IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 243
3036331

	BETWEEN	JANNE JUUTILAINEN Applicant
	AND	LEN REID OILS LIMITED T/A PENNZCORP Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Emma Monsellier, advocate for the Respondent
Investigation Meeting:	24 January 2019
Determination:	24 April 2019

DETERMINATION OF THE AUTHORITY

A. The employment of Janne Juutilainen by Len Reid Oils Limited ended by constructive dismissal.

B. In settlement of his personal grievance for unjustified dismissal, and by no later than 28 days from the date of this determination, Len Reid Oils Limited must pay Mr Juutilainen the following sums, which have been reduced by ten per cent due to actions by him that contributed to his grievance:

(i) $3,690 as lost wages; and

(ii) $9,000 as compensation for humiliation, loss of dignity and injury to feelings.

C. Within 28 days of the date of this determination Len Reid Oils Limited must also pay Mr Juutilainen $164 as wage arrears and $71.56 to reimburse him for the fee paid to lodge his application

in the Authority.

D. For breaches of the terms of Mr Juutilainen's terms of employment Len Reid Oils Limited must also pay, within 28 days of the date of this determination, a penalty of $2,000 to the Authority for transfer to the Crown Account.

Employment Relationship Problem

[1] Janne Juutilainen raised a personal grievance against Len Reid Oils Limited, which trades under the name Pennzcorp, on the grounds of constructive dismissal. He said his resignation, sent in writing on 29 June 2018, was caused by Pennzcorp changing his terms and conditions of employment and by starting steps to make his position redundant on the day he complained about how he was treated by his managers.

[2] Mr Juutilainen had begun work for Pennzcorp on 14 February 2018. His employment agreement described his position as being a driver and sales assistant. The role included driving a truck to deliver bulk supplies of the company's oil and lubricant products to customers in the Auckland, Waikato and Northland regions. Other duties were carried at the company's office and warehouse in Onehunga. His direct supervisor was Pennzcorp area manager John Johnson, also based at the Onehunga office, but delivery instructions were given by Pennzcorp managing director Murray Reid who worked from the company's office on the Kapiti Coast. Also based at the Kapiti Coast office was Pennzcorp sales manager Robert Manning who had regular contact with Mr Juutilainen about arrangements for bulk deliveries to customers.

[3] Mr Juutilainen also sought orders regarding wages arrears for one day's pay, calculation of his holiday pay and whether information Pennzcorp provided to ACC was incorrect and had resulted in him being underpaid earnings related compensation during a period of recovering from a work injury.

[4] Pennzcorp denied changes in its work requirements of Mr Juutilainen were changes to his term of employment. It also denied his claims that Mr Manning had threatened him and that the redundancy proposal was retaliation for a formal complaint he made about Mr Manning and Mr Reid.

The Authority's investigation

[5] Mr Juutilainen, Mr Manning, Mr Johnson and Mr Reid each lodged written witness statements for the Authority's investigation. All four men attended the investigation meeting and, under affirmation, answered questions about their written evidence. The parties also had an opportunity to provide closing submissions on the issues for determination.

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

The issues

[7] The issues requiring investigation and determination were:

(i) Was Mr Juutilainen's resignation caused by Pennzcorp breaching his terms of employment and duties owed to him as an employee, so that his resignation was really a constructive dismissal?

(ii) If he was constructively dismissed, what remedies should be awarded to Mr Juutilainen, considering:

(a) Lost wages; and

(b) compensation under s 123(1)(c)(i) of the Act ?

(iii) If any remedies were awarded, should they be reduced due to any actions by Mr Juutilainen that contributed to the situation giving rise to his grievance?

(iv) Was Mr Juutilainen owed any wages arrears?

(v) Were there breaches of Mr Juutilainen's terms of employment that warranted imposition of a penalty under s 134 of the Act and, if so, of what amount?

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

Was Mr Juutilainen's resignation really a constructive dismissal?

[8] A resignation may be held to amount to a constructive dismissal where an employer's breach of duty or a term of employment has caused a worker to resign and the breach was serious enough to make it reasonably foreseeable that the worker

would resign rather than put up with that situation. In this way what appears to be the worker's act of resigning is deemed in law to really be a dismissal because it was the result of what the employer did.[1]

[9] The Authority determines such matters on the balance of probabilities, that is its assessment of what is more likely than not to have been the case.

