

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 396
3050512

BETWEEN	KAYNE ANDERSON Applicant
A N D	VALLEY CRATES & ENGINEERING (2010) LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Werner van Harselaar, counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	9 April 2019 in Dunedin
Submissions Received:	9 April 2019 from the Applicant
Date of Determination:	4 July 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kayne Anderson worked for Valley Crates & Engineering (2010) Limited from 25 February 2017 until 14 February 2018.

[2] Mr Anderson has three complaints about his employment:

- (a) That he was not paid correctly for the work he undertook;
- (b) That he was bullied by the workshop foreman; and
- (c) That Valley Crates unjustifiably dismissed him on 14 February 2018.

[3] On 23 April 2018, Mr Anderson raised personal grievances for unjustified dismissal and unjustified action causing disadvantage.

[4] Valley Crates never responded substantively to the personal grievances, it simply acknowledged the grievances and then attended mediation.

[5] The grievances were not resolved in mediation and Mr Anderson lodged a statement of problem with the Authority in January 2019.

[6] Valley Crates did not lodge a statement on reply but did participate in the case management conference. In that case management conference, Morgan Campbell, on behalf of Valley Crates advised that he believed the Authority process was a waste of time and he wanted this matter resolved by a Judge. I advised Mr Campbell that despite his views, in this case, the Authority was bound to investigate the matter and determine the outcome and I would therefore proceed to hold an investigation meeting and subsequently issue a determination.

[7] Mr Campbell advised that he disagreed with the process and he would challenge any determination to the Employment Court. He then disconnected from the case management conference.

[8] I concluded the case management conference by making directions for the investigation meeting. These directions included a direction that Valley Crates lodge and serve wage and time records for Mr Anderson.

[9] A notice of direction recording my directions and a notice of investigation meeting setting out the date, time and location of the investigation meeting were served on Valley Crates. The notice of investigation meeting made it clear that if Valley Crates did not participate in the investigation meeting then I could proceed in its absence.

[10] On 9 April 2019, Mr Morgan attended the start of the investigation meeting. Again he questioned the process I was undertaking and indicated he would not participate. Mr Morgan then left the investigation meeting and there was no other representative or agent present for Valley Crates.

[11] Given the circumstances of Valley Crates choosing not to participate in the investigation of this matter, I considered it was safe to proceed without its involvement.

Wage arrears

[12] There are two parts to Mr Anderson's wage arrears claim. First, he says Valley Crates did not pay him the correct wage rate for all of the hours he worked and second, he says Valley Crates did not pay him the correct amount of annual holiday pay that it owed him at the end of his employment.

[13] In order to resolve these claims I need to determine:

- (a) What was the wage rate Valley Crates and Mr Anderson agreed he would be paid;
- (b) How many hours did Mr Anderson work;
- (c) Based on hours worked and the agreed wage rate what should have been Mr Anderson's gross earnings;
- (d) What was Mr Anderson actually paid and if there is any shortfall between this and his gross earnings, this is the amount owing;
- (e) Based on Mr Anderson's gross earnings calculated at (c) what was Mr Anderson's holiday pay entitlement, calculated at 8%¹;
- (f) What holiday pay was Mr Anderson paid and if there is any shortfall between this and Mr Anderson's entitlement, this is the amount owing.

[14] Valley Crates did not provide wage and time records as I directed it to do. As it has failed to do this I can rely on Mr Anderson's records of hours worked and wages owed².

[15] Mr Anderson started working at Valley Crates on 25 February 2017. Mr Anderson says he did not discuss a wage rate with Valley Crates, rather he was told he would be paid for a week's work.

¹ Section 25 of the Holidays Act 2003.

² Section 132 of the Employment Relations Act 2000.

[16] Mr Anderson then received an employment agreement but this did not set out his wage rate either. In Mr Anderson's first payslip his wage rate was recorded as \$15.25 per hour.

