluded that the disrepute into which Ms Harris brought TWL was not at the serious end of the spectrum of such misconduct.

[146] Even if her conduct which brought the company into disrepute could be said reasonably to have amounted to serious misconduct, the collective agreement and the House Rules make it clear that this would not automatically have warranted Ms Harris's dismissal. Rather, bringing the company into disrepute may have made her liable for dismissal depending on the answer to the question whether a fair and reasonable employer in all the circumstances could have dismissed for this serious misconduct.

The consequences of serious misconduct

[147] In his evidence Mr Bunce said that he considered that the commission of what he described as Ms Harris's "gross misconduct" (what the collective agreement and the House Rules refer to as "serious misconduct") crossed a line of unacceptability and resulted, therefore, in dismissal. He used, as an example, the hypothetical taking of $100 from a store till by himself. He said that in these circumstances he would expect no less than summary dismissal and inferred that this was TWL policy, that is that the commission of serious misconduct would result in dismissal. I infer from his evidence that he considered that the commission of "gross" (serious) misconduct necessarily warranted summary dismissal.

[148] Mr Bunce's view was, however, erroneous. He conceded that this was so when taxed about it in evidence. The collective agreement, and the TWL House Rules incorporated into it, provide that serious misconduct "may" result in summary dismissal. This allows a degree of sensible flexibility in dealing with conduct which may, strictly, meet the definition of serious misconduct but which may also be sufficiently innocuous, or the subject of such mitigating factors, as may lead TWL to impose a lesser sanction than summary dismissal. What is of concern, however, is that Mr Bunce's previous misapprehension of the consequences of serious misconduct influenced significantly his decision to dismiss Ms Harris summarily. There is a serious risk of error by Mr Bunce in assuming that the commission of what he considered was serious misconduct warranted dismissal automatically.

Another ground justifying dismissal?

[149] Ms Swarbrick, in closing submissions, contended that a further justification for Ms Harris's dismissal was that she did not intervene in Mr and Mrs Rakete's interference with Mrs Pattinson by requiring them to cease to act on TWL's behalf or to otherwise cease their provocative involvement in the incident.

[150] The simple answer to this submission is that this was never a ground for complaint about Ms Harris's conduct before her dismissal. Put another way, Ms Harris was not dismissed in reliance on this ground which has only emerged subsequently. It cannot, therefore, constitute a ground warranting or contributing to the justification for dismissal. It may be taken into account under s 124 of the Act and/or in relation to the remedy of reinstatement which Ms Harris seeks, but not otherwise.

A consideration of alternatives to dismissal?

[151] TWL's case is that Mr Bunce did consider alternatives to Ms Harris's summary dismissal but determined that the seriousness and unacceptability of her conduct meant that the company had lost trust and confidence in her such that dismissal was the only viable option.

[152] However, had TWL assessed such misconduct as the Court has determined occurred, could Mr Bunce have then likewise decided that there was no alternative but to dismiss Ms Harris summarily?

[153] It was common ground that Ms Harris had worked for about 14 months in the role of Loss Prevention Officer. Despite having to deal with fraught and sometimes stressful situations with customers in the store, there had been no previous complaint or criticism about how she had done so.

[154] In view of the conclusion that TWL could not reasonably have found Ms Harris guilty of the serious misconduct of intimidating and threatening customers, and that the disrepute into which she brought the employer was at the less serious end of that continuum, I have concluded that TWL should have given greater consideration than it did to alternatives to summary dismissal. Given that TWL could only reasonably have concluded that Ms Harris misconducted herself rather than misconducted herself seriously, those alternatives could have included a formal employment warning, retraining or upskilling, or other sanctions available to the company, short of summary dismissal.

[155] TWL's failure to consider alternatives in all of the circumstances also contributes to a finding of unjustified dismissal.

Dismissal unjustified

[156] Taken together, the foregoing conclusions about what TWL did, and how it did it, mean that the employer has failed to establish that summary dismissal was what a fair and reasonable employer could have done in all the circumstances and that how TWL went about doing so was how a fair and reasonable employer could have investigated the complaints of misconduct against Ms Harris leading to its decision to dismiss her summarily.

[157] This means that Ms Harris has a personal grievance. She was dismissed unjustifiably. Although that was the conclusion reached by the Authority, the Court

has arrived at the same destination by a very different route and on other and very different grounds.

[158] To the extent that this process may have included Ms Harris suffering an unjustified disadvantage, this is linked so inextricably to the dismissal that it, and any remedies for it, should be considered as a part of the dismissal grievance.

[159] This decision requires the Court now to consider Ms Harris's challenge to the Authority's determination about remedies. It also requires the Court to consider the separate question of remedies that flow from the Court's own decision that dismissal was unjustified.

Remedies

[160] These were not addressed, or not sufficiently, in evidence called for Ms Harris. Some evidence of wages received by her following her dismissal from other employment was produced belatedly but there was no calculation of the extent of loss or indeed whether Ms Harris had suffered any loss of income at all. The plaintiff's counsel was content to attempt to resolve the issue of compensation for remuneration loss if the Court found dismissal to be unjustified with leave reserved to have the Court fix such compensation if agreement could not be reached.

[161] Similarly, there was only scant evidence called for Ms Harris about the non-economic consequences of her dismissal on her. The Court accepts that consequences such as humiliation, distress, loss of reputation and the like would probably have been suffered by Ms Harris but the particulars and extent of these can only be guessed at. The Court does not do so.

