IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 134
ARC 1/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BRENDON RICHARD BOOTH Plaintiff
AND	BIG KAHUNA HOLDINGS LIMITED Defendant

ARC 84/13

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BETWEEN	BRENDON RICHARD BOOTH Plaintiff
AND	BIG KAHUNA HOLDINGS LIMITED Defendant

Hearing:	12-15 May 2014 (Heard at Whangarei)
Appearances:	P Swarbrick, counsel for plaintiff T Cleary and J Golightly, counsel for defendant
Judgment:	24 July 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] This case involves the complexities that can arise between workplace, personal and family relationships. The plaintiff, Mr Booth, worked in a relatively small, family oriented, company. He was promoted to the position of Group General Manager and was responsible for administrative staff in that role. There were around

12 employees, one of whom was the daughter of the Director, Mr Bowling. Mr Bowling was Mr Booth's manager. Mr Booth was in a relationship with Mr Bowling's daughter, who I will refer to as Ms A. Things began to deteriorate shortly after Mr Booth's relationship with Ms A came to an end and when a stream of text messages that Mr Booth had sent to a female administration assistant were drawn to Mr Bowling's attention.

[2] Mr Booth was dismissed and pursued a personal grievance alleging unjustified dismissal and disadvantage. His grievance was dismissed by the Employment Relations Authority (the Authority).[1] Mr Booth filed a challenge to the Authority's determination. Because the challenge was heard on a de novo basis the evidence was heard afresh. It is fair to say that the case has evolved since its inception.

[3] The starting point for each party was diametrically opposed. Mr Cleary, counsel for the defendant, candidly accepted in opening that there were procedural difficulties with the process adopted by the company. He submitted that Mr Bowling had an obligation as an employer to ensure the safety of his staff at work and that he could not be criticised for having taken steps to do so in the circumstances of this case, albeit in a procedurally deficient manner. Ms Swarbrick, counsel for the plaintiff, submitted that Mr Booth's communications were with someone he considered to be a friend, that they fell within the personal, rather than the professional, sphere and that they could not justifiably have given rise to Mr Booth's dismissal.

[4] There are obvious difficulties for both an employer and an employee in situations involving personal relationships that arise out of, or spill into, the workplace. Those difficulties are likely to be exacerbated where, as here, there is an additional familial overlay. Things are not always as they seem at first blush, particularly when personal and family relationships are involved. An employer is indisputably obliged to take reasonable steps to ensure the safety of those at work but that does not enable an employer to short-circuit the usual requirements of an employment investigation, or unnecessarily intervene in an employee's private life.

[1] *L v M* [2013] NZERA Auckland 430.

[5] While a significant amount of evidence was given, much of it had only peripheral relevance to the key issues for determination. The focus must be on what the employer knew, or ought reasonably to have known, at the relevant time. With this in mind, I turn to consider the factual context in which the disciplinary process and Mr Booth's ultimate departure from the company unfolded.

The facts

[6] Mr Booth was employed by the defendant company on 17 October 2011. He was promoted to General Manager within a relatively short space of time. There is no dispute that he was good at his job and brought many skills to bear. The company was a relatively small one. Mr Bowling was the Managing Director and his wife, Mrs Bowling, worked in the company along with their daughter, Ms A. Mr Booth entered into a relationship with Ms A, who was around 17 years his junior, in May 2012. She moved in with him, sharing a home at Ngunguru (some distance away from Kamo where the company is based).

[7] By February 2013, Ms A was working elsewhere but had by this time introduced Mr Booth to an acquaintance of her's, who I shall refer to as Ms B. Ms B had completed her tertiary studies and was looking for work. Ms A suggested that there might be a role available in the company and suggested that she meet with Mr Booth. The meeting occurred and Ms B was employed as an administration assistant. In that role she reported directly to Mr Booth.

[8] It is clear that while Ms B regarded herself as Ms A's friend, she socialised from time to time with Mr Booth, including going out to their house in Ngunguru for dinner and, on one occasion, drinking to excess and staying the night. While there was a considerable amount of evidence about how uncomfortable Ms B felt in Mr Booth's presence this does not squarely tally with the nature and tone of numerous text exchanges that occurred prior to the events in question. And Ms B readily conceded in cross examination that aspects of her evidence in chief (from a pre-prepared brief) had been couched somewhat unfairly.

[9] Ms A moved out of the home she shared with Mr Booth on 25 April 2013. She advised Mr Booth that she wanted some time to herself and asked him not to contact her. It is apparent that he did not take this request on board and that some text exchanges took place over this two day period.

[10] That weekend Ms A moved back in with her parents. On Sunday 28 April she advised Mr Booth by text message that she wanted to end the relationship. Mr Booth was very upset about this. Mr Bowling, by way of comparison, was not. He had never approved of the relationship, having particular regard to the age gap between Mr Booth and his daughter. In evidence he said that both he and his wife thought that Mr Booth's relationship with their daughter was "inappropriate, unprofessional and disrespectful" to them, including because of the age gap. They were also concerned about the fact that Mr Booth was a senior manager who had significant control over Ms A in the workplace. While Mr and Mrs Bowling harboured these concerns, they did not raise them directly with Mr Booth.

[11] The next day (Monday 29 April) Mr Booth sought to enlist Mr Bowling's assistance in speaking to Ms A. The details of this discussion are in dispute. Mr Bowling says that he told Mr Booth to stop harassing his daughter, that it was up to her whether or not she wanted to speak to him, but that it would be "business as usual" at work. Mr Booth says that Mr Bowling made it clear that if he contacted his daughter his job would be at an end. I preferred Mr Booth's recollection of the tenor of this conversation, for reasons which will become clear.

[12] It is apparent that there had been a loose arrangement between Mr Booth and Ms B that she might go to dinner at his house on 29 April 2013. In the event, Ms B did not go to Mr Booth's house. Ms B had a kickboxing training session in the evening. She told her trainer, Mr Pitman, that she had been invited out to Mr Booth's house and that she did not feel comfortable about it (although she did not say why). Her trainer happened to work as a manager within the wider family group of companies. Ms B had not, by this stage, received all of the text messages that are central to this case. Mr Pitman called another person over to participate in the conversation. That person was one of Mr Bowling's sons. They advised Ms B not to go out to dinner. Mr Pitman did not subsequently raise any concerns with Mr

Bowling about the conversation he had had with Ms B and there is no evidence that Mr Bowling's son did either.