[17] This wage rate represented the minimum wage rate at the time Mr Anderson started working for Valley Crates. However, the minimum wage rate increased on 1 April 2017 to \$15.75 but Mr Anderson's wage rate was not increased.

[18] Mr Anderson says he worked an average of 40 hours per week at Valley Crates and he was paid weekly up until the week ending 2 February 2018.

[19] He was not paid for the work he did from 5 February 2018 until the termination of his employment.

[20] So, it is clear to me that Mr Anderson is owed wages of 50 cents per hour for an average of 40 hours per week for the period from 1 April 2017 until 2 February 2018. I calculate this to be 1,760 hours and therefore \$880.00 (gross) in wage arrears.

[21] Mr Anderson is also entitled to payment for the week ending 9 February 2018 plus three further days leading up to his dismissal on 14 February 2018. This is 64 hours work at a rate of \$15.75, which is \$1,008.00 (gross).

[22] Based on Mr Anderson's records I calculate that his gross earnings for his period of employment with Valley Crates should have been \$32,758.00 (gross). Mr Anderson's annual holiday pay entitlement, calculated at 8% is \$2,620.64.

[23] Mr Anderson took 6 days paid holiday during his employment, for which he was paid \$732.00 by Valley Crates.

[24] Mr Anderson also received one payment from Valley Crates on 14 February 2018 of \$467.53, which I calculate to be \$607.00 (gross) and two further payments of \$610.00 (gross) in May 2018.

[25] So, this means Mr Anderson was paid additional sums of \$2,559.00 (gross) by Valley Crates. I will apportion this amount against the annual holiday pay Mr Anderson should have been paid. The difference is a shortfall of \$61.64 (gross).

[26] In total, I calculate that Valley Crates owes Mr Anderson wage arrears of \$1,949.64 (gross).

Unjustified action

[27] Mr Anderson's personal grievance for unjustified action arises out of allegations about Valley Crates foreman and how he treated Mr Anderson. The events complained of occurred in and around September 2017.

[28] Given that Mr Anderson's personal grievances were formally raised on 23 April 2018, there is an apparent failure to raise the grievance for unjustified action within 90 days of the events occurring, which is a requirement of the Employment Relations Act 2000 (the Act).³

[29] So, the first issues I must determine for this personal grievance are:

- (a) On what date did the actions which constitute Mr Anderson's unjustified disadvantage grievance occur, or on what date did he become aware of them, whichever is the later, is this more than 90 days prior to the unjustified disadvantage grievance being raised;
- (b) If Mr Anderson's unjustified disadvantage grievance was not raised within the 90 day timeframe, did Valley Crates consent to the unjustified disadvantage grievance being raised outside of the 90 day period?

[30] Assuming that Mr Anderson did raise his personal grievance for unjustified action in time or that Valley Crates consented to the grievance being raised out of time then I must consider:

- (a) What are the actions Mr Anderson complains of and did they occur?
- (b) Do these actions give rise to a personal grievance, that is:
 - i. Did these actions cause disadvantage to Mr Anderson's employment or a condition of his employment; and
 - ii. If so, were Valley Crates' actions justified?

³ Section 114 of the Employment Relations Act 2000.

(c) If Valley Crates' actions give rise to a personal grievance, what remedies should I award Mr Anderson, which includes considering contribution.

[31] Turning first to the issue of whether the personal grievance for unjustified disadvantage was raised within 90 days, the events, which Mr Anderson complains of, occurred in September 2017. Clearly, the letter dated 23 April 2018, which sets out the personal grievances, is not within the 90-day timeframe.

[32] I must therefore look to consider whether Mr Anderson raised his unjustified disadvantage grievance by some other means within that 90-day timeframe.

[33] Mr Anderson says he complained about the foreman's actions towards him in September 2017.

[34] I accept it is possible for a personal grievance to be raised orally in a meeting or a series of meetings and communications⁴.

