

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 281
3099612

BETWEEN SHAUN RAMSAY-CARDNO
 Applicant

AND THE PALLET COMPANY
 (HAWKES BAY) LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Seungmin Kang, counsel for the Applicant
 Nick Barton for the Respondent

Investigation Meeting: 17 November 2021 by Zoom

Submissions [and further 17 November 2021 from the Applicant
Information] Received: Scheduled for 3 December 2021 but nothing received
 from the Respondent

Date of Determination: 29 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Shaun Ramsay-Cardno was employed by The Pallet Company (Hawkes Bay) Ltd (“TPC) for approximately seven months. In a second amended statement of problem he make several claims in relation to TPC’s actions.

[2] First, there is a claim that Mr Ramsay-Cardno was unjustifiably disadvantaged by TPC’s failure to pay him his entitlement to receive 1 week’s compensation pursuant to s 97 of the Accident Compensation Act 2001 when it was due to be paid. This matter was originally pleaded as an arrears of wages claim. I shall return to this issue.

[3] Next, he says was unjustifiably disadvantaged by various actions and omissions taken by TPC after he reported he had a personal injury. Finally, he claims he was unjustifiably dismissed on 10 June 2020 after TPC restructured its business.

[4] Mr Ramsey-Cardno seeks compensation for hurt and humiliation associated with each of the personal grievance claims. He further requests to have penalties awarded to him for TPC's breach of his employment agreement and a breach of good faith.

Relevant background information

Events leading to the unjustified disadvantage claim

[5] Mr Ramsay-Cardno began working as a labourer for TPC on or about 12 November 2019 with both parties having previously signed a written employment agreement. His employment in the six weeks (or thereabouts) up to the Christmas period of that year appears to have been uneventful although TPC says Mr Ramsay-Cardno took three sick days over this timeframe.

[6] Mr Ramsay-Cardno returned to work on Tuesday, 14 January 2020 after the holiday break. His work that day comprised picking up pieces of wood, which could weigh up to 25 kgs.¹ The work was performed over 11 hours and was repetitive. At some point over the course of his shift Mr Ramsay-Cardno experienced pain in his right wrist. He continued performing the same work the following day on Wednesday, 15 January 2020. Mr Ramsay-Cardno experienced further pain in his wrist and reported the matter to TPC's Health and Safety Officer. His wrist was bandaged. He returned to undertaking the same tasks.

[7] In the afternoon of 16 January 2020, Mr Ramsay-Cardno was seen by a GP and diagnosed with a work-related gradual process injury. An application to ACC was made.

[8] Mr Ramsay-Cardno was referred also to a physiotherapist, whom he saw on Friday, 17 January 2020. The wrist was placed in a cast. He was informed he could return to light duties at work if he was symptom free.

[9] On Monday, 20 January 2020 Mr Ramsay-Cardno provided his manager, Mr Jim Burns, with the GP's medical certificate and advised him of the requirement he be put on light duties. Mr Ramsay-Cardno says the manager initially appeared to accept this

¹ Recorded in a document attached to the first statement in reply, lodged on 12 October 2020, it is said the Health and Safety officer considered "The maximum he would be lifting would be 25 kgs".

recommendation, and he was given different work. However, this too required heavy lifting. Mr Ramsay-Cardo says he took that matter up with the manager. I shall return to the detail of Mr Ramsay's conversation with the manager later in this determination, noting Mr Burns was not present at the Authority's investigation meeting and there is no direct evidence from him on this matter. In any event Mr Ramsay-Cardo says the manager told him it was the only alternative work available, or he "*could go home*". He took that statement to mean he should quit if he was unwilling to do the work he was assigned. No other work was offered. Mr Ramsay-Cardo says he needed the income from his job, and he says he had no choice but continue with the repetitive lifting work.

[10] On Tuesday, 21 January 2020, the applicant saw both his doctor and his physiotherapist again. It was reiterated to him he should work only light duties.

[11] Over the following two days Mr Ramsay-Cardno was assigned the same work he had been doing the previous week.

[12] On Friday 24 January 2020 he again attended appointments with a doctor and his physiotherapist and was advised he take 4 weeks off work to rest the wrist.