[162] Although reinstatement was advanced by Ms Harris as her primary remedy for unjustified dismissal and there was evidence called from TWL witnesses opposing this remedy, again the evidence about its practicability and reasonableness[8] from Ms Harris was, at best, minimal. Mr Cranney relied more on opposing TWL's resistance to reinstatement by reference to principles stated in earlier cases and there

[8] The tests for reinstatement under s 125 of the Act.

is indeed some merit in this approach. Where, as here, an employer resists reinstatement because of a loss of trust and confidence in the former employee as a result of the circumstances of dismissal, but a review of those circumstances discloses that, reasonably and objectively, the employer did not have grounds or at least such sound grounds to lose trust and confidence, the employer cannot continue to oppose reinstatement for those reasons.

[163] Finally, on the issue of reinstatement, Mr Cranney told the Court from the Bar that Ms Harris would agree to reinstatement at any of TWL's stores as far away from Kaikohe as Auckland, if the Court was satisfied that she could not be reinstated to the position of Loss Prevention Officer, or to one no less advantageous to her, at the Kaikohe store.

[164] The evidence establishes that Ms Harris was the sole full-time Loss Prevention Officer at Kaikohe and that TWL has subsequently appointed a replacement employee. That store alone has a staff of about 40. Although, at the date of hearing, there may not have been any staff vacancies at Kaikohe, the Court can take judicial notice of the phenomenon of staff turnover, particularly in enterprises such as TWL, which will create staff vacancies from time to time. TWL's website reveals that it has four stores in the far North and mid Northland and 15 stores in the Auckland metropolitan area.

[165] Ms Harris has sought reinstatement from the outset, so that TWL has been on notice that it may potentially be faced with such an order. Indeed, given Ms Harris's indication that she would be prepared to be reinstated to any one of a number of other TWL stores throughout Northland, it is even more likely that there will be, if not a Loss Prevention Officer vacancy, then another staff vacancy across that greater number of stores. Such a reinstatement could also avoid any possibility of a personality clash between management of the Kaikohe store and Ms Harris although TWL is correct to say that it is not only Mr Bunce who will need to be able to work harmoniously and trustworthily with Ms Harris: so too would any other store management.

[166] Ms Swarbrick was correct that Mr Bunce was not cross-examined seriously about his evidence opposing reinstatement. However, it does not follow, therefore, that the Court must accept this evidence. That is because it is evidence of the witness's opinion rather than of a fact. That opinion must be assessed in the light of the Court's finding whether the employer could, in all the circumstances, have concluded reasonably that it had lost trust and confidence in Ms Harris to the extent of the relationship not being able to be restored with these necessary constituents.

[167] The Court's conclusions as to what the employer could reasonably have found in respect of the complaints means, in turn, that Mr Bunce's assessment of the loss of trust and confidence cannot stand, at least as robustly as he considered. Mr Bunce genuinely believed at the time of dismissing Ms Harris, and indeed when he gave evidence about this, that his loss of trust and confidence in her was such that reinstatement would be neither reasonable nor practicable. However, I conclude on an objective assessment of the evidence that even if it could be said to have been warranted, such loss of trust and confidence is not irremediable so that it would be reasonable and practicable to reinstate Ms Harris to a successful employment relationship with TWL. In those areas where Ms Harris's conduct fell below reasonably expected standards, as it did, a combination of supervision, training and a now stark realisation on Ms Harris's part of the consequences of so behaving, are likely to ensure that such an incident would not be repeated, and that a productive and harmonious working relationship can be restored.

[168] In these circumstances, reinstatement to a Loss Prevention Officer position, or one no less advantageous to her, is reasonable and practicable and will be ordered. That should be at Kaikohe or, if not, at the nearest located TWL store no further distant than Auckland.

[169] This order is not confined to the Kaikohe branch of TWL if there is no vacant position there but should apply to the nearest available vacant position at a TWL branch closest to Kaikohe. It would be reasonable for TWL to require Ms Harris to undertake appropriate customer service and/or Loss Prevention Officer training before resuming her duties at TWL, although she should do so as a paid reinstated employee. The parties are reminded that the Ministry of Business, Innovation and

Employment's Mediation Service is available to assist them if there are particular difficulties with the implementation of a reinstatement order.

Section 124 reductions for contribution

[170] Section 124 ("Remedy reduced if contributing behaviour by employee") provides:

> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[171] Mr Cranney was very critical not only of the determination in this case but of the Authority's application of s 124 in other cases. He submitted that it is not a proper application of the section to simply decide, as the Authority Member did in this case following the finding of unjustified dismissal, that the grievant was so blameworthy for the circumstances that led to her dismissal that she would not be entitled to any remedies at all. Mr Cranney submitted that the proper approach is for the Authority to determine, first, what should be the remedies for that unjustified dismissal before applying the s 124(b) statutory reduction if that is applicable.

[172] An associated argument advanced by Mr Cranney is that the remedy of reinstatement is not reducible under s 124(b) because of the way in which it is defined in the statute. In practical terms, counsel submitted that the "extent" of the remedy of reinstatement is fixed statutorily by s 123(1)(a) which provides:

> (1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
> (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:

[173] Mr Cranney's argument was that, if reinstatement is practicable and reasonable pursuant to s 125, then the reinstatement must either be to the employee's

former position (including all terms and conditions of employment applicable to that position) or to the placement of the employee in another position but which is, nevertheless, no less advantageous to the employee. Counsel submitted that any order for reinstatement in these terms cannot be reduced under s 124. To do so would infringe on the statutory nature of the remedy.