[13] A lengthy text message exchange took place over the course of the evening during which Mr Booth encouraged Ms B to go to his home for dinner and Ms B made it increasingly clear that she did not wish to go. She made it plain that she felt that she was in a difficult position, being Ms A's friend, and that she did not wish to be caught in the middle of the relationship breakup. Mr Booth said that he had guests in his house that evening. His text messages referred to the fact that he needed someone to talk to, that he was upset, and that he regarded Ms B as a friend. There were a number of messages that referred to an offer of a day's leave if Ms B went out for dinner, peppered with smiley faces and mutual 'LOL's' ("laughing out loud").

[14] The text message train concluded with a morose description of how much Mr Booth loved Ms A and that he was sitting on the sofa with her cat wishing she (Ms A) was with him. Mr Booth had been drinking at the time he sent the text messages.

[15] I set the text message exchange out in full, because it is necessary to view the comments in context:

> Mr Booth: You coming?
>
> Ms B: Sorry just finished boot camp
>
> Mr Booth: Sweet. So ya on ya way then :-)
>
> Mr Booth: We going to take the day off tomorrow :-)
>
> Ms B: Who is?
>
> Mr Booth: We all are lol
>
> Mr Booth: You on your way
>
> Mr Booth: Sweet see our soon
>
> Ms B: Lol I can't take time off I don't have any annual leave!
>
> Mr Booth: Still come out :-)
>
> Mr Booth: I'll give ya a sick day :p

Ms B: Haha I don't even get those yet

Mr Booth: I'll give one in lieu

Ms B: I still can't afford to take the time off lol thank you for the invite but I think given the circumstances it probably isn't a good idea

Mr Booth: But u can still come out. Surfers are here.

Mr Booth: Under what circumstance? The Brendon's a admin whore??...

Mr Booth: I need a friend. I know you're a good friend

Ms B: Lol no not that! I'm [Ms A's] friend too and I really don't think I'm the best person to hang out with right now, I'm sorry

Mr Booth: Y aren't ya? What's up

Ms B: Because it puts me in an awkward position

Mr Booth: How

Mr Booth: I don't want to leave you a msg…

Mr Booth: No ones taking sides here are they…

Mr Booth: …

Mr Booth: Explanation pwease

Mr Booth: You ok? You not sure what to say.

Ms B: I'm not taking sides but I don't want to feel like I have to either. Please try and understand the position it would put me in if we started hanging out, considering I am [Ms A's] friend and you are my boss

Mr Booth: You are my friend. I don't understand this boss, can't be friend thing. Keep work at work, friends are still friends.

Mr Booth: Professional and personal can be separate.

Ms B: I don't have a problem being friends with my boss at all! I think it's good if you can be but, given the situation I wouldn't feel comfortable if we socialise outside of work at least until everything has settled down

Mr Booth: Look [Ms B], [Ms A] is a beautiful person and I love her. I'd love to still be with her. It doesn't mean we can't be friends. I wouldn't ask u here on your own.

Mr Booth: Settled down. I need friends.

Ms B: I understand that you're feeling pretty alone right now because I've been in exactly the same place before, and you do need friends to help you through this. I'd really like to be one of those friends but I don't think it's my place. You need friends who are just yours

> Mr Booth: No just mature friends. Understanding friends
>
> Mr Booth: You can be a mutual friend. They are the best friends
>
> Mr Booth: Being emphathetic to both parties, telling both the most wise advise.
>
> Mr Booth: I'm not a cheater, or a shallow person. I'm laying here next to [Ms A's] cat, thinking about her, wanting her here, with 2 couch surfers in my house. I don't want anyone but [Ms A]. And her cat. And what we had together.
>
> Mr Booth: What we had planned together, her and I. Us.

[16] The following morning Ms B told a work colleague about the text messages and Mrs Bowling became involved. She looked at the text messages and asked Ms B not to delete them. The issue then came to Mr Bowling's attention and he spoke to Ms B. He too read the text messages. I pause to note that Ms B made it clear in cross examination that all she had said to Mr and Mrs Bowling was that Mr Booth had been texting her. She was firm that she had never told anyone at any stage that she viewed the texts as inappropriate. Mr Bowling told Ms B that she had nothing to worry about, that her job was safe and that she would be protected. Mr Bowling then contacted a lawyer. A letter of suspension was drafted.

[17] Mr Booth did not come in to work on Tuesday 30 April. He sent Mr Bowling a text that morning advising that he was dealing with "personal stuff". He sent another text later that night saying that he would not be in the next day either as he was "[s]till dealing with stuff". Mr Bowling says that he did not pick up the text messages, and that this was not the usual mode of communication with Mr Booth. It is evident that Mr Booth rang the Bowling household late the same night. Mr Bowling answered the telephone and says that Mr Booth was upset and angry and demanding to speak to Ms A. Mr Bowling was understandably unimpressed, told Mr Booth never to ring him at home again, and put the telephone down.

[18] The next day Mr Bowling put the suspension letter in the glove box of his truck and drove out to Ngunguru. His wife drove out in another vehicle. Prior to his departure Mr Bowling had contacted the Police. He said that he did so because he was not sure of the reception he would get from Mr Booth and was concerned that there might be trouble. Mr Bowling said that the purpose of the visit was two-fold:

first, to talk to Mr Booth about a possible suspension; and second, to collect his daughter's personal effects from the home. He said that it had been arranged between Mrs Bowling and Mr Booth that the Bowlings would visit on the Wednesday to collect Ms A's possessions. Mr Booth denied that there had been any such arrangement, and Mrs Bowling did not give evidence. In any event, there was no suggestion that a time had been agreed on even if a day had been. Mr Bowling conceded in cross examination that Mr Booth may not have been expecting him. I accept that Mr Booth was surprised when Mr Bowling arrived on his doorstep.

[19] Mr Bowling opened the conversation with the words: "we need to have a chat". His evidence was that he said this in such a way that it would have been apparent to Mr Booth that they needed to talk about the text messages. He says that he was bolstered in this view by suspicions he had that Mr Booth had accessed the company computer system and was aware that Ms B had made "a complaint" about him. He was not able to point to anything that supported his suspicions.

[20] Mr Booth reasonably believed that Mr Bowling was there in a personal capacity, with his truck, to collect Ms A's possessions. Mr Booth made it clear that he was not in a state to deal with such issues. This is consistent with his text messages. Mr Bowling did not say that he wished to speak to Mr Booth about work related matters. He did not say that he was considering suspending Mr Booth. He did, however, say that he had spoken to the Police and would get them to come around, if that proved necessary. Not surprisingly, this inflamed the situation.