[13] Mr Ramsay-Cardno's application for ACC was accepted in January 2020.

[14] When Mr Ramsay-Cardno advised the manager he had been placed on ACC and was not to work, he says the manager advised him that TPC "*would fight*" the claim.

[15] In its statement in reply, TPC says the manager did not accept Mr Ramsay-Cardno's incapacity was work related. The manager was said to be of the view that the injury had occurred over the Christmas break. TPC further notes the medical referral to ACC attributed Mr Ramsay-Cardno's pain as caused by lifting blocks of timber that weighed between 40-50kg. TPC says that is not correct. It says it asked Mr Ramsay-Cardno to have the detail on his ACC medical certificate corrected.²

[16] On 11 February 2020 Mr Ramsay-Cardno's then representative wrote to TPC asking it to pay his entitlement to a 'first week compensation' pursuant to s 97 of the Accident Compensation Act 2001 ("ACA"). There is an issue as to whether unjustified disadvantage

² Recorded in the respondent's initial statement in reply.

personal grievances were raised in this correspondence. Around the same time TPC lodged an application with ACC to have the claim reviewed.

Events leading to the unjustified dismissal claim

[17] Mr Ramsay-Cardno's ACC records indicate there was a reduction in pain once he stopped attending work. However, his symptoms did not fully abate. Surgery was performed on his wrist in August 2020.

[18] There was no direct contact between the parties after Mr Ramsay-Cardno was placed on leave in late January 2020.

[19] TPC says it posted a letter to Mr Ramsay-Cardno on or about 3 June 2020. A copy of the letter was provided to the Authority. The letter contains advice that TPC was reviewing the structure of the business. The letter asked Mr Ramsay-Cardno to contact it so that any possible upcoming changes, and how these may impact him, could be discussed.

[20] Mr Ramsay-Cardno says he never received the letter. He says the first time he saw the letter was when it was provided to the Authority by TPC two days prior to the Authority's investigation meeting.

[21] It is accepted that TPC emailed to Mr Ramsay-Cardno a letter on 10 June 2020. The relevant portions of the letter are set out below:

Dear Shaun

The Pallet Company (Hawkes Bay) Ltd has been reviewing the structure of the business. This review is in response to the impact on the business of ongoing difficult trading conditions and resourcing challenges.

Further to recent site communication we regret to inform you your role has been disestablished, effective 9 June 2020.

[22] The remainder of the letter set out the arrangements for payment of the contractual notice period.

Additional information

[23] It is unclear from the evidence when exactly ACC reviewed Mr Ramsay-Cardno's claim, however on 11 June 2020 TPC made inquiries about the matter and were advised by ACC that:

The claim has been signed off by our Technical Services team and the cover has been accepted as a result of a “gradual process mechanism but of a series of events that have occurred over a single shift”.
So this has been approved as a work injury. ...

[24] There is no evidence that TPC has challenged this decision.

[25] Mr Ramsay-Cardno received ACC compensation until early October 2020 when he was given full clearance to work.

The Authority’s investigation

[26] The parties were unable to resolve their differences and the Authority had been required to investigate and determine Mr Ramsay-Cardno’s claims.

[27] Mr Ramsay-Cardno, his representative, and Mr Barton, on behalf of TPC, each attended the Authority’s investigation meeting via Zoom.

[28] Mr Ramsay-Cardno provided a written statement in advance of the meeting. As already noted, TPC provided an amended statement in reply and attached the letters of 3 and 10 June 2020 two days before the Authority’s investigation. A further letter signed by Mr Barton’s Executive Assistant recorded the letters of June 2020 had been posted by her to Mr Ramsay-Cardno. Mr Barton relied on the contents of TPC’s pleading documents as the basis on which it provided evidence.

[29] Both witnesses answered questions from the Authority and where relevant, under cross examination. As already noted, the manager, Mr Burns, was not present at the Authority’s investigation meeting, nor was TPC’s Health and Safety officer, or the Executive Assistant.

[30] It has not been necessary to record all the evidence and submissions before the Authority, but all information has been carefully considered. I have made findings of fact and law so as to resolve the matters the of dispute between the parties.