[174] I begin by analysing the components of s 124. The logical sequence to the application of the section begins with the word "must". This means that in every case where the Authority or the Court finds that an employee has a personal grievance, the Court will apply the subsection (a) and (b) considerations in deciding "both the nature and the extent" of the remedies to be provided in respect of that personal grievance.

[175] The "nature" of the remedies addresses those different remedies set out in s 123 which include reinstatement (subs (1)(a)), reimbursement of lost earnings (subs (1)(b)), what is commonly referred to as distress compensation (subs (1)(c)(i)), compensation for loss of other benefits (subs (1)(c)(ii)) and the other remedies set out in s 123(1) which are less commonly applied.

[176] The "extent" of the remedies to be provided for in the personal grievance that the Court must consider in every case addresses the amount or duration of any of those particular remedies. So, in practice, the "extent of the remedies" may include how much of the remuneration lost as a result of the grievance will be compensated for under s 123(1)(b), how much compensation under s 123(1)(c) will be awarded, and the like.

[177] The Authority or the Court must consider "the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance". Working backwards from the end of that phrase, "the personal grievance" is the Authority's or Court's finding of an unjustified dismissal from, or unjustified disadvantage in, employment, and the other varieties of statutory grievance.

[178] Next, "the situation that gave rise to" that personal grievance is the series of relevant events which caused the employee to have been dismissed or disadvantaged unjustifiably. Longstanding case law establishes that there must be more than simple cause and effect shown.[9] The employee's actions must be culpable or blameworthy or wrongful actions which must have contributed, for example, to a complaint of serious misconduct which, following investigation, brought about the dismissal of the employee.

[179] Finally, in this process of consideration of s 124(a), the Authority or the Court is required to "consider the extent" to which those employee actions contributed to the situation that gave rise to the grievance. That connotes a proportionate analysis reflecting the commonsense experience that, on many occasions, an employee will have been at fault but the circumstances did not justify that employee's dismissal or disadvantage. There are, also, many cases in which the Court will find that there is no element of (culpable) contributory conduct by an employee, in which case neither the nature nor the extent of the remedies to be provided will need to be reduced.

[180] Next, the Authority and the Court are left with a broad discretion even if they find that the actions of the employee contributed towards the situation that gave rise to the grievance. That is because of the opening words of s 124(b) ("if those actions so require"). In each case, therefore, even if there were blameworthy or culpable actions or omissions of the employee that contributed to the situation that gave rise to the grievance, it will still be necessary for the Court or the Authority to consider whether those will "require" a reduction of the remedies.

[181] On the next point, Mr Cranney is correct about how s 124 must be applied. The Court or the Authority will need to consider and determine what remedies would have been awarded but for the existence of culpable contributory conduct which requires their reduction. That is because of the words used at the end of s 124(b), "… the remedies that would otherwise have been awarded …". Mr Cranney is correct that the Court or the Authority is obliged to follow the statute and to assess

[9] *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 134 at 337-339, *Lavery v Wellington Area Health Board* [1993] 2 ERNZ, 31 at 52-53.

remedies absent any consideration of contributory fault, before the reduction exercise is applied under s 124.

[182] Finally, it is necessary to address the difficult question of what is meant by the word in s 124(b), "reduce". Mr Cranney argued that this means to lessen but not to eliminate or negate. Ms Swarbrick on the other hand submitted that a reduction can include a complete reduction which amounts to an elimination of any remedies. Using the methodology commonly adopted by the Authority, Ms Swarbrick submitted that a reduction can range in percentage terms between a fraction of one per cent at one end of the scale and 100 per cent at the other end of the scale.

[183] It is correct, as Mr Cranney submitted, that the Authority in particular now very frequently applies s 124 by a reduction expressed as a percentage and also, not infrequently, that the Authority (and on occasions the Court also) has made 100 per cent reductions of remedies as the Authority did in this case. Some judges have, however, questioned how a dismissal can be logically at the same time an unjustified dismissal but also 100 per cent the fault of the employee.[10] Put another way, if an employee is entirely responsible, by his or her conduct, for his or her dismissal, can this be said logically to have nevertheless been an unjustified dismissal?

[184] There is some judicial authority on this challenging question although the cases were both decided principally under the Employment Contracts Act 1991 and judicial views are not unanimous. No case has considered the question in light of the most recent amendments to the personal grievance provisions in the legislation enacted in 2010.

[185] Section 40(2) of the Employment Contracts Act 1991 was materially identical to the current s 124 of the Employment Relations Act. The Employment Contracts Act, however, appeared to repeat the provision specifically in relation to remuneration loss (s 41) whereas the current legislation has omitted that repetition and has extended the reduction for contributory fault provisions to unjustified

[10] *Kaipara v Carter Holt Harvey* [2012] NZEmpC 40 at [70]-[71] per Chief Judge Colgan, *Tupu v Romano's Pizzas (Wellington) Ltd* [1995] 2 ERNZ 266 at 278 per Chief Judge Goddard, *NZFP Pulp and Paper Co Ltd v Horn* [1996] 1 ERNZ 278 at 285-286 per Chief Judge Colgan.

disadvantage grievances which were not covered by s 40(2) of the Employment Contracts Act.