[10] Mr Juutilainen's claim of constructive dismissal rested on allegations Pennzcorp treated him unfairly and unreasonably in four ways:

(i) by changing terms of his employment without fair, prior consultation;
(ii) by Mr Manning using threatening language towards him;
(iii) by advising him of a proposal to disestablish his position on the day he complained about interactions with Mr Manning and Mr Reid; and
(iv) by not participating in mediation about his employment relationship problems after he gave notice of resignation.

[11] A fifth allegation, that Pennzcorp breached its obligations by not providing Mr Juutilianen with access to adequate work and safety gear was put aside at the investigation meeting. Copies of correspondence between Mr Juutilainen and the Pennzcorp office manager showed adequate information and permissions were provided for Mr Juutilainen to get appropriate gear.

[12] For reasons that follow, and assessed on the balance of probabilities, the evidence did not support Mr Juutilainen's first and second allegations but did support his third and fourth allegations as more likely than not to be correct.

(i) Were Mr Juutilainen's terms of employment changed without fair consultation?

[13] The question of whether Mr Juutilainen's terms of employment, and specifically his work starting times, were changed without fair consultation arose from some changes to a delivery run made in April and then exchanges between him and Mr Reid during late May and early June about his working hours.

[14] When Mr Juutilainen started work for Pennzcorp in mid-February 2018 he learnt about the bulk delivery runs from Mr Johnson, who initially travelled with him on those runs to various customers in the top half of the North Island.

[1] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IOUW Inc* [1994] 1 ERNZ 168 at 172.

[15] On 30 April Mr Reid informed Mr Juutilainen that arrangements for a regular southern run were to be changed. The starting time for the first day of the run was to be changed so Mr Juutilainen needed to spend only one night out of Auckland, not two nights. This required a 6am start on the first day rather than an 8am start.

[16] Mr Reid had not talked to Mr Juutilainen about the prospect of that change before issuing the revised schedule. He said this was because the change required an earlier start on only two days in each month and was consistent with the hours of work clause in Mr Juutilainen's employment agreement. The clause said work was "for 40 hours each week Monday to Friday between the hours of 8am and 5pm" but continued with this provision: "The employee may be required to work additional hours to meet the requirements of the position and demands of the customer". Mr Reid also recalled that Mr Juutilainen had said in his job interview that he would prefer an earlier start on those days rather than having to stay away a second night.

[17] There was little to suggest Mr Juutilainen had, when first told of it, disagreed with how that change to those starting times was made or whether it could be made at all. A few weeks later, on 24 May, he raised his own suggestion for a further change to his usual working hours of 8am to 5pm. He asked Mr Reid to agree to a 7am start time so he could then finish work by 3.30pm. His proposed change would have reduced his personal commuting time to and from the Otahuhu warehouse during Auckland rush hour traffic. Mr Reid agreed to consider Mr Juutilainen's request but, by email on 28 May, later confirmed the existing 8am to 5pm working hours, expect for the days that the south run required an earlier start.

[18] Mr Reid's 28 May email also included a new schedule for how bulk deliveries were to be made and listed 27 instructions that Mr Reid described as the job requirements. The following day Mr Juutilainen sent Mr Reid a text saying that what Mr Juutilainen described as a change of roster was "not going to work in anyone's favour".

[19] The 28 May email from Mr Reid, with its detailed description of what Mr Juutilianen was required to do, was a pointer to his growing concern about how Mr Juutilainen was carrying out the bulk delivery work. It set out his expectations that Mr Juutilainen would start work at set times, visit all customers on the run list, load

his truck on the previous day for the next day's run and keep records of delivery to customers and customer requests up to date.

[20] A fortnight later Mr Reid postponed a planned northern delivery run because Mr Juutilainen had not left the depot by the 8am time required for the schedule of deliveries to customers that day. He referred to earlier instances of Mr Juutilainen not leaving by the required time and not visiting all customers on the schedule or in the order they appeared on it. He asked Mr Juutilainen to explain why. Mr Juutilainen responded by saying he had asked to start at 7am and still could not find any reason he could not.