[31] This determination has been issued outside the timeframe set out at s 174C(3)(b) of the Employment Relations Act where the Chief of the Authority has decided exceptional circumstances exist.³

³ Pursuant to s 174C(4)

The issues

[32] To determine whether Mr Ramsay-Cardno's was unjustifiably disadvantaged by TPC's failure to pay first week compensation, and/or by its actions in following his notification to it of his personal injury, I must first determine whether a personal grievance was raised about either of these matters within the statutory time frame. If personal grievances were properly raised, I must consider whether TPC's actions were unjustifiable and whether Mr Ramsay-Cardno's was disadvantaged by these.

[33] To determine whether Mr Ramsay-Cardno was unjustifiably dismissed, I need to the examine the reasons on which TPC says Mr Ramsay-Cardno position was redundant, and whether the process used by TPC to reach that conclusion was undertaken fairly.

[34] If Mr Ramsay-Cardno is found to have been unjustifiably disadvantaged and/ or unjustifiably dismissed, I must determine whether remedies should be awarded, including whether penalties should be awarded.

Were grievances raised?

[35] Section 114(2) of the Employment Relations Act (the Act) governs what must be done to raise a personal grievance. It provides:

... a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[36] In the recent case of *Chief Executive of Manukau Institute of Technology v Zivaljevic* Judge Holden noted that what amounts to raising a raising a personal grievance has been dealt with by the Court on many occasions. She identified a number of key principles that have emerged over time, as follows.⁴:

“The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there has been a series of communications, not only would each be examined as to whether it might constitute raising a grievance, but the totality of communications might also constitute raising a grievance.

⁴ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [35] -[38]

It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it at first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.”*

***Footnotes omitted**

[37] Counsel for Mr Ramsay-Cardno refers to the content of the letter on 11 February 2020 to say the grievance concerning payment of first week compensation and the grievance concerning TPC's response to Mr Ramsay-Cardno's complaint about the safety of the work he was required to do were both raised in this correspondence.

Is the claim for “first week compensation” a personal grievance claim?

[38] The letter of 11 February set out the material requirements of s 97 of ACA as they relate to an employer's duty to pay first week compensation, and this correspondence was squarely aimed towards putting TPC on notice of its obligations under that provision.

[39] To the extent the correspondence articulated Mr Ramsay-Cardno's entitlement to the payment and that it wanted TPC to address that matter, it could be said the content of the letter raised a personal grievance on the issue. However, I consider the issue is better characterised as an arrears of wages claim, as was originally pleaded. This is because the obligation to pay first week compensation arises under the ACA at s 97. Sections 98 and 99 under the ACA are also relevant to this matter.

[40] Section 98 ACA goes on to state it is the employer in whose employment the claimant suffered the work-related personal injury who is liable to pay the first week compensation, and the February correspondence expressly characterised the obligation on TPC to make the payment as statutory in nature.

[41] Section 99 ACA then defines ‘First week compensation’ as salary or wages for, amongst other things, the purposes of s 131 of the Employment Relations Act 2000 (“the Act”). Section 131 of the Act provides the Authority with the jurisdiction to order recovery of arrears of wages or other money payable to an employee.

[42] The above provisions, read together, provide a statutory process by which an employee applicant may seek payment from his or her employer for first week compensation, as Mr Ramsay-Cardno seeks to do. There is nothing in the ACA to suggest a personal grievance is an available mechanism to address a claim of this nature.

[43] The appropriate cause of action in respect of the alleged failure by TPC to pay First week compensation is as an arrears of wages claim, and I shall treat that matter accordingly.

Was a personal grievance alleging TPC failed to provide a safe workplace raised within 90 days?

[44] On behalf of Mr Ramsay-Cardno it is claimed the letter of 11 February 2020 raised a personal grievance concerning the safety of the work he was required to do.