[35] The question is whether the complaint in September 2017 was sufficient to say that the unjustified disadvantage grievance was particularised such that Valley Crates could address it.

[36] In *Creedy v Commissioner of Police*⁵ the Court held that:

It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient and therefore not raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance without specifying the statutory type of the grievance as, for example, unjustified disadvantage in employment ... For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... What is important is that the employer has been aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[37] Based on this I am not satisfied that Mr Anderson did enough to raise his personal grievance. That is, the personal grievance for unjustified action causing disadvantage was not raised by Mr Anderson's complaint about the foreman.

[38] Therefore, overall the grievance was not within the 90-day period.

⁴ *Liumaihetau v Altherm East Auckland* [1994] 1 ERNZ 958 and *The Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* (AC14/08) and *Phillips v Nettel Communications* [2002] 2 ERNZ 340

⁵ [2006] 3 NZELR 293 at para.[37]

[39] Following from this decision, I must consider whether Valley Crates, by its actions, has consented to the personal grievance being raised after the 90 day period.

[40] In *New Zealand Fisheries Ltd v Napier City Council*⁶ the Court of Appeal stated:

As the dictionary definition indicates, “consent” involves agreement to a proposal or request. Mere acquiescence in a state of affairs would not be enough ... acquiescence involves no more than the passive standing by without objection, whereas consent requires a positive affirmative act ...”

[41] In *Vulcan Steel Limited v Kirean Wonnocott*⁷ Chief Judge Colgan stated that:

Although participation in the grievance resolution process by the employer has been a feature of a number of cases where implied consent has been found to have been given, that is not the test.

As case law establishes, whether there was implied consent is a matter of fact and degree. All relevant facts are for assessment individually and collectively. The facts of Mr Wonnocott’s case are unique, if only because it involved multiple grievances, intense participation (even while his employment continued) of experienced employment lawyers on both sides; and a significant level of written recording of both parties’ positions. As to the other element of “degree”, the delay in raising the grievance was a day or two at most. Had Mr Wonnocott been months out of time in raising his grievance, it is likely that there would not have been consent, either express or implied.

[42] In *Anna Ale v Kids At Home Limited*⁸ Judge Inglis stated:

It was also submitted that the defendant’s apparently unconditional attendance at two mediations was reflective of implied consent. Ms Burke submitted that attendance at mediation must be viewed in context. I agree. While attendance at mediation may be taken as signifying consent to pursue a grievance out of time, much will depend on the circumstances. Mediation is effectively mandatory in this jurisdiction. This will often make it difficult for the Court to conclude with any confidence that consent has been given simply by the act of attending mediation without expressly stating it is not to be construed as a waiver. Where, as here, there are a number of alleged grievances, some but not all of which are said to be within time, it will be difficult to conclude that attendance at mediation signifies consent. I do not accept that the defendant’s attendance at mediation can reasonably be construed as implied consent to pursue a disadvantage grievance out of time having regard to the particular circumstances.

[43] The question of whether an employer has consented to the late raising of a personal grievance is one of fact and degree. Consent requires more than just a passive standing by,

⁶ (1990) 1 NZ ConvC 342 at p 190

⁷ [2013] NZEmpC 15 at [45] – [46]

⁸ [2015] NZEmpC 209 at [34]

there needs to be an affirmative action. Merely participating in the personal grievance procedure is not enough for that affirmative action if participation is only attending mediation without any other engagement in the substance of the personal grievance raised and where there is more than the grievance or claim to be mediated.

[44] There is no evidence that there was an express acceptance by Valley Crates that the personal grievance for unjustified disadvantage could be raised outside of the 90 day timeframe.

[45] Therefore, the issue is whether there is some action by Valley Crates that means it impliedly consented to the personal grievance for unjustified disadvantage being raised outside of the 90 day period.