[21] Mr Bowling then went to his truck and retrieved the suspension letter. He handed the letter to Mr Booth, told him to read it and then he and his wife departed.

[22] The letter advised Mr Booth that he was suspended and set out three allegations of serious misconduct. One of the foundations of the plaintiff's challenge is that the ground kept shifting underneath him in terms of the way in which the defendant's concerns were articulated and the case he was being asked to answer. It is accordingly important to have regard to the formulation of the misconduct that the plaintiff was alleged to have committed at each step of the process.

[23] The letter of 1 May 2013 stated that:

> Please note at this stage the allegations are as follows:
>
> i. That you have acted inappropriately in your position as a Senior Manager and in particular in texting to a Junior Administrator.
>
> ii. That you have suggested that this staff member be given a sick day or a day in lieu so that she can come out and to see you.
>
> iii. That the staff member is a 'the Brendon's admin whore'.
>
> …
>
> The above are serious concerns to the employer and could be serious misconduct.
>
> *The employer is concerned as to the abuse of power in your position, and the offer of time off either by a paid sick day or a day in lieu should the staff member visit you at your home.*
>
> This could lead to a serious loss of trust and confidence in your position as a Senior Manager.
>
> …
>
> (emphasis added)

[24] A summary of the text messages relied on by the defendant were attached to the letter. Mr Booth was invited to a disciplinary meeting on 3 May and advised that he was "temporarily" suspended from his duties.

[25] In cross examination, Mr Bowling confirmed that the three issues identified in the letter of 1 May were the three issues that he expected Mr Booth to respond to at the meeting.

[26] Mr Booth's lawyer, Mr Browne, responded to the letter the following morning. He queried the basis for the suspension, advised that the text messaging had taken place outside office hours, and requested that the suspension be lifted. A request for a new meeting time was accommodated but the request to lift Mr Booth's suspension was greeted with a one line response, confirming that Mr Booth would remain suspended on pay. No explanation for the suspension, or why it was considered necessary, was given.

[27] The disciplinary meeting was held on 8 May. Mr Bowling, Mr Booth and their respective lawyers attended. Mr Booth was provided with an opportunity to respond to the three identified issues of concern. In summary, it was said that the text message exchange must be viewed in context; Ms B had indicated that she might come out to his house that evening; and that Mr Booth had just broken up with his girlfriend, had been drinking, and was texting a friend after hours for some emotional support. He said that the reference to a day off was a joke and that this was supported by the inclusion of a smiley face at the end of the text. Mr Booth made the point that he had been responsible for tidying up sick leave for the company and ensuring that it was not abused, the inference being that it would be incongruous for him to seriously suggest a breach of the policy.

[28] One of the text messages had referred to an "admin whore". Mr Booth said that this was an in-joke between Ms B and Mr Booth, was not about Ms B, and that he was surprised that Ms B was upset. The personal relationship between Ms B and Mr Booth was reiterated, including that she had visited his house at Ngunguru on other occasions, that Mr Booth was aware that Ms B had a partner, that he believed that they were friends, and that he had other guests at his house that evening.

[29] Part of the House Rules relating to harassment were read out and provided to Mr Booth during the course of the meeting. The relevant extract provided that:

> *Romantic involvement with staff members who report to you is considered unacceptable*, and may lead to disciplinary action and dismissal. This is because it may affect the work environment during or after the relationship has ended, and because it may affect our reputation through charges of favouritism, exploitation, etc.
>
> (emphasis added)

[30] Mr Booth was asked whether he had wanted to be "more than friends" with Ms B, and he confirmed that he had not. Mr Browne, whose evidence I accept, said that this assertion was greeted with a smirk from Mr Bowling.

[31] Mr Booth was asked whether there were telephone calls between himself and Ms B that evening. Mr Booth said that there were no telephone conversations. Midway through the meeting, Mr Booth was provided with a copy of a Facebook

entry that appeared to have been posted by him at 11.33 pm on 30 April, saying "Sorry Y", together with another three minutes later: "Y". Mr Booth could not immediately recall sending these and the meeting was adjourned for 10 minutes. Mr Booth reiterated that he could not recall posting these Facebook entries. The meeting was adjourned to enable further inquiries about the Facebook entries to be made.

[32] Mr Booth reiterated the good work he had done for the company and his ongoing commitment to it. He said that Mr Bowling had never approved of his relationship with Ms A, describing this aspect of the discussion at the meeting as "very delicate". Reference was made to the alleged threat to terminate Mr Booth's employment if he contacted Ms A again. Mr Bowling said that he could not recall saying that everything would be "okay" so long as Mr Booth stopped texting and Facebook messaging Ms A. Mr Booth said that he had recorded what Mr Bowling had said during the course of the discussion on Monday in a diary note. This aspect of the meeting assumed some significance, for obvious reasons. I have already observed that I preferred Mr Booth's evidence as to his conversation with Mr Bowling earlier in the week. That was broadly consistent with the final draft of the meeting notes and Mr Browne's evidence. Mr Booth was cross examined on whether a diary note actually existed and, if it did, why it had not been produced. Mr Booth said that he had moved house a number of times and had been unable to locate it. And there is nothing to suggest that the defendant requested it at the time Mr Booth asserted its existence.

[33] Both Mr Booth and Mr Browne gave evidence that Mr Bowling appeared angry and aggressive during the course of the disciplinary meeting. Mr Bowling did not accept this, although it became clear that he did not have a clear recollection of what had occurred, describing his memory of the meeting variously as "foggy" and "a bit hazy". I have no difficulty accepting all of Mr Browne's evidence, including as to how the meeting unfolded. His evidence was given in a straightforward and objective manner, and was materially consistent with the documentation. Mr Golightly, the only other person who had attended the meeting and was otherwise involved in the disciplinary process, did not give evidence.

[34] The following day the defendant's lawyer, Mr Golightly, emailed Mr Browne advising him that it appeared that Mr Booth had tried to ring Ms B three times during the course of the evening, that this appeared to be at odds with his comment during the disciplinary meeting the previous day that he had only texted her, and requested that Mr Booth comment on the attempted telephone calls.

[35] On 10 May, Mr Browne provided a written response. In relation to the telephone call issue, he advised that Mr Booth was not able to access a log of his calls so far back and that his recollection was that there had been no telephone conversations, but stated that he was not in a position to confirm whether or not they had taken place. Mr Browne said that they were having difficulty understanding the relevance of the issue in any event.