[45] It is arguable that the letter did not sufficiently convey the substance of the grievance as Mr Ramsay-Cardno purports, however it is not necessary to make a finding on this point. This is because I am satisfied Mr Ramsay-Cardno raised a personal grievance about his concerns as to the impact the work was having on him earlier on 20 January 2020, when he provided TPC with a medical certificate. Mr Ramsay-Cardno’s testimony is that when he realised TPC wanted him to continue with the heavy lifting duties, he made it clear he was unhappy at being required to return to the activities which were causing him pain and for which he had been advised against. He repeated to his manager the medical advice he had received, and in particular that he had been told not to perform activities involving heavy and repetitive lifting until he was asymptomatic. Mr Ramsay-Cardno advised his manager he was uncomfortable performing the work in the current circumstances and reiterated he be put on light duties.

[46] Notably, TPC does not challenge Mr Ramsay-Cardno’s testimony as to what was conveyed by him to his manager, and I have no reason to doubt the evidence given by Mr Ramsay-Cardno’s on this point.

[47] I must find an objective observer would reasonably conclude from the content of Mr Ramsay-Cardno's discussion with his manager on 20 January 2020 that TPC was made aware that Mr Ramsay-Cardno did not consider the work assigned to him was safe for him to perform and that he wanted TPC to address that matter. It follows that the verbal exchange between Mr Ramsay-Cardno and the manager met the requirements of s 114(2), and a personal grievance was raised.

Personal grievances concerning a claim of unjustified disadvantage

[48] Section 103(1)(b) of the Act defines the scope of an unjustified disadvantage grievance in the following way:

103 Personal grievance

- (1) For the purposes of this Act, ***personal grievance*** means any grievance that an employee may have against the employee's employer or former employer because of a claim—
- (a) ...
 - (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or
 - ...

[49] There are two elements to a claim of unjustified disadvantage.

[50] First, there must be an action by the employer which is unjustifiable, noting that whether an employer's action (under s 103A(2) of the Act) is justifiable is objectively assessed against what a notional fair and reasonable employer could have done in the circumstances at the time the action occurred.

[51] Next, the unjustifiable action must affect the employee's terms and conditions of employment, such that the employee was disadvantaged.

[52] It is accepted by the Employment Court that unjustified disadvantage grievances are not necessarily confined to actions that breach the contract between the parties.⁵ In *Downer v New Zealand Ltd v Jones*⁶, Judge Smith observed:

⁵ *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 at [45]

Some aspect of an arrangement between an employer and an employee could, ... be a “condition” of employment while not being a term of the contract.⁷

Was Mr Ramsay-Cardno unjustifiably disadvantaged by TPC’s response to his personal injury?

[53] As foreshadowed, Mr Ramsay-Cardno says he was unjustifiably disadvantaged in various ways by the company’s response to his personal injury.

[54] First, it is submitted that, having reported to TPC that he was injured from the work he was doing, Mr Ramsay-Cardno injury was further aggravated by TPC’s insistence he return to the repetitive heavy lifting activities.⁸ Whilst I consider Mr Ramsay-Cardno was unjustifiably disadvantaged by TPC’s action, he is not able to seek compensation for a personal injury that is said to have been aggravated by TPC’s conduct. Section 317(1) of the ACA states:

- s 317 (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of –
- (a) personal injury covered by this Act; or
 - (b) personal injury covered by the former Acts.

[55] The provision effectively prohibits Mr Ramsay-Cardon from issuing proceedings and obtaining corresponding compensation for any matter arising directly or indirectly out of the personal injury he suffered. This is because Mr Ramsay-Cardno’s personal injury was covered by ACC and he received earnings related compensation for the length of time needed to allow him to recover. It follows that this aspect of Mr Ramsay-Cardno’s claim is not a matter he is able to pursue.

[56] However, the Employment Court has, in several judgements, observed that s 317(2) ACA does not provide a complete bar to an employee pursuing compensation for matters that are disjunctive of the personal injury, as follows⁹

- s 317 (2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from, -

⁶ *Downer New Zealand Ltd v Jones* [2018] NZEmpC 77

⁷ Above at [104]

⁸ Submissions for the Applicant dated 17 November 2021 at para. 12(a).

⁹ See for example *Mitchell v Blue Star Print Group* [2008] ERNZ 594; and *Robinson v Pacific Seals Ltd* [2015] NZEmpC 84

- (a) any damage to property; or
 - (b) any express term of any contract or agreement (other than an accident insurance contract under the Accident Insurance Act 1998); or
 - (c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract of service.
- (3) However, no court, tribunal or other body may award compensation in any proceeding referred to in subsection (2) for personal injury of the kinds described in subsection (1).