[186] The Court of Appeal, although by way of observation (obiter dicta), referred to the issue in *Ark Aviation Ltd v Newton.*[11] The Court of Appeal appears, however, to have favoured an approach that deals with what might be called 'nil remedies' as one of the Court's general discretions under s 123 of the current Act. The Court of Appeal noted:

> [41] The purpose of the direction to assess the nature and extent of remedies, including sums which in general must be awarded to reimburse lost wages according to what is thought just and equitable, is to enable the Tribunal and the Employment Court to do justice to the overall situation that is proved at the hearing of the grievance. That is ultimately done when determining remedies. The statutory provisions should be interpreted to give them full effect, consistent with this statutory purpose.
>
> …
>
> [45] While it is not strictly in issue in the present case we should make it clear that we do not rule out the possibility that in some situations misconduct of an employee only discovered after a dismissal may be so egregious as to require the discretion to provide for a remedy under s 40(2) not to be exercised at all in favour of the employee whose grievance has been established. We have in mind deliberate and serious misconduct by an employee, which significantly affects the employer, and which amounts to a serious abuse of the trust and confidence that underpins the relationship.
>
> [46] … A contract of employment is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing: *Telecom South Ltd v Post Office Union Inc* [1992] 1 ERNZ 711; [1992] 1 NZLR 275, at p 722; p 285 per Richardson J [as he then was]. An employee guilty of a fundamental breach of those contractual obligations arguably cannot be said under s 40(1) to have lost wages or other money or any benefit, or under s 41(1)(b) to have lost remuneration, as a result of a personal grievance. If that is so no obligation to order reimbursement arises at all. Nor would reinstatement or compensation for humiliation, loss of dignity or injury to feelings, both of which are discretionary remedies, be appropriate.

[187] As may be seen from the foregoing passage, the Court of Appeal identified the application of s 40(2) of the Employment Contracts Act (the material predecessor of the current s 124) as being exercisable in the case of serious misconduct discovered by the employer only after dismissal. That is not the position in this case although, arguably, if the section could be applied to after-discovered misconduct, there is no reason in principle why it should not also be applied to conduct known to

[11] *Ark Aviation Ltd v Newton* [2001] ERNZ 133 at [41], [45]-[46] (CA).

the employer at the time of dismissal. The test suggested by the Court of Appeal under s 40(2) of the Employment Contracts Act was a high one. Conduct which might negate the exercise of the Court's discretion to provide for a remedy or an established grievance was said to be "so egregious". This was expanded upon, theoretically, as "deliberate and serious misconduct … which significantly affects the employer, and which amounts to a serious abuse of the trust and confidence that underpins the relationship".

[188] *Ark Aviation* was followed by this Court in *Eniata v Amcor Packaging New Zealand Ltd.*[12]

[189] Turning to cases in which the question of whether reduction can include extinguishment, the first was *Tupu v Romano's Pizzas (Wellington) Ltd.*[13] There Chief Judge Goddard concluded that "Contributory conduct is available to reduce remedies not to extinguish them". The Court in that case distinguished what it described as substantive grounds which justified dismissal and procedural grounds the unfairness of which made the dismissal unjustified. The Court declined to reduce remedies to the point of extinguishment. It does not appear from the judgment that the question, on which the Chief Judge pronounced, was argued comprehensively before him.

[190] In *Salt v Fell*[14] the Court of Appeal again examined the consequence of misconduct discovered only after the dismissal and whether this could sound in a reduction of remedies. Explaining the principle, albeit in a different context,[15] the Court said:

> Whichever approach is adopted, the result should be that the employee does not benefit from his or her wrong. At times, the subsequently discovered conduct may be so egregious that no remedy at all should be given, notwithstanding the dismissal being technically unjustifiable. But that will not often be the outcome. After all, the employer has also committed a wrong, namely an unjustified dismissal based on what he or she knew at the time. He or she did not act as a fair and reasonable employer would have acted in all the circumstances at the time.

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[12] *Eniata v Amcor Packaging NZ Ltd* [2002] 2 ERNZ 154.
[13] *Tupu v Romano's Pizzas (Wellington) Ltd*, above n 10, at 272.
[14] *Salt v Fell* [2008] 3 NZLR 193 (CA).
[15] At [96].

[191] Next, the Court of Appeal also touched on the issue in its judgment in *Telecom Ltd v Nutter.*[16] Although not addressing the issue of zero or nil compensation, the Court of Appeal expressed the view that a finding of contributory fault of 50 per cent is one of significant contribution.[17]

[192] In *Wilmshurst v McGuire (t/a California Sun & Beauty Studio)*[18] Chief Judge Goddard commented on the apparent inconsistency of first making, and then cancelling, a monetary award. He said:[19]

> … the Tribunal was right to think that, in most cases, the legislation requires it to make an award and then a deduction from it for conduct that calls for a deduction. Where that deduction is as high as 100 percent, the making of an award in the first place, only to confiscate it a moment later, although an entirely proper course, can be misunderstood and can expose the Tribunal to avoidable uninformed criticism. It is open to the Tribunal, in cases in which it thinks that the employee should recover nothing, to say so as part of the process of assessing compensation. A nil award is the equivalent of nominal or token damages at common law and would convey the Tribunal's view that the case should never have been brought. … If the employee has behaved in a way that is strongly causative of the situation that gave rise to the personal grievance, and that behaviour was reprehensible in a way that is relevant to the employment relationship and was known to the employer before dismissing the employee, so that it can be said that but for the employee's bad behaviour the employer probably would not have considered dismissing the employee, then the Tribunal may be justified in awarding no compensation for injury to the employee's feelings or reputation or for humiliation.