[36] The asserted relevance of the telephone calls was never explained to Mr Booth, although during the course of cross examination Mr Bowling accepted that it was a "really important point" for him that Mr Booth had said that he had not made the telephone calls when he had. Mr Bowling also accepted that he had failed to articulate his concern that Mr Booth was being evasive. This failure had obvious implications for Mr Booth's ability to respond to the concerns that his employer held, but had not squarely advised him of. The way in which Mr Bowling couched his concern (namely that Mr Booth had asserted that he had never made the calls) was also revealing, as it is apparent from the finalised minutes of the meeting, and Mr Browne's contemporaneous correspondence of 10 May, that Mr Booth had only ever said that there were no telephone conversations.

[37] In relation to the concerns identified in the defendant's earlier correspondence, the points made in the disciplinary meeting were reiterated. Mr Browne contended that the fact that Mr and Mrs Bowling disapproved of Mr Booth's relationship with their daughter was "highly relevant" and that Ms A's return to the workplace, since Mr Booth's suspension, supported these concerns. Mr Browne was cross examined on the fact that his letter made no reference to the alleged threat that Mr Bowling had made to Mr Booth during their Monday conversation. He said, and I accept, that he had already raised it during the course of the meeting and it had been denied by Mr Bowling.

[38] On Friday 10 May Mr Golightly sent Mr Browne another email. The email stated:

> I also attach a statement from [Ms B] delivered to our office on Thursday.

[39] No explanation was provided as to the delay in securing the statement. Mr Booth was not advised what, if any, concerns the statement gave rise to from the defendant's perspective and no response was requested in relation to its contents.

[40] Ms B's statement, which had been taken by Mr Bowling, noted that she felt that Mr Booth would not take no for an answer, that she and he were never friends, that she had gone out to dinner at his place because of her friendship with Ms A, and that she had spoken to Mr Pitman because she felt the texts were inappropriate. Ms B resiled from this latter comment in cross examination, confirming that she had not told Mr Bowling that she thought the texts were inappropriate.

[41] In evidence Mr Bowling said that he had no reason to doubt what Ms B had told him and that it was for this reason that he did not consider it necessary to undertake any further inquiries. This attitude likely explains the further email sent by Mr Golightly at 4.24 pm on Friday 10 May to Mr Browne, advising that a preliminary finding would be made on Monday. It will be immediately apparent that this left very little time for Mr Booth and his lawyer to consider matters and respond. However, as I have already observed, no response had in fact been requested.

[42] A preliminary decision was forwarded, as foreshadowed, on Monday 13 May. The letter noted that the comments relating to sick leave were considered inappropriate, as was the reference to "admin whore". It was said that the pressure placed on Ms B during the course of the text message exchange was inappropriate and "considered as harassment", and that "[e]ven if the comments … were a joke or in jest (which is not accepted) it is still inappropriate behaviour by a senior manager to a junior staff member".

[43] The letter again referred to Mr Booth not having accepted that the telephone calls had taken place, advised that the employer's trust and confidence had been seriously eroded, that the defendant had considered Mr Browne's letter of 10 May,

and that the defendant's preliminary view was that serious misconduct had occurred and that dismissal was warranted. A response was requested within two days if issue was taken with the preliminary findings as to serious misconduct and the proposed disciplinary outcome.

[44] Mr Browne responded to the letter within the required timeframe. He raised a number of issues relating to the process that had been followed, including in respect of suspension without consultation. Reference was also made to the shifting sands of complaint, and being 'ambushed' at the disciplinary meeting with the Facebook messages, a copy of the House Rules, and the assertion that Ms B had felt uncomfortable with the text messages. A complaint was also made in relation to the late provision of Ms B's statement, Mr Browne noting that:

> It is fundamentally unfair that our client be banned from communicating with [Ms B] on the one hand, while on the other hand the employer has free reign – at the very end of the investigation – to obtain a statement from [Ms B] which it has used against our client without giving him a proper opportunity to respond to it.

[45] Mr Browne also identified a number of perceived deficiencies in the defendant's substantive (preliminary) findings, including that no weight had been given to the context in which the text messages had occurred, the apparent inconsistencies within Ms B's statement about not being friends with Mr Booth but being a Facebook friend of his, and inconsistencies in the text messages relied on by the defendant suggesting that she had no problem being friends with her boss (being Mr Booth). The letter pointed out that Ms B's replies in relation to the sick leave comments clearly indicated that she had taken them as a joke at the time, and that in relation to the telephone calls:

> … our client cannot recall making them and his phone does not keep a log of calls that far back so we cannot verify whether the allegation is correct. We do not see how our client can be penalised for failing to divulge irrelevant information which he cannot recall (and now cannot verify).

[46] It was further noted that any suggestion, arising from the defendant's reference to the House Rules, that Mr Booth wanted a relationship with Ms B was clearly incorrect and inconsistent with the text messages. Mr Browne made the additional point that sexual harassment had not been raised previously, in anything

other than a peripheral way (by way of restricted reference to it in the House Rules). Mr Browne concluded that dismissal would be inappropriate, including having regard to Mr Booth's excellent record with the company and the absence of any previous misconduct or complaints.

[47] Despite the matters identified in Mr Browne's lengthy letter, the defendant was able to respond the same day, advising as follows:

> We thank you for your letter of 15 May 2013.
>
> We confirm the employer's decision stands and that [Mr Booth] is dismissed for serious misconduct.
>
> This is effective immediately.
>
> Please have your client return all company property … tomorrow at **4.00 pm, 16 May 2013**…

[48] The plaintiff immediately raised concerns about what the serious misconduct relied on by the defendant and asking for a statement of reasons for the dismissal. A personal grievance was simultaneously notified.

[49] The defendant's subsequent letter setting out the reasons for the finding of serious misconduct is revealing. It states a number of reasons, namely:

- The power imbalance between Ms B and Mr Booth given their relative ages and seniority and the fact that she reported to him.
- The persistent and inappropriate pressure he put on her to come to his private residence, following her repeated refusals to do so. This pressure comprised the texts messages and the three attempts that Mr Booth made to call her that evening.
- The offer to give Ms B a day off in lieu was not accepted as a joke. This conclusion was reached because Ms B's statement made it clear that she had taken the statement seriously and the fact that Mr Booth did take a day off, and that a "natural reading" of the text messages supported that view.
- Mr Booth's lack of judgment and his failure to accept or understand that his conduct exposed his employer to a risk of Ms B making an allegation of sexual harassment against it, having regard to the location of his residence and the likelihood that she would be staying overnight; the consumption of alcohol; his emotionally distraught state and the content and tone of the text messages that put Ms B into a position where she was being asked to comfort him.