...

[57] Mr Ramsay-Cardon points towards s 317(2)(b) and (c) alongside the contents of his employment to say his was unjustifiably disadvantaged by TPC's actions. The material terms of the parties' employment agreement at cl 30 provides:

30.1 The employer will take all practical steps to ensure a safe and healthy work environment for employees. ...

30.2 The employee is required to report all accidents and/or injuries to the employer. Both the employer and employee have a duty to promptly take all reasonable and practical steps to eliminate, isolate or minimize any significant hazards observed in the course of employment.¹⁰

[58] Having reported his injury as required under the employment agreement I find TPC failed to comply with its own obligations at cl 30. An employee should be able to expect its employer to comply with its contractual obligations. I accept Mr Ramsay-Cardno felt he was not respected by TPC by its omission to address his safety concerns and it caused him to lose trust and confidence in the relationship. I find Mr Ramsay-Cardno was disadvantaged by TPC's approach to its contractual obligations in this way. Nor can TPC's insistence that he continue to undertake the heavy lifting duties be objectively regarded as a reasonable instruction in the circumstances.

[59] It appears TPC's indifference to Mr Ramsay-Cardno health status at the time was grounded on a view that it thought the personal injury was caused by Mr Ramsay-Cardno's use of a handsaw over the holiday break. Mr Ramsay-Cardno says there is no basis for that position, and it is clear TPC did not put that allegation to Mr Ramsay-Cardno for his comment before it relied on that assumption to inform its approach. This omission too was unfair.

¹⁰ Above at [104]

[60] During the Authority's meeting Mr Barlow suggested that if Mr Ramsay-Cardno did not think he could do the work he was offered he could have simply gone home and TPC would have paid his ACC entitlement. That assertion does not sit easily with evidence that the company challenged Mr Ramsay-Cardno's ACC claim withheld payment of first week compensation for over 15 months.

[61] TPC further says no other employee has suffered an injury doing the work Mr Ramsay-Cardno did. Moreover, it says the injury described by the physiotherapist indicated the injury was caused by a gradual process which it considered could not have occurred over an 11-hour shift. However, if TPC had doubts about whether Mr Ramsay-Cardno's injury was work related it was open to it to investigate the matter further including obtaining additional information about the injury with either of the health specialists treating him, or obtain independent advice. It did not, and in the absence of any inquiry of this nature it cannot be the action of a fair and reasonable employer to have disregarded the contents of the medical certificate dated 17 January 2020 and simply acted according to its own unsubstantiated views. It is difficult not to form an impression that, having decided the injury was not work-related, TPC proceeded to act as if the injury did not exist at all.

[62] The effect of TPC's breach of cl 30 of the employment agreement and its failure to address the workload issues raised by Mr Ramsay-Cardno was not the action of a fair and reasonable employer in all the circumstances. TPC's unjustified actions and omissions resulted in corresponding disadvantages to Mr Ramsay-Cardno terms and conditions of employment. None of these have arisen out of the personal injury he suffered and Mr Ramsay-Cardno is entitled to seek compensation for his non-economic losses. I shall return to this matter when addressing remedies.

Was Mr Ramsey unjustifiably dismissed?

The legal position

[63] TPC accepts it dismissed Mr Ramsay-Cardno.

[64] The Employment Relations Act 2000 (the Act) records, at s103A(2), that an employer must justify a decision to dismiss an employee. In doing so the Act requires the Authority to objectively assess whether the employer's actions and the way it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[65] In applying s 103A(2) to circumstances where an employee has been made redundant, the Authority must consider whether there were genuine grounds on which to make an employee's position redundant, and whether the process taken to reach that conclusion was fair, noting minimum procedural standards are set out at 103A(3) of the Act which the Authority must consider. As a matter of procedural fairness, at a minimum an employer is expected to inform an employee of its concerns and allow the employee an opportunity to respond before it takes action.