[193] The only other case in which the legal issue has arisen whether reduction includes extinction was *Kendal v A Mark Publishing Ltd.*[20] Addressing the equivalent words under the Employment Contracts Act 1991, "reduce the remedies that would otherwise have been awarded accordingly", the Court held that:

> Such an approach impresses me as being within the broadly enabling legislative intent, given the plain ordinary meaning of *"reduce"* which means to *"make .., smaller or less"* (The Concise Oxford Dictionary - The New Edition for the 1990s, p1006). In my view reduction to the point of extinction is not, upon a plain words/plain meaning approach, a contradiction in terms.

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[16] *Telecom Ltd v Nutter* [2004] 1 ERNZ 315 (CA).
[17] At [97]-[99].
[18] *Wilmshurst v McGuire (t/a California Sun & Beauty Studio)* [1999] 2 ERNZ 128.
[19] At 132.
[20] *Kendal v A Mark Publishing Ltd* CEC19/97, 18 July 1997 (EmpC).

[194] Although it is not entirely clear from the judgment, it does not appear that the Court heard legal argument on the question from which it was able to distil this principle.

[195] As with many aspects of statutory employment law, there is analogous common law precedent. Nominal, even absurdly nominal, awards of damages have sometimes been made to illustrate a judge's or a jury's view that whilst a plaintiff suffered a legal wrong, such was the inconsequential nature of that wrong and/or the plaintiff's contributory conduct, that only a derisory award of damages is warranted. Such an approach was usually a minimal award but not the absence of an award. There may well have been implications for costs in the event of a nil award, so that judges and juries may have intended, by such awards, that plaintiffs would only have their costs met. Under a regime where costs must follow the event, it may be crucial to determine "the event" to ensure how costs will fall. Under the Act's discretionary costs' regimes, that may be less crucial.

[196] Whether Parliament intended "reduce" to mean eliminate must be seen in the context of the provisions of the Act providing remedies for personal grievances. A number of those remedies are discretionary but there is one exception to that. Section 128 applies where the Court or the Authority concludes both that an employee has a personal grievance and that the employee has lost remuneration as a result of the personal grievance. The remainder of s 128 then provides for a mandatory minimum payment of compensation to such an employee and gives the Authority or the Court a discretion to require the employer to pay a greater sum for compensation. Subsections (2)-(3) are as follows:

> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
>
> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[197] Subsection (2) states that remuneration compensation will be the lesser of either the remuneration actually lost by the employee as a result of the grievance or three months' ordinary time remuneration.

[198] Assuming that an unjustifiably dismissed employee has lost remuneration and the Court or the Authority must order compensation for that under subs (2), does s 124, properly construed, nevertheless trump s 128(2) by enabling the Court or the Authority to eliminate what would otherwise be the statutory minimum compensation?

[199] The answer lies in s 128(2) itself. It is expressly subject to s 124 so that reductions for contributing behaviour or conduct by an employee can include what would otherwise be the statutory minimum compensation payable under s 128(2).

[200] The other relevant contextual consideration arises under s 103A. Section 124 has been applied by the Authority and the Court in cases where an unjustified dismissal or disadvantage arises because of a so-called procedural defect but in circumstances where the merits or substance of the employee's conduct would otherwise make dismissal justified. Section 103A(5) now deals with such cases expressly. Process defects that are both minor and do not result in the employee being treated unfairly cannot (the subsection is mandatory) alone cause a dismissal or an action to be unjustified. The application of subs (5) now deals with cases in which the Authority or the Court might previously have used s 124 to reduce to nothing any remedies that would otherwise be provided to do justice to the sort of situation caught by s 103A(5). In this way it is arguable that such cases will be treated as justified dismissals rather than as unjustified dismissals but for which no remedies at all are provided.

[201] I do not propose to determine whether remedy "reduction" under s 124 can extend to complete remedy extinguishment. Individual judges have delivered contradictory judgments and then under an earlier legislative regime that may not necessarily be applicable now. The issue has not been argued comprehensively as would be appropriate before making a significant judgment on this question. In any event, I have concluded that, in addition to Ms Harris's dismissal being unjustified,

her contributory conduct would warrant a lesser reduction than total extinguishment of remedies even if the latter might be available to the Court in law.

[202] For all these reasons, I would prefer that a full Court should consider and decide this question after considered argument and will only say that, despite recourse to reduction amounting to total extinguishment by the Authority and the Court on a number of occasions, there is nevertheless a respectable argument that this may not be a proper application of s 124.

A s 124 reduction of reinstatement?

[203] Although not argued by counsel at the hearing and because my decision on reinstatement is not affected by it, the following are observations only although on an important point of law which may be able to be determined in another case. Can the Authority or the Court apply s 124 to the remedy of reinstatement under s 123(a) by reinstating an employee to a position with the employer which was not the employee's former position or one no less advantageous to the employee? There are cases that conclude that this can be done but, respectfully, I have doubts about the correctness of that interpretation of ss 123(a) and124.