- The use of sexual language in the texts (namely the reference to "admin whore").

- The fact that Mr Booth's employment agreement, House Rules and disciplinary policy provided that harassment of an employee constituted serious misconduct.

- That Mr Booth had failed to apologise for his behaviour as being totally inappropriate and had not apologised to the defendant for his actions.

- That Mr Booth had not been forthcoming when asked if there were any telephone calls in addition to the text messages, and had been "selective" in his answer.

- That Mr Booth's conduct on 29 April 2013, his lack of insight and failure to accept responsibility had caused the defendant's trust and confidence in him to be irreparably damaged.

[50] As will be apparent, the statement of reasons set out a number of matters that had not previously been clearly articulated, or articulated at all. What is also apparent is that the defendant relied on Ms B's statement without further inquiry. I return to this issue later.

The law

[51] Mr Booth alleges that his dismissal was unjustifiable and that he was unjustifiably disadvantaged by his suspension. The statutory test of justification is contained in s 103A of the Employment Relations Act 2000 (the Act). That section provides that the question of whether a dismissal or action was justifiable must be determined, on an objective basis, having regard to whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. In applying the test the Court must consider the non-exhaustive list of factors outlined in s 103A(3):

> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

> (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
>
> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[52] In addition to the factors described in s 103A(3), the Court may consider any other factors it thinks appropriate.[2] A dismissal or action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.[3]

[53] The role of the Court is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[54] As a full Court observed in *Angus v Ports of Auckland Ltd*:[4]

> A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

Unjustified disadvantage

[55] The plaintiff was suspended from 1 May 2013 until his dismissal on 15 May 2013. I accept the plaintiff's submission that there were difficulties with the suspension both from a procedural and substantive perspective.

[56] The defendant's House Rules refer to the power to suspend, stating that:

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[2] Section 103A(4).
[3] Section 103A(5).
[4] *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

> An employee may be suspended on full pay, pending investigation, if we consider it necessary. We will consult with the employee before such a step is taken.

[57] No prior consultation occurred and I was not drawn to Mr Bowling's evidence that he sought to discuss the proposal with Mr Booth when he travelled to Ngunguru but was rebuffed. Mr Booth had not attended work and there was otherwise no urgency relating to the situation that required immediate action. This is reflected in the fact that no steps had been taken the previous day (30 April) after Mr Bowling had become aware of the text messages.

[58] The circumstances surrounding Mr and Mrs Bowling's arrival at Mr Booth's home suggest that Mr Bowling was not intending to have a discussion about a proposal to suspend. Rather the (unarticulated) suspicion that Mr Bowling had that Mr Booth had accessed the office computer system for unauthorised purposes, his advance contact with the Police, and the signed suspension letter all suggest that Mr Bowling arrived with a pre-determined plan in mind. Subsequent events reinforce this conclusion, including the fact that when the suspension was queried (not once, but on three separate occasions) no substantive reason was advanced for it (inconsistently with the obligation to be responsive and communicative, contained within s 4(1A)(b) of the Act).

[59] There was, as Ms Swarbrick submitted, alternatives available which may have met any concerns that the defendant reasonably had in relation to Ms B's safety. It is apparent that no alternatives were considered. I do not accept that it was fair and reasonable to act as Mr Bowling did, arriving on the doorstep of Mr Booth's home, threatening Police involvement, and summarily handing over a pre-prepared letter of suspension.

[60] Mr Cleary submitted that the plaintiff suffered no disadvantage because he remained on full pay during the course of his suspension. While he may not have suffered financial disadvantage, that is too narrow a view. Mr Booth was suddenly and completely excluded from the workplace, and was unable to work.[5] It is evident

[5] See *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA) at 516, although this case also involved a suspension without pay.

that the suspension and the way in which it was effected caused Mr Booth some upset. His evidence in this regard was reinforced by the evidence of both of his parents, who were sufficiently concerned about him that they travelled to Ngunguru to support him.

[61] I deal with relief below.

Unjustified dismissal

[62] The plaintiff's claim of unjustified dismissal is advanced on a number of grounds, many of which overlap. In essence, it is submitted that the decision to dismiss was predetermined, blighted by partiality and that the conduct in question did not amount to serious misconduct warranting dismissal. It is also said that there was a failure to clearly articulate the concerns the defendant had, thereby undermining Mr Booth's ability to respond.

[63] I am satisfied that the process followed by the defendant was fundamentally flawed. Mr Bowling was ill-equipped to conduct the investigative and disciplinary process given the strong views he held about Mr Booth's relationship with his daughter and the way in which Mr Booth was dealing with the emotional fall-out of its disintegration, most particularly his attempts at ongoing contact. Mr Booth tried to contact Ms A at her family home, which led to further (abrasive) contact with Mr Bowling. Mr Booth tried to enlist Mr Bowling's support in resuscitating his relationship with Ms A, but these attempts fell flat. I have no doubt that Mr Bowling was extremely annoyed about Mr Booth's attempted contact with his daughter, including by way of late night telephone calls, and had no wish to see the relationship rekindled. Mr Bowling had made it clear that Mr Booth's continued employment would be in jeopardy if he continued to try to contact Ms A. In the event, Mr Booth did not heed that warning. Ms A returned to the workplace shortly after Mr Booth had departed. The breakup of the relationship and the fall-out from it, which involved both Mr Bowling and Mr Booth, occurred in the days immediately before the text message exchange. These factors undoubtedly affected Mr Bowling's ability to approach the disciplinary issue with the objectivity and dispassion that was required.

[64] While there would likely have been difficulties in identifying a person other than Mr Bowling to undertake the decision-making process, it would have been possible to explore other options, such as securing the services of an independent investigator.

[65] It is true, as Mr Cleary points out, that neither the plaintiff nor his lawyer suggested that Mr Bowling recuse himself but it is clear that strong concerns were raised about the position Mr Bowling was in, having regard to his personal interests and what he had said. I cannot accept that a failure to raise procedural deficiencies automatically leads to a waiver of an ability to later impugn the process that was followed. After all, an employer is obliged to ensure (consistently with its resources and other relevant factors) that it undertakes a fair process. And relevantly the focus is on the employer's conduct, not the employee's.