[66] Section s 4(1A)(c) of the Act imposes an additional "good faith" consideration when assessing an employer's actions. The effect of this provision requires an employer who is proposing to implement redundancies, to provide employees who may be adversely affected with access to information relevant about the proposal, and an opportunity to comment on it, before the decision is made. Notably, cl. 5.1.3 of Mr Ramsay-Cardno's employment agreement replicates this good faith consideration. In this respect the obligation on TPC to advise Mr Ramsay-Cardno that his employment was at risk and to provide him with all information relevant to that matter and allow him to comment on it, was not only an obligation under the Act but also an obligation as a matter of contract between the parties.

Discussion

[67] I have begun with an assessment of the consultation process used by TPC to make Mr Ramsay-Cardno redundant.

[68] I understand the consultation process with Mr Ramsay-Cardno in relation to TPC's proposal to restructure the business was initiated by the letter dated 3 June 2020.

[69] As foreshadowed, there is inference in Mr Ramsay-Cardno's evidence that the 3 June 2020 letter was never sent to him because he did not receive it. Against that challenge Mr Barton's EA sent a signed letter to the Employment Relations Authority advising she has posted the letter. I note however she did not attend the Authority's investigation so as to answer any questions about that matter.

[70] On balance it is not necessary to determine this issue. Even if I were to accept the letter was sent by TPC and received by Mr Ramsay-Cardno, I find the contents of the letter did not meet the standard of a satisfactory consultation document. The letter recorded;

[TPC] ... is currently reviewing the structure of the business. This review is in response to the impact on the business of ongoing difficult trading conditions and resourcing challenges.

As you are currently off work due to ACC and not attending work at the moment, we are needing you to contact us, so we can discuss any possible upcoming changes and how any possible upcoming changes may affect you.

We hope to hear from you as soon as you receive this letter, so we can make arrangements to meet with you.

Kind regards

[71] There is nothing in the letter to suggest TPC was proposing to make a decision that was, or was likely to, have an adverse effect on the continuation of Mr Ramsay-Cardno's employment, or any other of its employees. Nor does the letter include any information that is relevant to the proposal and the basis for it. Even if Mr Ramsay-Cardno had received the letter I must find he would have been unable to meaningfully respond and engage with TPC as to the substance and effect of the restructure where there was no indication in the letter as to what exactly was being contemplated by the review.

[72] There is an argument that the letter could be regarded as the starting point of a consultation process. And there is a suggestion in TPC's pleadings that any short-comings concerning its consultation process were caused by Mr Ramsay-Cardno who did not involve himself in it. I do not accept this position.

[73] Given the possible consequences of the review on Mr Ramsay-Cardno's ongoing employment it was incumbent on TPC to:

- (i) make contact with Mr Ramsay-Cardno's to ensure he had received the letter,
- (ii) detail the nature of the review and provide all information relevant that matter,
- (iii) allow Mr Ramsay-Cardno's an opportunity to comment on the proposal; and
- (iv) genuinely consider Mr Ramsay-Cardno's response before a decision was made.

[74] It is clear TPC did not make the above inquiries with Mr Ramsay-Cardno. Rather, it simply decided to terminate Mr Ramsay-Cardno's employment 6 days after it is said to have sent the letter dated 3 June 2020. That was not the action of a fair and reasonable employer

in all the circumstances, and I must find Mr Ramsay-Cardno dismissal was procedurally flawed and unjustifiable.

[75] TPC did not provide any additional information to demonstrate the redundancy was genuine, although there is a suggestion that TPC was negatively impacted by the Covid 19 pandemic. TPC's amended statement in reply records that 47 out of 59 positions were disestablished following the review. But the pandemic does not, in itself, provide substantive grounds for disestablishing Mr Ramsay-Cardno's position particularly where some other staff remained employed and it remains unclear why Mr Ramsay-Cardno was selected for redundancy.

[76] In all the circumstances Mr Ramsay-Cardno's dismissal was unjustified.

Remedies

Compensation

[77] Compensation under s 123(1)(c)(i) of the Act is awarded where the applicant has experienced humiliation, loss of dignity and injury to feelings flowing from an established unjustified disadvantage or unjustified dismissal.