[21] Later that day Mr Juutilainen sent two lengthy emails setting out his view of how the runs were organised, whether some calls to customers were necessary and seeking Mr Reid's agreement to his suggested change to his working hours so he could reduce his commuting time. Mr Juutilainen said he did not understand the three reasons that he was told Pennzcorp would not agree to the change of hours he sought. Those reasons included the company not wanting other staff to ask for a similar change, wanting to be open until 5pm to match customers' working hours and because those working hours were the longstanding practice of the company. He referred to "huge demand" for drivers in Auckland and asked if Mr Reid was willing "to let me go" or whether there was something about his job performance that was not satisfactory.

[22] It appeared that Mr Reid then agreed to a request from Mr Juutilainen to talk face to face about his query about his working hours when Mr Reid was next in Auckland. Mr Reid visited Pennzcorp's Auckland depot on 26 June but, according to his evidence, Mr Juutilainen told him "everything was fine and he had no issues to discuss".

[23] Against that background the evidence did not establish that arrangements Pennzcorp made for Mr Juutilainen's working hours, including different start times for some runs, were a breach of his terms of employment or of duties owed to him. The changes were within the scope of what was permitted by his employment agreement. Rather, what it disclosed was concern about how he was carrying out his work. How Mr Reid subsequently dealt with those concerns was a different matter, as addressed later in this determination.

(ii) Did Mr Manning threaten Mr Juutilainen?

[24] Mr Juutilainen alleged he was threatened and abused by Mr Manning a during telephone conversation with him on 27 June 2018. Phone records confirmed Mr Manning and Mr Juutilainen spoke by telephone that day but each gave starkly different accounts of what was said.

[25] Their phone conversation, in the afternoon, occurred against a background of a sharp exchange of emails between Mr Reid and Mr Juutilainen that morning. Mr Reid sent an email noting Mr Juutilainen was still at the depot at 8.49am but was told the previous day that he should be at a customer site "first thing" that day. Mr Reid wrote: "When I say first thing that means you leave at 8.05am." Mr Juutilainen responded at 8.59am:

> I leave when I am ready to leave.
> Please get off my back and let me do my job ok.
> I'm leaving soon.
> Cheers.

[26] Mr Reid replied at 9.24am:

> I am absolutely astounded with your belligerent attitude. I have given you a fair and reasonable request to do a job first thing this morning as the customer is waiting and we have made promise to him that it would be sorted first thing this morning which I relayed to you yesterday. However you continually persist in ignoring simple requests. Any further refusal to comply with instructions will result in a formal disciplinary meeting. I believe what I'm asking is fair and reasonable.

[27] In the mid-afternoon of 27 June Mr Manning spoke by telephone with Mr Juutilainen about a customer delivery for the following day. After that conversation he sent a text message that began the following exchange:

Manning:	Hello, Just so there is no misunderstandings about phone conversation I have said to [customer name] you will be leaving the warehouse at 8.00am so will be with him around 8.30ish.
Juutilainen:	I'm not leaving 8am sorry. I need to change [a bulk container] in the morning. Send his number so I call him in the morning. Why you making my schedule without asking … this is getting so silly. …
Manning:	Please follow my instructions.
Juutilainen:	Don't ever threaten my life again!!!
Manning:	I believe you have confused our conversation with one

from someone else.

[28] A few minutes later Mr Reid and Mr Juutilainen had the following text message exchange:

> Reid: Hi JJ. Are you refusing to load a [bulk container] on to the truck this afternoon ready for departure at 8.00am tomorrow morning?
>
> Juutilainen : I don't have time to do that now. I have 30 mins my break left. Please tell [Mr Manning] that it is last time he threatens my life. As manager he can't do it … send number and I call customer in the morning what time I'm there. Not talking now after my life has been threatened.

[29] Mr Juutilainen's evidence was that Mr Manning threatened and abused him during their phone conversation earlier that day. Mr Manning's request to prepare the truck for the next day's delivery required loading of a bulk container on to the truck deck. Mr Juutilainen told Mr Manning he did not have time to do that in the remaining work time for this day, which included taking a 30-minute break he had not yet taken. He said Mr Manning responded by shouting at him: "I am going to come there and rip your head off your shoulders".

[30] The following morning, on 28 June, Mr Juutilainen sent Mr Reid an email with the subject heading "Serious misconduct". He said his life was threatened by Mr Manning on the previous day and he was seeking legal advice on how to handle the situation. He also said he was being bullied by Mr Manning and Mr Reid because they were asking him to complete tasks that it was not possible to complete. He said they had employment relationship problems they needed to solve and said he would contact Employment Mediation Services for help.