[66] Whether consciously or subconsciously, I am satisfied that Mr Bowling was unable to bring an objective approach to bear and that this coloured the way in which he dealt with the disciplinary process, inexorably leading to one result – namely Mr Booth's departure from the company. This is reflected in the failure to, for example, obtain a statement from Ms B at an earlier stage, to ask additional questions of her about the nature of her relationship with Mr Booth and the context of the text message exchange, the pre-emptory manner in which the suspension was dealt with, and the evidence relating to the jaundiced way in which Mr Booth's responses were considered.

[67] Mr Booth did not deny the fact that he had sent text messages to Ms B. The issues in relation to that conduct were ones of degree and context. Mr Booth sought to explain the context of the text messages but that explanation was not accepted by Mr Bowling, essentially on the basis that he did not believe what Mr Booth had to say and he was willing to accept, without further inquiry, Ms B's statement. It was not reasonable of him to do this having regard to the tenor of the text messages on their face, the seeming inconsistencies between the statement and the messages, and what Mr Booth had said about a pre-existing personal relationship. This warranted further inquiry. The fact that Mr Bowling did not take this step reinforces the

conclusion that he had already effectively made up his mind as to what had occurred and what the outcome would be.

[68] Under skilful cross examination, Mr Bowling said that the "admin whore" reference had been the "glaring thing" for him at the disciplinary meeting. Ms B confirmed in evidence that the phrase was a standing joke between Mr Booth and Ms A and that she (Ms B) was "in on it". If Mr Bowling had asked Ms B further questions about her relationship with Mr Booth and the content of the text messages and what they may or may not have revealed, relevant information about the reference may have come to light. He never took this step, despite what Mr Booth had told him about the background context of the messages and his explanation as to this particular phrase. Ms B may also have been able to inform Mr Bowling of relevant issues of 'text speak' which, during the course of the hearing, it became apparent that Mr Bowling was unfamiliar with. He was unaware that 'LOL' indicated humour, conceding in cross examination that – on reflection – these texts might be seen as light hearted banter. He also accepted that he had found it hard to fathom what 'LOL' meant at the time, although it is notable that he did not take steps to clarify the point with either of the people who had participated in the text exchange.

[69] Mr Bowling accepted in evidence that a smiley face might be indicative of a joke but he did not follow this up with Ms B. In relation to the 'day off' text message, Mr Bowling did not ask Ms B what she had reasonably drawn from it, despite asserting in the preliminary letter that it had been taken seriously and although Mr Booth had made it clear that it had been intended as a joke. One of the grounds set out in the reasons for dismissal letter was that Mr Booth had failed to apologise to either Ms B or more generally. If Mr Bowling had made further inquiries he might have found out that Ms B took the Facebook entry posted on 30 April ("sorry") as an apology from Mr Booth for all the texts he had sent earlier in the evening, agreeing that it could accurately be characterised as 'texter remorse' and an acknowledgment from Mr Booth that he should not have sent the texts. Further, it is notable that Mr Booth had accepted, during the course of the disciplinary meeting, that his actions had been "unwise" and reflected an error of judgment. This was not acknowledged by the defendant.

[70] Had further inquiries been undertaken by Mr Bowling the history of the social interaction between Mr Booth and Ms B might also have been uncovered, including the fact that they were friends on Facebook and that she had sent a number of jovial texts to him relatively recently of a personal nature and outside work hours, including one in which she had advised Mr Booth that, "I'm in bed with a glass of wine watching vampire diaries lol".

[71] Despite the incomplete and conflicting nature of the information, Mr Bowling did nothing to clarify the situation. He said that he regarded what Ms B had to say as inherently reliable, stating "I don't know why she would lie to me". There are many reasons why people say things that do not correspond directly with what has occurred. It is not uncommon for this to have something to do with the way in which a particular question is asked or what the person thinks the asker of the question wishes to hear. And while Ms B says, and I accept, that she never told anyone (including Mr Bowling) that she thought the text messages were inappropriate, these words were nonetheless recorded in her statement. It remained unclear why this was so.

[72] As Judge Couch observed in *Timu v Waitemata District Health Board*, a case involving a disputed allegation of assault by a mental health nurse on a patient:[6]

> [93] In general, it may well be acceptable when initiating an investigation into suspected misconduct for an employer to simply ask witnesses what they know and to listen uncritically to their replies. Equally, if what the witnesses say is consistent and apparently complete, it may be acceptable to rely on what they have said without further inquiry. Where, however, there are significant differences between the accounts given by witnesses or the responses are unsatisfactory, more will be required of the employer to ensure that the investigation is full and fair.

[73] The circumstances of this case demanded further investigation. There must have been some doubt about the nature of Ms B's relationship with Mr Booth, and the reasons why he was texting her, having regard to his responses to Mr Bowling, the content and tone of a number of the text messages, and Mr Bowling's awareness that Ms B had previously been to Mr Booth's house and was friends with Ms A. While a considerable amount of attention was focused at the hearing on how Ms B

[6] *Timu v Waitemata District Health Board* [2007] ERNZ 419 (EmpC).

felt at the time she received the text messages, that is not the relevant inquiry for the purposes of the Act. Rather it is on what the employer knew or ought reasonably to have known during the course of the process. While the fact that Mr Booth sent the text messages was not in dispute, the circumstances in which they were sent were critical to any conclusion reached about the seriousness of his conduct.

[74] Mr Bowling concluded that the text messages were unwelcome and amounted to harassment, and that Mr Booth had lied about the telephone calls. The company was sufficiently well resourced to enable it to obtain legal advice, and it did. It could reasonably have been expected to carry out a full and fair inquiry. It fell well short in this regard.

[75] Mr Cleary submitted that s 103A(3) simply requires the raising of concerns, not that the alleged misconduct be specifically labelled. This terminology overlooks one important word in s 103A(3)(b). That provision requires an assessment as to whether the employer has "raised *the* concerns that the employer had with the employee before dismissing or taking action". The reference to "the" suggests a necessary level of specificity or interrelationship between the concerns held and the reasons relied on for the eventual dismissal or action. The fundamental point (from a natural justice perspective) is that the concerns the employer has must be adequately identified to enable the employee to understand what conduct is being impugned and what they are being asked to respond to.