[46] Valley Crates did not respond substantively to the personal grievance letter. It did nothing to set out any response to allegations giving rise to the personal grievance for unjustified disadvantage nor did it raise the issue of the personal grievance being raised out of time.

[47] The only action that Valley Crates took in response to the personal grievance letter was to agree to go to mediation and it is not clear on what terms it agreed to attend mediation.

[48] So then, I must decide if the failure to object to the personal grievance for unjustified disadvantage being raised outside of the 90 day period coupled with an agreement to attend mediation is an implied acceptance of the late raising of the personal grievance.

[49] I do not accept that this amounts to an implied acceptance of a grievance being raised out of time.

[50] A mere failure to raise the issue of the personal grievance for unjustified disadvantage being out of time in response to the personal grievance letter is, of itself, not enough. This is so because Valley Crates did not engage in the substance of any of the grievances at that time.

[51] All that Valley Crates did was agree to attend mediation. I think something more than simply agreeing to go to mediation without raising the issue of the 90 day time period is required. Valley Crates would have needed to engage in a substantive discussion around the personal grievance.

[52] On this basis I am satisfied Valley Crates did not consent to the personal grievance for unjustified disadvantage being raised outside the 90 day period.

[53] In conclusion, Mr Anderson did not raise his personal grievance for unjustified disadvantage within the required 90 day period and Valley Crates did not consent to this grievance being raised outside of that 90 day period. As a result, I cannot consider and determine Mr Anderson's personal grievance for unjustified disadvantage.

Unjustified dismissal

[54] There are two broad questions to answer for Mr Anderson's unjustified dismissal claim:

(a) Did Valley Crates follow a fair disciplinary process in coming to the conclusion to dismiss?

(b) Was the decision to dismiss substantively justified?

[55] If Mr Anderson is successful with his unjustified dismissal claim then I will need to consider remedies including reinstatement, reimbursement and compensation. I will also need to consider contribution if I award any monetary remedies to Mr Anderson.

[56] Mr Anderson was dismissed following an accident at work on 7 February 2018. On 7 February, Mr Anderson was cleaning out the drum of a concrete mixer. As he was setting up the compressed air tool he was going to use, Mr Anderson removed his safety glasses; he says it was a hot day and the glasses had fogged up. Mr Anderson then started using the compressed air tool without putting his safety glasses back on; he says he simply forgot to do this.

[57] Unfortunately for Mr Anderson when he used the compressed air tool the air hose connector burst off the air hose and this steel connector struck him in the eye.

[58] Mr Anderson was taken to A&E where he was treated for the injury to his eye. Mr Anderson completed an ACC form at the hospital but he was not given a copy of it to take away.

[59] Mr Anderson reported back to Michael Clarke, the Valley Crates Operations Manager who had assisted him after the accident, when he left the hospital. Mr Anderson was signed off work until 19 February 2018 and he told Mr Clarke this and that he would provide the medical certificate.

[60] Then on 12 February 2018, Mr Campbell called Mr Anderson and told him to come in to work the next day to meet with him. Mr Anderson went into work on 13 February 2018 and Mr Campbell handed him a letter, which was dated 12 February 2018, and told him he was to attend a disciplinary meeting the next day.

[61] The letter Mr Anderson received on 13 February 2018 stated (amongst other things):

It has been brought to my attention that there apparently was an unreported serious harm incident last Wednesday 7 February 2018 during which you received an injury to your eye. I was out of the office away at a site at the time and on my return I was surprised to learn the following things allegedly took place:

- a. You were asked to do a job 7 February 2018 and apparently did not wish to proceed
- b. You then had a bit of a fit during which you pulled an airline which dislodged and struck your eye
- c. You were not wearing your eye protection
- d. You were taken to A & E by staff and you said you would get yourself home
- e. You did not notify us of the outcome of your treatment
- f. The incident went unreported to WorkSafe NZ

As a result of the alleged incident and the other matters which allegedly flowed from the incident I now need to meet with you to discuss several allegations of serious misconduct in relation to your role as labourer with Valley Crates & Engineering 2010 Ltd.