[204] In *Excell Corporation Ltd v Stevens*[21] Judge Travis dealt with this question as follows:[22]

> I am not persuaded by Mr Parmenter's contention that the Authority had no jurisdiction to make an order reinstating Mr Stephens to a position that was less advantageous. That is certainly the requirement of s 123(a) when the Authority is exercising its discretion and equity and good conscience jurisdiction to make a reinstatement order settling the grievance. That section is followed immediately by s 124, which requires the Authority or the Court, in deciding both the nature and extent of the remedies to be provided, to consider whether there has been contributory conduct and, if those actions so require, to "reduce the remedies that would otherwise have been awarded accordingly". That section must be a reference back to the remedies provided in s 123 which includes the remedy of reinstatement. It therefore provides a statutory basis, and indeed a statutory obligation, for the Authority to modify the reinstatement order it would otherwise have made under s 123(a).

[21] *Excell Corporation Ltd v Stephens* [2003] 1 ERNZ 487.
[22] At [22].

[205] When considering the "nature" of the remedies under s 124, the Authority or the Court is, in a case of reinstatement, required to consider whether or not to reinstate the employee pursuant to their statutory powers to do so under s 123(a) of the Act. When the Authority or the Court considers the "extent" of that remedy, as it must under s 124, it does so on the presumption that it will order reinstatement (as opposed to refusing it) so that the "extent" question is the extent of the reinstatement order. Unlike, for example, monetary compensation for lost remuneration, "reinstatement" is tightly defined by s 123(a). Parliament has permitted only two sorts of reinstatement, to the position previously occupied or to one no less advantageous than that. So, in my view, it is distinctly arguable that the "extent" question for the Authority or the Court under s 124 in relation to reinstatement is only whether it is to be to the former position or to one no less advantageous. If that is correct, it would mean that the Authority and the Court are not empowered to go beyond those alternatives and to direct what might be called a demotion reinstatement including to a position with the employer that is less advantageous to the employee than the one from which he or she was dismissed.

[206] Although greater flexibility in reinstatement orders may be very desirable, such a discretion is for Parliament to give to the Authority and the Court and not for those bodies to adopt unilaterally and contrary to the statute. There were, no doubt, policy reasons behind that restrictive definition of reinstatement under s 123(a). These included making reinstatement an effective remedy not able to be watered down, ultimately to the point of meaninglessness, by the Authority or the Court.

[207] That interesting, important and difficult question will be for decision in another case.

A s 124 reduction in this case?

[208] What is an appropriate reduction of the remedies to which Ms Harris would otherwise be entitled to reflect her undoubted blameworthy conduct that contributed to the situation that gave rise to the grievance?

[209] Ms Harris's most blameworthy contributory conduct was her continuing to confront and remonstrate with Mrs Pattinson when the latter had effectively left the store. Although some of what was attributed to Ms Harris was probably Mrs Rakete berating Mrs Pattinson, Ms Harris's conduct there was nevertheless unnecessary and inappropriate. On the other hand, Ms Harris's conduct in her interactions with Mrs Pattinson inside the store was less reprehensible, particularly in view of Mrs Pattinson's defiant refusal to remove her dog and to ignore Ms Harris. The reduction for blameworthy contributory conduct therefore relates principally to the final episode between the two women.

[210] A difficulty in applying a judicial reduction is that the Court is not yet in a position to make a final assessment of remuneration loss. The evidence is that after a relatively short period following dismissal, Ms Harris obtained alternative casual or on-call employment at a lower hourly rate than she had been paid at TWL. She subsequently obtained a position at a local school as a teacher's aide at an hourly rate that may have been higher than her TWL pay but was paid for fewer hours overall than with TWL.

[211] The fairest course in the circumstances is to direct that the following reductions be applied to the remedial orders to be made by the Court or as may be settled by the parties.

[212] First, I have concluded that it is both practicable and reasonable in all the circumstances for Ms Harris to be employed as a Loss Prevention Officer or in some other role at TWL which is no less advantageous to her.

[213] The Court's order for reimbursement of loss income (if any) is to be confined to the period of three months immediately following Ms Harris's dismissal, and such payment is to be reduced by 33.33 per cent under s 124 of the Act.

[214] Non-economic compensation under s 123(1)(c)(i) is to be limited to the sum of $4,000 to comply with s 124. Had those statutory requirements not been applicable, the Court could not have ordered any more than $6,000 as such compensation in view of the paucity of evidence supporting an award.

[215] Leave is reserved for either party to apply for any further orders or directions in relation to the remedies set out above.

Costs

[216] Ms Harris is entitled to orders for costs in both the Authority and in this Court. I propose to allow the parties an opportunity to settle questions of costs but if they cannot do so within one month, Ms Harris may have leave to file a memorandum about the amount of her costs with TWL having the period of one month thereafter to file and serve a memorandum in reply.

Section 123(1)(ca) recommendations

[217] Section 123(1)(ca) provides, among the statutory remedies for a personal grievance, that:

> if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:

[218] Mr Cranney for Ms Harris urged the Court to make a recommendation to TWL about how it should deal in future with complaints against staff members couched in the objectionable terms that Mr Pattinson's were. Counsel submitted that customer complaints containing racial abuse should be referred back to the complainant before investigation by the employer with a request for the removal of the abusive material from them. Counsel submitted that employees complained about should be asked to respond to the non-objectionable version of the complaint, together with being provided with a copy of the abusive version, with a clear statement from the employer that it had required the complainant to lodge an amended version of that complaint.