[76] The defendant failed to clearly articulate the concerns it had, or says it had. This undermined Mr Booth's ability to provide a response to them. Mr Booth was not told of the significant concerns that Mr Bowling held about the veracity of his response and which Mr Bowling confirmed in cross examination was a major issue for him. No explanation was given for this and it is difficult to see any good reason for the omission. As I have already observed, it suggests a closed mind. Mr Booth was not told of Mr Bowling's concerns about the Facebook messages or, other than in the preliminary letter, the "admin whore" issue. And ultimately it appears that he was dismissed for harassment. The defendant did not frame the allegations in this way during the course of the process, other than indirectly. As Ms Swarbrick points out, the only reference to harassment was the reading out of that part of the House

Rules at the disciplinary meeting. That part of the House Rules refers to a prohibition on romantic relationships in the workplace. There was no suggestion that Mr Booth was in a romantic relationship with Ms B, although it appears that Mr Bowling was concerned that Mr Booth might be harbouring a desire to enter one with her.

[77] It is telling that Mr Browne thought that the concerns his client was being asked to answer at the disciplinary meeting related to the 'day off' issue. The letter to the defendant following the disciplinary meeting of 10 May reflects that. If there was a discernible mismatch between the plaintiff's understanding of the issues of concern and what the defendant had in mind, that should have been drawn to the plaintiff's attention in a timely manner to allow him time to respond. This did not occur.

[78] The difficulties were graphically illustrated during the course of Mr Bowling's evidence when he was asked to explain what the reasons for Mr Booth's dismissal had been. It became apparent that he harboured a raft of concerns, including that the behaviour that he took from the text messages was a warning sign that history might have been repeating itself and that the same sort of relationship that Mr Booth had had with his daughter might be developing with Ms B. The correspondence reinforces the moveable feast that Mr Booth was confronted with – the reasons morphed from the allegations letter, to the preliminary decision letter, to the reasons for dismissal letter. None were directly on all fours with one another. The way in which Ms B's statement was belatedly presented, with no request for a response or articulation of what might be drawn from it, reiterates the failure to provide Mr Booth with an adequate opportunity to respond. Rather it suggests a predetermined process and a related disinterest in what Mr Booth might have to say.

[79] Trust and confidence cannot reasonably have been destroyed or eroded where the findings of fact underlying such a conclusion are flawed.[7] The lack of proper investigation rendered the conclusion that Mr Booth was guilty of serious misconduct warranting dismissal unfair and unreasonable.

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[7] *Walker v Firth Industries a division of Fletcher Concrete & Infrastructure Ltd* [2014] NZEmpC 60 at [86].

[80] Mr Clearly mounted an argument that cases involving harassment require a special approach and that the procedural deficiencies in this case ought not to lead to a finding of unjustifiability. The argument is unattractive, firstly because it assumes that Mr Booth was guilty of harassment and, secondly, because it suggests more broadly that the end justifies the means. The requirement to follow a fair process is directed at securing a just result. Where a person's explanation has not been adequately considered, and has been dealt with in a manner that exhibits a closed mind and lack of objectivity, there are difficulties in assuming that the conclusions reached were open to the decision-maker or would otherwise have been sound.

[81] I do not accept that cases such as this warrant a departure from the well accepted approach to procedural unfairness. It would require an overlay to s103A(3) and (5) that is not warranted on an application of established principles of statutory interpretation. Those who are subject to allegations of harassment, however morally repugnant the facts might seem, are equally entitled to a fair process and to have their responses, and the surrounding circumstances, appropriately considered.

[82] The test of justification must be applied having regard to all the circumstances at the time in question. Those circumstances included the recent relationship breakup, which Mr Bowling knew Mr Booth was very upset about, and the familial relationships which were in play. There is nothing in the contemporaneous documentation to suggest that Mr Bowling took these factors into account. Nor is there anything to suggest that Mr Bowling took into account Mr Booth's previous, seemingly good, record. Further, it is clear that Mr Bowling refused to acknowledge Mr Booth's acceptance, during the course of the disciplinary meeting, that he had made an error of judgment in texting Ms B or his Facebook apology to Ms B that Mr Bowling was privy to. Despite these factors, Mr Bowling said in evidence that Mr Booth's lack of acknowledgement weighed very heavily with him. He also asserted that if Mr Booth had apologised he would not have been dismissed. Indeed, Mr Bowling also made it clear in cross examination that he might not have proceeded with a disciplinary process at all had he been able to discuss matters with Mr Booth, which he said he was not able to do because Mr Booth was off work and then "refused to talk to him" when he visited his house. If

that is accepted, it tends to suggest that Mr Bowling did not consider the conduct as seriously as he otherwise asserted.

[83] I find that the decision to dismiss Mr Booth and the process adopted to reach that decision were outside the range of what a fair and reasonable employer could have done in all the circumstances at the time. The dismissal was unjustifiable.

Remedies

[84] Mr Booth seeks a global payment of $25,000 by way of compensation under s 123(1)(c)(i) of the Act. It is submitted that the evidence of his distress at the way in which his suspension and then dismissal were dealt with warrants an award at the high end of the spectrum. I accept that Mr Booth was upset about the unjustified actions of his employer and that a claim for compensation under this head has been made out. I do not accept that compensation of the quantum sought is appropriate. Part of the distress that Mr Booth suffered from at the relevant time was plainly connected with the breakup of his relationship with Ms A, and he cannot be compensated for that. Standing back and considering all of the relevant circumstances I consider that a global award of $10,000 for the unjustified disadvantage and unjustified dismissal is appropriate in the circumstances.

[85] Mr Booth seeks compensation for just under six calendar months of lost wages and other benefits (comprising lost KiwiSaver contributions, the value of a cellphone and a work car) in the sum of $48,802.64. As Ms Swarbrick submitted, that calculation was not challenged.

[86] I am satisfied, based on the evidence before the Court that the plaintiff took adequate steps to mitigate his loss.

[87] Where the Court is satisfied that an employee has lost remuneration as a result of a personal grievance, it must (whether or not it provides for any of the other remedies provided for in s 123 of the Act) order the employer to reimburse the employee for the remuneration lost as a result of the personal grievance. The amount of the reimbursement must be whichever is the lesser amount of the lost

remuneration or three months' ordinary time remuneration.[8] However, pursuant to s 128(3) of the Act, the Court may, in its discretion, order an employer to pay the employee a greater sum for lost remuneration.[9]

[88] The principles applicable to determining an appropriate sum by way of lost remuneration are well established.[10] There is no automatic entitlement to "full" compensation. The employee's actual loss sets an upper ceiling on any award. The individual circumstances of the case must be considered, allowing for all contingencies which might, but for the unjustified dismissal, have resulted in the termination of the employee's employment. Moderation in setting awards for lost remuneration is appropriate.