The allegations are that you:

1. Failed to take proper care in the execution of your duties resulting in deliberate willful (sic) self-harm.
2. Failed to wear proper PPE even though you have been repeatedly told to do so.
3. Failed to notify us of the outcome of your hospital treatment; and
4. Failed to complete required Health and Safety documentation within the specified time frame,
5. Which resulted in us missing our deadline with WorkSafe NZ for reporting a serious harm injury.

[62] Mr Anderson attended the disciplinary meeting on 14 February 2018, with a support person, who was not an employee of Valley Crates. Based on the evidence from Mr Anderson and his support person I conclude that the following occurred in the meeting:

- (a) Mr Campbell and Mr Clarke attended the meeting for Valley Crates.
- (b) Mr Anderson explained what he had done with the safety glasses i.e. putting them on top of his head as they were fogged up and then forgetting to put them back on – he told Mr Campbell and Mr Clarke this was a mistake and not intentional.
- (c) Mr Campbell accused Mr Anderson of being angry at the time of the incident and having a fit. Mr Campbell said other employees had seen this but he did not provide any information about who they were and what they claimed to have seen. Mr Anderson denied having a fit, telling Mr Campbell he did not know what he was talking about.
- (d) Mr Campbell then asked Mr Anderson why he had not provided the ACC form to Valley Crates. Mr Anderson explained that he had completed the form at the hospital but was not given a copy to bring back with him. Mr Anderson gave Mr Campbell and Mr Clarke a copy of the medical certificate he had received at the hospital. Mr Campbell got very angry at this point, yelling at Mr Anderson about how he should have given them the ACC form and that they (presumably the hospital) always give you a copy so he would have had it.
- (e) Mr Anderson's support person tried to calm Mr Campbell down but this had no effect. Mr Campbell then asked Mr Clarke, "What do we do?" Mr Clarke simply replied with "dismissal". Mr Anderson was then told to collect his tools and leave.

[63] As Mr Anderson was leaving he asked Mr Campbell why he had stated that the incident was wilful self-harm. Mr Campbell replied that three employees had told him this. Mr Anderson asked who they were and Mr Campbell replied that he could not tell him as it would be a health and safety issue to give him their names.

[64] As Mr Anderson was dismissed the onus is on Valley Crates to prove that the dismissal was justified.

[65] The first issue for justification is, in coming to the decision to dismiss did Valley Crates follow a fair process. Based on sections 4(1A) and 103A of the Act the matters for me to consider are:

- (a) Did Valley Crates investigate the allegations of serious misconduct sufficiently;
- (b) Did Valley Crates outline the allegations, explain the possible implications of a finding of serious misconduct and give all of the information it had that was relevant to the alleged serious misconduct, to Mr Anderson for him to consider and respond to;
- (c) Did Valley Crates give Mr Anderson a reasonable opportunity to respond to the allegation of serious misconduct, before it made its decision to dismiss;
- (d) Did Valley Crates consider properly any explanation given by Mr Anderson before it made its decision to dismiss;
- (e) Did Valley Crates give Mr Anderson an opportunity to respond to its decision to dismiss before it imposed that sanction;
- (f) Did Valley Crates consider any responses given by Mr Anderson to Valley Crates' decision to dismiss, before it finally decided dismissal was the appropriate sanction;
- (g) If there was a failing by Valley Crates in any of the steps above, does that render the disciplinary process unfair?

[66] Having considered each of these areas my concerns are:

- (a) Valley Crates did not sufficiently investigate the allegations of serious misconduct.
- (b) Valley Crates did not properly raise its concerns with Mr Anderson and it did not give him the relevant information to respond to.

(c) Valley Crates did not genuinely consider Mr Anderson's explanation before it decided he should be dismissed.