[219] Mr Cranney submitted that, as in this case, TWL's first response to the complainant, in the form of an apology for the employee's behaviour complained about, could be seen as an acceptance by the employer of the whole of the Pattinson complaint including the egregious invective. Counsel submitted that:

> The matter was tainted from the outset by an inappropriate attitude that the customer is always right. … The relevant meeting's [between Mr Bunce and Mr and Mrs Pattinson] record simply records that they both endorsed "all the points that had been raised in the letter".

[220] Mr Cranney raised the point that it was only after TWL had begun its investigation into this complaint and upon suspending Ms Harris that she was provided with a copy of the Pattinson complaint letter.

[221] I decline to make the recommendation sought by Mr Cranney under s 123(1)(ca) for the following reasons.

[222] First, although the Pattinson complaint letter sparked the investigation that led to Ms Harris's dismissal, I do not think that the objectionable content of the Pattinson letter was a decisive or even a significant factor in the personal grievance. That is not to say that it was not a relevant factor: indeed, it was relevant for reasons previously set out relating to the great care TWL needed to take in assessing the complainants' credibility. But the objectionable content, which is what Mr Cranney submitted should be the subject of a recommendation, was not itself a *significant* factor in Ms Harris's treatment and dismissal.

[223] Next, I imagine, or at least hope, that such a complaint about staff so worded is, if not unique, then rare. Such a matter is better suited in my view to consideration by, and action on the part of, the Human Rights Commission. This is the body best suited to addressing the fact and implications of such situations. It would not have been inappropriate in my view for TWL to have referred the Pattinson correspondence to the Human Rights Commission at the same time as undertaking the investigation that it did into the actual complaints against Ms Harris.

[224] Next, the content of the Pattinson letter was a useful indication to TWL not only of the detail of the misconduct alleged against Ms Harris recorded by Mr and Mrs Pattinson only hours after it occurred. It was also more broadly a relevant indication of their general attitude towards Maori (of whom Ms Harris is one), TWL Kaikohe staff (of whom many shop floor employees, if not management, are also Maori), and the TWL Kaikohe store itself.

[225] As Mr Cranney accepted, and despite the significant upset to Ms Harris that its content caused, TWL was going to have to disclose the Pattinson complaint to her sooner or later. On balance I consider that it decided to take the correct course of action by investigating the complaints against Ms Harris. As the rest of this judgment discloses, however, how it did that in practice was erroneous.

[226] I accept that good relations with customers are a paramount consideration for TWL. That is epitomised by the phrase that Mr Cranney used in his submission, "the customer is always right". Whilst that cannot be true literally, the statement epitomises the philosophy of a retailer always satisfying the customer even if the customer may be unreasonable or wrong. As with all bumper sticker slogans, in employment relations' situations, however, its application as a statement of commercial imperative must yield if necessary to the requirements of the law. And as this case has shown, at least in some respects, the customer was not right, and it was wrong for TWL to have so concluded against the weight of evidence to the contrary.

[227] There are, however, some elements of the case on which it is appropriate to make a recommendation under s 123(1)(ca). They include TWL's investigative process in relation to complaints of misconduct or serious misconduct against staff. TWL has a substantial Head Office organisation which includes specialist human resources and employment law advisers. Whilst the evidence shows that Mr Bunce, had recourse from time to time to advice from TWL's specialist staff, the task of investigating (including interviewing) and decision making was left to Mr Bunce himself with assistance from Ms McCoid, his Assistant Manager. Given the findings about some of the errors in that process, I recommend that TWL give consideration to the provision of more specialist support to otherwise busy store management when dealing with complaints such as these, where a difficult investigation may well lead to dismissal and a challenge to it.

[228] This recommendation extends also to two particular aspects of the evidence in this case if it typifies TWL's practices generally.

[229] The first is to consider appropriate training of managerial staff in investigative interviewing techniques. What questions were asked, how they were asked, and evaluation of all of the information provided to the investigating managers, left the Court with the impression that they had not received training in modern investigative interviewing techniques. These are designed to elicit all relevant and good quality information that will survive robust scrutiny in subsequent judicial proceedings. This is now a field of expertise in which there is much available information and training about investigative interviewing which produces fair and high quality results. The Court has, at least once previously, made a recommendation to a similarly substantial employer along these lines.[23]

[230] The second recommendation concerns TWL's investigative record keeping. Even the reconstructed transcripts of investigative meetings were incomplete and included substantial elements of interpretation of what was said rather than a verbatim record.

[231] There was, however, a more fundamental problem to which I have already alluded, the apparently systematic destruction by TWL of contemporaneous notes during those interviews. As I imagine TWL now accepts, such material is, at least potentially, important evidence where there is a subsequent challenge to the outcome of the interview. The destruction of such primary records does not assist the Authority or the Court in determining disputed accounts of what happened and, if nothing else, may contribute to a preference for an account other than TWL's. Such notes should be retained and preserved in all cases, even if there may be other documents prepared from them. TWL should also give consideration to having an expert note-taker present at such interviews whose only task is to keep a record. It was difficult, if not impossible, for the managers who were conducting the interview also to keep a good record of what was said.