[31] Mr Manning denied making any such statement to Mr Juutilainen about tearing his head off his shoulders. He described the allegation as "totally absurd". On seeing Mr Juutilainen's written evidence for the Authority investigation Mr Manning learned that Mr Juutilainen had also lodged a complaint with the Police on the morning of 28 June about those alleged comments. Mr Manning said the Police had not contacted him at any time since about that complaint.

[32] Mr Reid's evidence was that he shared office space with Mr Manning and would have heard him shouting at Mr Juutilainen and making comments of the nature

alleged to have been made on 27 June. Mr Reid insisted he heard no such statements being made by Mr Manning.

[33] It was possible Mr Reid was not present or had been distracted by other work in their shared Kapiti Coast office space at the particular time that Mr Manning was talking by telephone with Mr Juutilainen on the afternoon of 27 June and had not heard what Mr Manning said. It was also possible Mr Reid and Mr Manning collaborated to give an untruthful account of what was said at their end of that conversation. However Mr Juutilainen's uncorroborated assertion lacked sufficient evidential weight to tip those simple possibilities into a finding, on the balance of probabilities, that it was more likely than not that Mr Manning had said the words that Mr Juutilainen alleged were used. At best there was a 'he said, he said' contest of evidence, with nothing to support one account as being more probable than the other.

[34] Accordingly, Mr Juutilainen had not established there was a breach of duty owed to him by any threatening comment being made by Mr Manning.

Was the redundancy process notified on 28 June for genuine reasons or a ruse?

[35] Within a few hours of receiving Mr Juutilainen's email complaint on 28 June, Mr Reid had a letter delivered to Mr Juutilainen. The letter was headed "Possible redundancy of position" and included the following explanation:

> After looking at our financial papers for the Auckland Branch and taking into account your comments that there is not enough work for you, it has unfortunately come to our attention that your position is no longer viable and we simply cannot afford to retain your position in the Auckland branch and may need to make your position redundant.
>
> It would therefore be appreciated if you could please be available to discuss this matter by teleconference at 11am. Please feel free to have a support person with you.
>
> We would certainly welcome any input from you at our Monday meeting to see if we can somehow find another option as to how we could make your position viable in our Auckland branch.

[36] The letter ended by telling Mr Juutilainen that he could take paid leave until the 2 July teleconference, in two working days time.

[37] The timing of this letter invited the obvious inference that the redundancy proposal was not made for genuine business reasons but, rather, was really made as a rapid response to Mr Juutilainen's complaint and was a means to remove him for what

Mr Reid really saw as performance or conduct issues. The context for that inference included Mr Reid's email of 27 June commenting on Mr Juutilainen's "belligerent attitude" and warning his conduct could result in a formal disciplinary process.

[38] The following day, Friday 29 June, Mr Juutilainen responded to the redundancy proposal by resigning. His letter of resignation, dated 28 June and sent by email on the morning of 29 June, said he believed he had a case for constructive dismissal because of threatening language used by Mr Manning and the "threat of possible redundancy". Mr Reid replied on Monday 2 July, accepting the resignation and telling Mr Juutilainen he was requested to work out his full four week notice period. Mr Reid's reply said Mr Juutilainen's last day of work would be 27 July.

[39] Although Mr Juutilainen's employment technically ended by resignation, Pennzcorp still had to answer the question of whether it had breached duties owed to him in how and when it advised him of its redundancy proposal and its rationale for the proposal. Determination on that point effectively involved considering the same test of justification as if the proposal had proceeded rather than being abandoned due to his resignation. The Court of Appeal has summarised that test in this way:[2]

> If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

[40] Under those s 4 consultation requirements Pennzcorp had to provide Mr Juutilainen with access to relevant business information, and the opportunity to comment on it, before making a decision about the future of the position he held.

[41] Mr Reid, in his written evidence, insisted the proposal to disestablish the bulk delivery driver's role at Pennzcorp's Otahuhu depot was made solely for commercial reasons based on the lack of work and financial viability of the role. He said the position had not been filled since Mr Juutilainen left and that supported the company's rationale for the proposal. He also described Mr Juutilainen's accusation

[2] *Grace Team Accounting Limited v Brake* [2014] NZCA 541 at [85]

that the proposal was made because of his complaint about Mr Manning as "nonsense".