(d) Valley Crates did not give Mr Anderson an opportunity to respond to its decision to dismiss before it confirmed its action.

[67] It appears from the disciplinary letter that Valley Crates had four allegations of serious misconduct:

(a) Mr Anderson did not want to do the job of cleaning the concrete mixer, had a fit and then did not execute his duties with proper care, which included pulling the airline causing the injury – this was wilful self-harm.

(b) Mr Anderson was not wearing PPE despite being told previously to do so.

(c) Mr Anderson failed to notify Valley Crates of the outcome of his hospital treatment.

(d) Mr Anderson failed to complete the required Health and Safety documentation within the specified item frame.

[68] There was no additional information provided with the disciplinary letter so, on the face of it, no basis for Mr Anderson to understand why the various allegations were being made. This additional information might have included:

(a) Statements from other employees who witnessed what occurred, which might support the allegation that Mr Anderson had a fit and pulled the airline.

(b) An explanation of what PPE Mr Anderson should have been wearing and a reference to any health and safety policy or other such document setting out this requirement. And then statements from employees who saw what Mr Anderson was wearing at the time.

(c) An explanation as to why it was alleged that Mr Anderson failed to report the outcome of his hospital treatment to Valley Crates and any supporting material.

- (d) An explanation of what the Health and Safety documentation was and why, how and by when, Mr Anderson should have completed these documents with reference to any relevant policy setting these requirements out. And then an explanation of why it was alleged that Mr Anderson failed to do this with any supporting evidence.

[69] It is the failure to provide this additional information and the failure of Valley Crates to put forward any evidence in my investigation meeting that informs my view that Valley Crates did not investigate the allegations properly. The absence of information suggests it did not have this because it did not conduct a proper investigation.

[70] It is also clear that Valley Crates failed to provide all of the relevant information to Mr Anderson as set out above.

[71] There is also further information that should have been given to Mr Anderson. Based on Mr Campbell's outburst in the disciplinary meeting it appears that he was concerned about the alleged failure by Mr Anderson to provide the ACC form to Valley Crates, yet there was no reference to this in the disciplinary letter nor was there any supporting information explaining what the apparent failing was and why.

[72] Finally it is very clear from the disciplinary meeting that neither Mr Campbell nor Mr Clarke considered anything Mr Anderson said, before they decided to dismiss him.

[73] Given all of the above, I am satisfied that Valley Crates failed to carry out a fair disciplinary process.

[74] The disciplinary process was sufficiently flawed that a fair and reasonable employer could not rely on the conclusion that Mr Anderson had committed some act or acts of serious misconduct. It follows that dismissing Mr Anderson was not a conclusion a fair and reasonable employer could come to in all of the circumstances and the dismissal was not substantively justified.

Remedies

[75] As Valley Crates unjustifiably dismissed Mr Anderson, I can award Mr Anderson any of the remedies provided for under s 123 of the Act; Mr Anderson seeks compensation and reimbursement.

Reimbursement

[76] Mr Anderson seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to ss 123(1)(b) and 128 of the Act.

[77] I am satisfied that Mr Anderson has a personal grievance and that he lost remuneration because of that grievance, so pursuant to s 128 of the Act I must award him the lesser of the lost remuneration or three months ordinary time remuneration.

[78] I calculate Mr Anderson's ordinary time remuneration, based on his evidence and the applicable minimum wage rate to be \$630.00 (gross) per week, which is \$8,190.00 (gross) for three months. Mr Anderson says his actual loss from his dismissal is \$15,315.00 (gross). So my starting point is \$8,190.00 (gross).

[79] I am persuaded that it is appropriate to exercise the discretion under s 128(3) to award a greater amount than three months ordinary time remuneration. However, undertaking a counterfactual analysis, I am not satisfied that Mr Anderson would have stayed at Valley Crates for the 23 weeks he has calculated his loss over. I think 18 weeks is appropriate. I have calculated 18 weeks remuneration based on the applicable minimum wage rate and an average of 40 hours per week to be \$11,700.00 (gross).