[89] Ms Swarbrick urged me to consider awarding more than three months' lost remuneration, based on the fact that Mr Booth had difficulty finding alternative work and was ultimately obliged to move from Whangarei to do so. Mr Booth set up his own company and started work on 4 November 2013. The period during which Mr Booth was unemployed sets an upper limit.

[90] Given the particular circumstances of the case, I do not accept that Mr Booth's dismissal would have been justified but for the procedural deficiencies I have traversed.[11] Accordingly I make no allowance for this contingency. Mr Booth had a good work record with the company, and had been promoted within it. There had been no previous instances of misconduct, or (it appears) serious lapses of judgment. Mr Booth acknowledged that his actions in texting Ms B in the way that he had was open to criticism. This acknowledgment, although not as fulsome as it might have been, suggests a degree of insight and tells against the likelihood of a repeat performance in the event that his employment had continued. Mr Booth's behaviour was fuelled by his very recent relationship breakup. It is speculative to suggest that the emotional impact of that would have continued to have consequences in the workplace, and Mr Booth made it clear during the course of the

[8] Section 128(2).
[9] *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482 at [20].
[10] See *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [70]-[83].
[11] See *Waitakere City Council v Ioane* [2004] 2 ERNZ 194 (CA) at [22]-[26] per William Young J.

disciplinary meeting that he was in a position to move on and put his relationship difficulties with Ms A behind him.

[91] It is evident that Mr Bowling was having real difficulties separating out his feelings as a concerned father and as an employer. He had, as I have found, made it clear to Mr Booth that if he continued to contact Ms A his employment was likely to be jeopardised. This attitude, coupled with Ms A's return to the workplace following Mr Booth's dismissal, would likely have compromised any continued employment for the six month post termination period claimed on behalf of the plaintiff, applying a counter-factual analysis. However, while the Court of Appeal has said that such an analysis must allow for "*all* contingencies which might … have resulted in the termination of the employee's employment",[12] I do not take this to include the possibility that an employer might have found another unjustified means of securing an employee's departure in the intervening period. In *Zhang*, the respondent employee had a chequered (and short) work history with the company, which told against the likelihood of an extended period of ongoing employment.[13] That is not the position in the present case. Nor is this the sort of case in which a lengthy period of lost remuneration is sought.

[92] Having regard to the above matters I am satisfied that Mr Booth is entitled to reimbursement of ordinary time remuneration for the 173 day period claimed, together with the other claimed benefits (comprising lost KiwiSaver contributions, the value of a cellphone and a work car), in the sum of $48,802.64.

[93] I must consider whether Mr Booth contributed to the situation that gave rise to the personal grievance, applying s 124 of the Act. That provision states that:

> **Remedy reduced if contributing behaviour by employee**
>
> 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

[12] At [81]; affirmed in *Zhang*, above n 9, at [26].
[13] At [39].

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[94] But for the text messages the grievance would not have arisen. In this sense Mr Booth's actions contributed to the situation giving rise to his grievance. There must, however, be a causal connection between the employee's actions and the grievance and, if such a connection exists, consideration must be given to whether the plaintiff's conduct was sufficiently blameworthy to require a reduction.

[95] The defendant emphasised Ms B's vulnerability, focusing on her youth, inexperience and position within the organisation, although I found this aspect of the evidence to be somewhat over gilded. The plaintiff thought that he was texting Ms B in a personal capacity but that overlooks the fact that he was her manager and, in that role, plainly had a degree of influence that could well play out in both the work and personal sphere. Mr Booth accepted that he had made an error of judgment and that what he had done was wrong. I wholeheartedly agree with that assessment.

[96] The plaintiff's conduct warrants a decrease in the remedies I would otherwise have granted. Ms Swarbrick referred to *Donaldson and Youngman (t/a Law Courts Hotel) v Dickson.*[14] There, the Court observed that situations in which a 50 per cent reduction in remedies are ordered should be "very rare" and that: "[a] moment's thought will show that attributing 40 percent of the blame for his or her dismissal to an employee is already a strong criticism indeed".[15] Insofar as this dicta may be taken to suggest an upper ceiling on s 124 deductions I respectfully disagree. The upper ceiling must, logically, be 100 per cent. And a cursory review of decisions of this Court and the Authority since 1994 reveals that deductions over 50 per cent for contribution are far from rare.[16]

[97] Mr Cleary submitted that there were a number of aggravating features of Mr Booth's conduct that ought to be reflected in a reduction in remedies, including the fact that he took a day off work following the text messages; called Mr Booth late at night and asked to speak to Ms A; refused to talk to Mr Bowling when he visited him

[14] *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920 (EmpC).
[15] At 929.
[16] See *Employment Law* (online looseleaf ed, Brookers) at [ER124.04(2)] for examples where the Court and the Authority have reduced remedies by 100 per cent.

at Mr Booth's home; and demonstrated a lack of insight into his behaviour. Many of these points blur into personal, rather than work related, matters and ought not to be visited on Mr Booth in terms of remedial outcome. Mr Booth took the day off work on 30 April after making it clear that he was dealing with personal issues, shortly after his relationship breakup. Contrary to the submission advanced on the defendant's behalf Mr Booth had shown a degree of insight into his behaviour, including at the disciplinary meeting. As noted at [90] above, this is not the sort of situation where it can confidently be assumed that the plaintiff would have been dismissed had Mr Bowling followed a fair process.

[98] Ultimately the extent to which an employee contributed to the situation is a matter of judgment, having regard to the particular facts of each case and the conduct at issue. In the circumstances I make a 35 per cent deduction for contribution.

[99] Interest was sought on the award for lost wages at the prescribed rate.[17] I did not understand the defendant to take issue with the appropriateness of such an award and it is so ordered.

[100] The consequence of this judgment is that the Authority's determination is set aside, together with its costs determination. The latter determination is the subject of further challenge by the plaintiff, the parties having agreed that the hearing of that challenge ought to be deferred until after the substantive challenge had been dealt with. Counsel are invited to confer and file a joint memorandum, if possible, in relation to the costs challenge.

[101] Costs are reserved at the request of the parties.

Christina Inglis
Judge

Judgment signed at 2 pm on 24 July 2014

[17] Pursuant to cl 14 of Sch 3 to the Act.