[42] The proposal letter of 28 June superficially addressed the minimum legal requirements for a commercial rationale, consultation and consideration of redeployment. However Pennzcorp's evidence on the timing and rationale for the proposal lacked credibility.

[43] It was correct that Mr Juutilainen had complained there was sometimes not enough work for him to do at the warehouse when he worked there between delivery runs but the company had considered the position sufficiently viable only four months earlier when it hired him.

[44] Mr Reid denied the proposal was conceived only on 28 June. He said he had discussed the prospect of redundancy of that position with Mr Manning and the office manager some three or four weeks beforehand. He described himself as "getting a bit frustrated at that stage" and the proposal was "all ready to go".

[45] The difficulties with Mr Reid's evidence on that point were twofold.

[46] Firstly, the frustration he described was clearly to do with Mr Juutilainen's performance of his role and what Mr Reid increasingly saw Mr Juutilainen as being unwilling to comply with reasonable instructions. The appropriate measure to address those concerns was a performance management process. However Mr Reid, in his oral evidence, said he "did not want to go down the performance process" because he believed that was difficult.

[47] Secondly, if Mr Reid was already considering moves to disestablish the position, he had an opportunity to tell Mr Juutilainen about that possibility when they met face to face on 26 June. Mr Reid said nothing about it. It was not until the conflict with him and Mr Manning on the next day and Mr Juutilainen's complaint of 28 June that Mr Reid moved to advise him of the proposal. On the balance of probabilities, the proposal was predominantly advanced as a pretext to dismiss someone who had become a disliked employee.

[48] The failure to directly address performance concerns, with a real opportunity to improve against clear standards, and the use of a prospective redundancy as an

alternative means of dismissal were breaches of the duty of fair treatment Pennzcorp owed to Mr Juutilainen, however unsatisfactory his performance or conduct may have been seen.[3] Pennzcorp's actions, through the redundancy proposal sent by Mr Reid, were not what a fair and reasonable employer could have done in all the circumstances at the time, so were unjustified.

[49] This breach of duty also clearly caused Mr Juutilainen to resign. It was not a situation he would put up with. On that ground alone he established that the end of his employment was caused by an unjustified action of his employer, so he was constructively dismissed.

(iv) Did Pennzcorp respond appropriately to request for mediation?

[50] A further breach of duty occurred when Mr Juutilainen sought Pennzcorp's agreement to mediation in the complaint he made about Mr Manning and Mr Reid by email on 28 June.

[51] Although Mr Juutilainen resigned on the following day, in response to the redundancy proposal, he had to serve out his notice period with his employment due to formally continue until 27 July 2018. This meant the terms in the employment agreement still applied to both parties. This included the term on resolving employment relationship problems. That term provided a first step of the worker and employer talking about the problem and trying to find solutions. The next step was seeking external help that included use of Employment Mediation Services.

[52] Both parties also continued to be bound by a statutory obligation to deal with one another in good faith and, while the employment relationship continued through the notice period, not to mislead or deceive one another.[4]

[53] Mr Juutilainen had sought Mr Reid's agreement to being paid out his notice period but the request was denied. Mr Reid declined further direct communication with him and in an email he sent to Mr Juutilainen on 2 July wrote that the matter "will now be in the hands of the Mediation Service". However when the Mediation Service contacted Pennzcorp's lawyer about mediation arrangements, the lawyer's reply sent on 10 July (when Mr Juutilainen was still an employee) declined the request to attend mediation. He did so because Mr Juutilainen had mistakenly named

[3] *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659 at 681.
[4] Employment Relations Act 2000, s 4.

Pennzcorp Limited as his employer rather than Len Reid Oils Limited trading as Pennzcorp. The lawyer said Pennzcorp Limited, a separate legal entity, had never employed Mr Juutilainen. In doing so Pennzcorp replied on a technical legal point to avoid or delay attending mediation. The two separate companies had the same registered offices and common shareholders. If Pennzcorp were acting in good faith, the lawyer would have corrected the minor error, by identifying the correct legal entity in the employment relationship, and attended mediation.

[54] However this breach of duty to Mr Juutilainen was not one that could be accounted as causative of his resignation. It occurred after his resignation was tendered and accepted, so did not contribute to the finding that he was constructively dismissed.