[78] Mr Ramsay-Cardno's seeks a global figure of \$15,000 to compensate his distress concerning TPC's response to his complaints concerning workplace safety and his dismissal.

[79] Counsel for Mr Ramsay-Cardno reports he was impacted by the injury and his ability to do day to day chores. He further says Mr Ramsay-Cardno worried about his hand and the medical treatments he was required to submit to. Mr Ramsay says he felt anxious about his financial circumstances. However, each of these matters relate (albeit indirectly) to the workplace personal injury he suffered and for which he has been compensated for via ACC. Compensation ordered pursuant to s 123(1)(c)(i) must be related to the effect of the dismissal and/or disadvantage and not for distress experienced as a consequence of the personal injury.

[80] I do accept however that Mr Ramsay-Cardno's dignity was negatively impacted by TPC's cavalier response to his concerns about the work he was instructed to undertake. Mr Ramsay-Cardno further says he was blind-sided by the way TPC dismissed him and that he subsequently experienced feelings of worthlessness. I have no reason not to accept his evidence on this point and that he was distressed by the suddenness of his dismissal.

[81] I consider \$15,000 is an appropriate compensatory sum taking into account the circumstances of this case and the levels of compensation currently awarded by the Authority. I cannot find Mr Ramsay-Cardno contributed to his personal grievances, and he is entitled to the compensation award without reduction.

Arrears of wages

[82] As noted earlier, TPC paid Mr Ramsay-Cardno his entitlement to first week compensation, albeit this was not until 6 May 2021, 15 months (or thereabouts) after it was should have been paid on 29 January 2020. It is appropriate TPC pay interest on the sum so as to compensate Mr Ramsay-Cardno for the delay in paying the statutory entitlement.

[83] Ramsay-Cardno's rate of pay was set at \$18 per hour. His unchallenged evidence is that he would have worked 55 hours in the week immediately after his doctor recommended on one month's leave. This information leads me to conclude TPC should have paid \$990.00 (gross) to Mr Ramsay-Cardno as first week compensation.

[84] Using the Civil Debt Interest Calculator I calculate the sum in interest owed amounts to is \$25.18.

Penalties

[85] Mr Ramsay-Cardno seeks penalties for TPC's breaches of the health and safety provisions in the parties' employment agreement, and for its breach of good faith at the time of his dismissal. I have already found TPC's failure to take all practical steps to ensure a safe work environment resulted in an unjustifiable disadvantage. The failure to properly consult with Mr Ramsay-Cardno regarding his position has meant his dismissal was unjustified. Both claims rely on the same factual matrix as that relied on to demonstrate and establish each of the above claims.

[86] In *Salt v Fell*¹¹ the Court followed the approach taken in *Xu v McIntosh*¹² and observed:

Where a remedy has been sought and granted in respect of a personal grievance, it will be unusual for a penalty to be imposed in respect of the same conduct on the basis that it is also a breach of an employment agreement. There would need to be "special facets of the breach calling

¹¹ *Salt v Fell* [2006] ERNZ 499

¹² *Xu v McIntosh* [2004] 2 ERNZ 448 at [45]

for the punishment of the employer on top of compensation for the employee".¹³

[87] TPC has already been ordered to compensate Mr Ramsay-Cardno for the conduct that underpins the claims for penalties. I am not persuaded there are special facets present in this case to warrant punishment. I decline to impose penalties in these circumstances.

Summary of findings and orders

[88] The Pallet Company (Hawkes Bay) Ltd is ordered to pay Shaun Ramsay-Cardno

(a) \$15,000 without deduction, as compensation pursuant to s 123(1)(c) of the Employment Relations Act 2000.

(b) \$25.15 as interest accrued for the delay in payment of first week compensation.¹⁴

Costs

[89] Mr Ramsay-Cardno's claims have largely been successful. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination is needed, Mr Ramsay-Cardno may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum The Pallet Company (Hawkes Bay) Limited will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[90] The parties can expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless there are circumstances or factors that allow for an upward or downward adjustment to the tariff.¹⁵

Michele Ryan
Member of the Employment Relations Authority

¹³ *Salt v Fell*, n 8 at [124]

¹⁴ Calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

¹⁵ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1