Compensation

[80] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. This is about compensating Mr Anderson for the humiliation, loss of dignity and injury to feelings he has suffered because of the unjustified dismissal.

[81] What I must do is identify the harm – humiliation, loss of dignity and injury to feelings - caused to Mr Anderson and the loss he suffered as a result. Then I must quantify that harm and loss.⁹

[82] Mr Anderson’s evidence shows that as a result of the way he was treated, he was down and did not go out much. On reflection he says he was depressed, although he did not get counselling or see his doctor about this as he thought he should just tough it out. Mr Anderson also had concerns over his finances, being forced to “live off his brother”.

[83] It is clear from Mr Anderson’s evidence and the evidence from his support person that the impact of the dismissal on Mr Anderson was reasonably significant in that he became withdrawn, choosing not to go out through embarrassment at what happened and being depressed. He changed from being an outgoing bubbly person to being a quiet and unsociable person who did not go out and did not discuss what had happened.

[84] So, Mr Anderson is entitled to compensation for the loss and harm caused by the loss of dignity, humiliation and injury to feelings described above. When assessing the value of that compensable loss and harm I have considered the recent decisions of the Employment Court, which provide guidance on the assessments.¹⁰

[85] I assess the level of harm and loss to be below the middle of the spectrum, and consider that the compensation sits at the lower end of the spectrum. I quantify the compensation payable to be \$15,000.00.

Contribution

[86] As I have awarded remedies I must consider whether Mr Anderson has contributed to the situation that gave rise to his unjustified dismissal.¹¹

[87] When assessing if Mr Anderson’s actions contributed to the situation that gave rise to his unjustified dismissal I am looking for a causal link between his actions and the situation that gave rise to the dismissal. If I am satisfied that there is a link, then I must consider

⁹ *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

¹⁰ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

¹¹ Section 124 of the Employment Relations Act 2000.

whether the behaviour was culpable or blameworthy, which would require a reduction in remedies.¹²

[88] I accept that Mr Anderson's actions on 7 February 2018 in forgetting to put his safety glasses back on may have contributed to his dismissal by Valley Crates. However I accept his evidence that this failing was not intentional – he simply forgot to put his safety glasses back on – so I conclude that his behaviour was not blameworthy or culpable. Therefore, there is no contributory behaviour and no reduction in remedies.

Conclusion

[89] Valley Crates is to pay Mr Anderson wage arrears of \$1,949.64 (gross).

[90] Mr Anderson did not raise his personal grievance for unjustified action causing disadvantage within the 90 day time frame and I do not have jurisdiction to determine the grievance.

[91] Valley Crates unjustifiably dismissed Mr Anderson. In satisfaction of this grievance Valley Crates must pay Mr Anderson the following amounts:

- (a) \$11,700.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000; and
- (b) \$15,000.00 without deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[92] Counsel for Mr Anderson sought costs based on the daily tariff with an uplift for the additional work undertaken because of the way Valley Crates conducted this matter.

[93] As Mr Anderson has been successful with his claim, he is entitled to a contribution to his costs. My starting point, as counsel submits, is to apply the daily tariff and then consider

¹² *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

whether this should be adjusted based on the principles in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*¹³, and *Davide Fagotti v. Acme & Co Ltd*¹⁴.

[94] My investigation of this matter took one half day. I am prepared to apply an uplift to the daily tariff in this case as I am persuaded by counsel that additional work was undertaken because of Valley Crates conduct of this matter. Half of the daily tariff is \$2,250.00 and I will increase this by \$500.00. So Valley Crates must pay Mr Anderson \$2,750.00 as a contribution to the costs he has incurred in this matter.

Peter van Keulen
Member of the Employment Relations Authority

¹³ [2005] 1 ERNZ 808

¹⁴ [2015] NZEmpC 135