[55] Pennzcorp's failure to properly participate in mediation continued at a later stage of the proceeding after Mr Juutilainen lodged his claim in the Authority. In breach of s 159(2) of the Act the company did not comply with directions to mediation made by the Authority on 12 September and 17 October 2018.

Remedies

[56] Having established his employment ended by constructive dismissal, Mr Juutilainen was entitled to an assessment of remedies for his personal grievance.

Lost wages

[57] Mr Juutilainen sought two amounts of lost wages: $2,132 for the 13 working days from after his employment by Pennzcorp ended and up to when he started a new job and then a further $3,772. This latter amount was to account for a difference of $164 a week, over a 23-week period, between what he got in his new job and his previous higher earnings at Pennzcorp.

[58] Having established a personal grievance and that he lost wages as a result, Mr Juutilainen was entitled to the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.[5] There is a discretion allowed for the Authority to grant a longer period of reimbursement of lost wages.

[5] Employment Relation Act 2000, s 128.

[59] The assessment of loss considers the contingencies of life, which means what else might have happened if the employment had not ended by unjustified dismissal.[6] In this case one such contingency was that Mr Juutilainen's employment may not have lasted much longer in any event. His resume, among documents lodged for the Authority investigation, listed seven previous jobs, of which six lasted less than one year. His email of 13 June to Mr Reid referred to being aged 40 at that time and his position with Pennzcorp being the twenty-seventh job of his working life. He also mentioned the huge demand for drivers in Auckland, noting that the TradeMe website had 689 driving jobs advertised at the time. In his oral evidence Mr Juutilainen accepted his reference in that email to those jobs was hinting that he had been thinking about leaving his job at Pennzcorp.

[60] Another contingency was the prospect that Pennzcorp could have begun a disciplinary process over its concerns about Mr Juutilainen's performance that, if fairly conducted, may have resulted in a justified dismissal some short time later anyway.

[61] Considering those contingencies there were no grounds for awarding a longer period of lost wages or the sum of three months' ordinary full time remuneration. The appropriate award of lost remuneration was for a lesser sum comprising two parts. Firstly, Pennzcorp must pay Mr Juutilainen $2,132 as lost remuneration for the 13 days before he started another job. Secondly, Pennzcorp must pay him for the weekly shortfall of $164 between his previous pay and what he got in his new job, but not for the 23 week period he claimed. Given the prospect that he may have not worked much longer at Pennzcorp, an award of that difference for a 12 week period was a sufficient assessment of that loss, that is $1,968. The total reimbursement awarded under s 128 of the Act is $4,100, subject to any reduction that may be made for contributory conduct.

Compensation for humiliation, loss of dignity and injury to feelings

[62] Mr Juutilainen sought an award of $27,500 as compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to his feelings.

[63] Part of that claim was based on the allegation Mr Manning had threatened his life on 27 June. This determination has not accepted that event were more likely than

[6] *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 [73] and [81] (CA).

not to have occurred as Mr Juutilainen described it. No compensation can therefore be awarded for distress said to have been caused by it.

[64] He was entitled to compensation for the upset he experienced as the result of receiving a redundancy proposal in apparent response to his complaint about the conduct of Mr Manning and Mr Reid towards him on 27 June. This was compounded by Pennzcorp's subsequent resistance to addressing those concerns in mediation, increasing Mr Juutilainen's sense of distress.

[65] He used some extravagant language to describe the effect of those events on him, including experiencing "a cocktail of shame", "undue trauma" and "an immeasurable toll". He also gave more measured evidence about suffering a loss of appetite, sleep and self-esteem both as a result but also while awaiting an investigation of his claim. Mr Juutilainen's evidence about the actual degree of injury to his feelings and sense of humiliation, considering the range of amounts awarded in similar cases, supported a modest award of $10,000 compensation, subject to any reduction for contributory conduct.

Reduction of remedies for contributing behaviour by Mr Juutilainen

[66] Where an employee is found to have a personal grievance and is awarded remedies, s 124 of the Act requires the Authority to consider the extent to which any actions of the employee contributed to the situation that gave rise to the grievance. Then, if those actions so require, the Authority must reduce the remedies that would otherwise have been awarded.

[67] Pennzcorp submitted that any remedies awarded should be reduced for blameworthy conduct by Mr Juutilainen referred to in the evidence of Mr Reid, Mr Manning and Mr Johnson. This included concerns about his timekeeping, whether he complied with instructions and abrupt, confrontational communications with them about work matters.