[232] Finally in this regard, I recommend to TWL that it consider and adopt the practice of other similarly well resourced employers that such interview notes be presented to the interviewees for subsequent confirmation and signature to minimise the possibility of any subsequent disagreement with their content.

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[23] *Clarke v AFFCO NZ Ltd* [2011] NZEmpC 17 at [32].

[233] It will be apparent from these recommendations that the Court was not unsympathetic towards the situation in which Mr Bunce in particular, but also Ms McCoid, were put in the investigative process. They had other important managerial duties to attend to at the same time as having to deal with serious allegations of misconduct against Ms Harris, the investigation and determination of which were necessarily time consuming and required the application of specialist expertise. For example, Mr Bunce and Ms McCoid had to identify, preserve and copy the CCTV recordings, although having little or no technical expertise in doing so. Ironically, the one person in the store who had this was Ms Harris and it was inappropriate for her to be involved in that exercise. It is surprising that technical assistance from TWL's Head Office was not provided and this was probably reflected in the less than ideal footage that was provided to the Court in the evidence. The Store Manager and his Assistant Manager should have been better supported by TWL in this and other respects relating to the case.

GL Colgan
Chief Judge

Judgment signed at 12.30 pm on Friday 3 October 2014

APPENDIX

(see [24] of Reasons for Judgment)

We had been in the store looking around together, and my wife was carrying our pure bred Chihuahua lapdog which is a very small white fluffy dog, and impeccably clean.

We arrived at the checkout to buy some items, which is about 3 meters from the exit.

Shortly after that, as we waited for another customer to pay, a member of staff called out to us that the dog is not allowed in the store.

We would have considered that fair enough if she had asked us politely to not bring the dog in again.

However she then decided to insist on my wife who was carrying the dog, to leave the store immediately.

Before entering the store we had discussed together if it was ok, and seeing no signs to the contrary, as some shops display, we went in.

We were not informed at the entry point by staff that the dog was not allowed. If this woman is a security officer she first failed her job at that point, to inform us.

We had been in Whangarei Warehouse the day before with the dog, and spoken to 5 staff, including the floor manager, none of whom mentioned the dog.

We were asked if we would not bring the dog in again, and I replied, "yes you can ask."

I thought it would be reasonable to allow us to complete the purchase and leave, but then they got ugly.

The Maori woman, possibly a security person, approached us insisting that my wife leave with the dog RIGHT NOW.

Then one or two other Maori women chimed in agreeing with her, and a Maori man appeared behind us, a very thin anorexic looking person, and told us he had authority to tell us to leave. He said he didn't have his uniform on right now but he [said] that he had authority.

My wife took the dog to the entry/exit area to wait for me to finish paying, without speaking.

As she left I heard the original woman state loudly, "how arrogant!" and then she continued to discuss it loudly with her co-workers, saying something like, "if they were Maori they wouldn't be like that …. And she said something else about white people .." and they agreed with her.

Then the original employee went out to the entry area and demanded my wife leave from there as well, calling her arrogant again.

My wife then pointed out that she was no longer in the shop, but this was not satisfying to your employee.

Then this woman threatened to call the Police and to have my wife served with a [trespass] notice!

I [don't] believe it is professional, or the employee's place to make personal assessments of customers, when in the process of advising customers of the store policy.

The whole issue here, I believe, is that we are both mature well dressed Europeans, with my Eastern European wife particularly attractive and tidy looking, with various jewellery and waist length hair tied up etc.

She presents as clean, tidy, and attractive, in contrast to the Warehouse women.

I believe this whole issue is [primarily] motivated by racist [prejudice], combined with female jealousy by Kaikohe Warehouse staff, who are predominantly unfriendly female non Europeans.

In any event it is unacceptable behaviour for Security staff or any other staff, to innocent customers.

I doubt the man mentioned has any legal Authority on the premises, and so staff should have asked him to keep out of the matter.

There is no sign informing customers of the no dog policy.

The dog is probably cleaner than the people making the fuss, and if swabs were taken for [faecal] coliforms from staff and the dog, I expect the dog would be carrying less.

Incidentally the Kaikohe Branch of Warehouse is not very clean, and almost without exception, when we go there, there is some kind of incompetence issue with staff.

We have never experienced any treatment like this anywhere before today.

To be honest, being served with a [Trespass] Notice to not enter that shop would not be a problem to us any more.

We were unable to find the item we had gone to the Kaikohe Warehouse to buy, [which we had been told was there, on the Warehouse computer] so we decided to go to the Kerikeri Warehouse.

We entered with the dog again, and nodded to the security person without any issue.

We found the item we wanted and checked out.

Then we approached the security guard to ask about Warehouse store policy in regard to dogs.

She was very positive and helpful, and we told her about how we were treated at Kaikohe branch.

Although clearly Maori herself, she was appalled about the racism, and sympathetic, and gave us information about the issue, and how to bring a complaint to the notice of Warehouse Management.

She pointed out that such a kind of dog is not dirty, or infectious, nor will it soil the shop since we are very aware of its bodily needs etc.

I am writing this to let you know how a customer can be treated there, and in the hope you can train the staff to perform more courteously in future, to control their base instincts, so we [don't] have to endure this kind of nasty, unpleasant, experience.

I suspect the office of the Race [Relations] Conciliator would be interested in this appalling behaviour.

An apology from those responsible will be welcome.

Please respond letting us know what action has been taken.