[68] Mr Johnson complained of what he described as erratic and odd behaviour by Mr Juutilainen. Mr Manning and Mr Reid referred to Mr Juutilainen not completing tasks at customer sites and not visiting some customers on run schedules, resulting in complaints. Mr Reid, with some 30 or more years' experience in the business,

understandably became annoyed when Mr Juutilainen, with only four months experience of it, argued with him about how delivery runs should be made.

[69] While those concerns were performance matters that could have been addressed earlier through a disciplinary process, their evidence established Mr Juutilainen frequently resisted requirements of him in a way that amounted to blameworthy conduct and had contributed to the situation giving rise to his grievance. A reduction of the remedies awarded by ten per cent was required to mark his contribution to what happened.

[70] The result of that adjustment is that the lost wages award is reduced to $3,690 and the compensation award is reduced to $9,000.

Wage arrears

[71] Mr Juutilainen's claim raised three questions about whether he received payments to which he was entitled during the remainder of his employment, following his resignation. Firstly Mr Juutilainen said he was not paid for 3 July. Secondly, he said his holiday pay in his final pay was subject to a higher tax rate than warranted. Thirdly, he said Pennzcorp had provided the wrong wage figure to ACC after he experienced an injury at work on 4 July and this had resulted in him being underpaid earnings-related compensation by ACC for the last three weeks of his employment.

[72] Pennzcorp did not pay Mr Juutilainen for 3 July as it said he did not work on that day. However Mr Johnson's oral evidence confirmed that Mr Juutilainen was at the Otahuhu depot on 3 July. Although Mr Johnson said Mr Juutilainen spent most of his time there preparing information relating to his resignation and personal grievance claim, those were work-related matters and Pennzcorp had not established a proper basis for withholding wages from him for that day. Mr Juutilainen was entitled to be paid the $164 he claimed as wages arrears for 3 July 2018.

[73] Mr Juutilainen said his final pay slip, dated 31 July 2018, showed tax was deducted from his holiday pay at a higher rate than was usually applied to his pay. He agreed however that the value of that tax deduction, if excessive, could be restored through his tax return. No order regarding holiday pay was required.

[74] On 4 July 2018 Mr Juutilainen went to work at the Otahuhu depot. Mr Johnson was working elsewhere that day. By email the previous evening Mr Johnson

left instructions about work for Mr Juutilainen to do at the depot on 4 July. This included moving some large containers. Mr Juutilainen said he injured his back while doing so. He went to the doctor and was placed on ACC. His leave for that injury continued until his employment ended.

[75] Mr Juutilainen received earnings related compensation during those remaining weeks. However he considered the amounts paid were less than the 80 per cent of his usual weekly earnings because Pennzcorp told ACC his earnings were lower than he actually received.

[76] It was not possible to definitively determine that issue on the information available for the Authority investigation meeting. However, even if it were, whatever remedy there was to that situation was in the hands of ACC rather than the Authority. If information about Mr Juutilainen's actual weekly earnings at the relevant time had to be corrected, ACC could confirm that information with Pennzcorp and ACC could then back pay any weekly compensation payment that was still due to him.

Penalty

[77] Mr Juutilainen asked for a penalty to be imposed on Pennzcorp for any breaches of his terms of employment that were found to have occurred.

[78] In respect of the established breaches of his terms, regarding a failure of fair treatment over the redundancy proposal and failure to participate in mediation before his employment ended, Pennzcorp was liable to a penalty under s 134(1) of the Act.

[79] Considering the range of factors set for assessing the amount of any penalty under s 133A of the Act, Pennzcorp must pay a penalty of $2,000. Its breaches were deliberate and a penalty was necessary to punish Pennzcorp for those actions and to deter other employers from engaging in such breaches.

[80] As the loss or damage suffered by Mr Juutilainen as a result of those breaches has been addressed by the remedies awarded for his grievance, Pennzcorp must pay the full amount of the penalty to the Authority for transfer to the Crown Account.

Costs

[81] Mr Juutilainen represented himself in making his application to the Authority and did not incur any legal costs. Pennzcorp must however, in light of his success, reimburse Mr Juutilainen for the expense of $71.56 incurred as the fee to lodge his application.

Robin Arthur
Member of the Employment Relations Authority