

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 395
3121892

BETWEEN MOHAMMED HANIF
Applicant

AND ORORA PACKAGING NEW
ZEALAND LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Michael Smyth, counsel for the Applicant
Richard Harrison and James Cartwright, counsel for the
Respondent

Investigation Meeting: 28 and 29 July 2021 at Auckland

Submissions Received: Received 5 and 17 August 2021 from the Applicant
15 August 2021 from the Respondent

Date of Determination: 17 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mohammed Hanif was dismissed from his employment with Orora Packaging New Zealand Limited (Orora or the company) in March 2020. He claims his dismissal was unjustifiable. He also claims to have been unjustifiably disadvantaged in his employment by the actions of his employer in the months before he was dismissed.

[2] Those actions included the employer failing to carry out a fair performance process prior to commencing a disciplinary procedure; failing to produce accurate records of meetings held with him; unlawful suspension from employment; and pressuring him to resign from his employment.

[3] Orora denies Mr Hanif's claims and says his dismissal was justified in the circumstances. It denies suspending him from his employment and says it did not unjustifiably disadvantage him as he has claimed.

Background and events leading up to dismissal

[4] Mr Hanif had been employed by Orora¹ in Auckland for more than 32 years when his employment was terminated with immediate effect on 5 March 2020. He had undertaken many roles in the company over those years and since 2005 had been a Team Leader – Corrugator, working a shift that started at four o'clock in the afternoon and finished at midnight or, frequently, later. Mr Hanif referred to this as the night shift, while Orora's witnesses referred to it as the afternoon shift. I will refer to it as the afternoon/night shift.

[5] Orora is a global company specialising in designing, creating and delivering total packaging solutions, according to its website. It appointed a new Production Manager, Cameron McOmish, in January 2019. Mr McOmish was aware when he joined the company that quality and waste were significant issues for it and that these affected its profitability.

[6] The result of Mr McOmish's focus on these issues was that a spotlight fell on the afternoon/night shift and on Mr Hanif's performance as Team Leader. Mr Hanif reported to the Shift Manager who in turn reported to Mr McOmish, but Mr McOmish took over the oversight of Mr Hanif in February 2019. In April of that year he placed Mr Hanif on a performance improvement plan (PIP) after consulting with Orora's Human Resources Manager, Angela Clark.

[7] The PIP's purpose, as stated on the document, was "*to provide clear, measurable improvements points to support an employee to meet the expectations of the current role, within a set timeframe.*" It identified six performance issues relating to Mr Hanif's "*recent difficulty in controlling waste in his area of responsibility*" and specified six performance indicators/required outcomes/timeframes.

[8] The PIP was intended to operate from 15 April 2019 to 17 June 2019 with performance review meetings to be held fortnightly, the first being scheduled for 29 April and the final on

¹ The company was known by different names at times during Mr Hanif's employment.

or about 17 June 2019. Due to the performance review meetings not being held as frequently as anticipated, the period of review was extended until 17 July 2019.

[9] Mr Hanif had long service leave scheduled to start the week before the final performance review and Mr McOmish agreed to defer the review until his return from leave in September 2019.

[10] On 4 September 2019, Mr Hanif had an accident at work which resulted in his having some days off work in the following week and being certified by his General Practitioner (GP) as fit to work reduced hours on restricted duties for much of September. He was then certified as fit to work full hours but on restricted duties in October 2019.

[11] Mr Hanif and Mr McOmish met on 26 September 2019, with the Production Manager referring to it as a meeting to discuss they were to go from there. On 15 October 2019 they had the final performance review meeting. Mr McOmish noted in the “*Employee Comments*” section of the PIP review report that Mr Hanif had refused to sign the document.

[12] On 29 October 2019, Mr McOmish gave Mr Hanif a letter and a Preliminary Disciplinary Investigation report and instructed him to go home. The letter invited Mr Hanif to participate in a disciplinary meeting on 1 November 2019 over possible specified breaches of company policies and procedures and related to performance issues. This was characterised as serious misconduct that could result in disciplinary action up to and including dismissal. Mr Hanif was instructed to remain offsite at the company’s expense until the matter was resolved.

[13] The disciplinary meeting scheduled for 1 November was deferred due to the unavailability of Mr Hanif’s Union representative and took place on 13 November 2019.

[14] Mr Hanif’s GP certified him as unfit for work for seven days from 4 November 2019 and then for a further 10 days from 11 November 2019.

[15] A “Stay at Work” (SAW) plan was instigated by the Accident Compensation Commission (ACC), initially with a target date of a return to full work for Mr Hanif of 16 December 2019. Mr Hanif says he participated in the plan until he was advised on 5 December 2019 that his employer had no work for him, while Orora asserts he did not participate in the SAW plan.

[16] On 7 November 2019 Ms Clark emailed a Union official (at 4.44 pm) to the effect that the company had received information from Mr Hanif's GP that day that Mr Hanif could return to work on restricted duties for six hours per day. Ms Clark advised the Union that Mr Hanif would have to work on the day shift because of the restricted duties and he could return to work the next day, i.e. 8 November 2019.

[17] An email from the Union to Mr Hanif on the morning of 8 November 2019 indicates the Union Official had been at a meeting the previous afternoon and evening and had missed Ms Clark's email at the time. She apologised to Mr Hanif and advised him she had emailed Ms Clark to ask if she wanted him to turn up to work later that day or on the following Monday.

[18] Mr Hanif's conduct over this period was included in an Investigation Report dated 8 December 2019, compiled by Ms Clark, and attached to a letter dated 12 December 2019 inviting him to a further disciplinary meeting. In her letter Ms Clark informed Mr Hanif the discrepancies identified in the report suggested he may have been misleading and/or deceitful to her and others in the responses he had given to them in the course of the process.

[19] While acknowledging there may be explanations or additional information that would support a different perspective, Ms Clark noted that his actions may have undermined the employer's trust and confidence in the employment relationship, thereby putting his employment at risk.

[20] The concerns the company wished to discuss included Mr Hanif's failure to return to work as required by his medical certificate. This in turn formed part of the "*many falsifications and irregularities*" in communication and information from Mr Hanif and "*others that have been working with him*" that Ms Clark found.

[21] The investigation report contained a Summary of Findings in bullet point form under the headings "1st week ACC; Attendance and timekeeping; Return to work; and Training and Operation of the Corrugator". The bullet points were stated as facts rather than matters up for discussion, including four bullet points beginning with the words "Falsely claims .. "referring to Mr Hanif.

[22] The report ended with Ms Clark's conclusions follows:

There are many falsifications and irregularities in these events. The employee is obliged to act towards the employer with good faith and to not mislead or

deceive the employer. This obligation has clearly been breached. It is highly likely [Mr Hanif] has also misled the Union and possibly the OT engaged by ACC, depending on which version of the truth is believed.

[23] The disciplinary meeting was held on 18 December 2019 at which Mr Hanif was accompanied by two Union representatives, one of whom took notes of the meeting. A copy of those handwritten notes was provided in the Common Bundle. Ms Clark and Mr McOmish attended the meeting for Orora and one of them provided typed notes that appeared to have been written after the event. The order of items discussed differed considerably from that of the Union's contemporaneous notes.

[24] The meeting was adjourned until the New Year.

[25] On 23 January 2020, Mr Hanif attended a meeting with Orora during which he was informed that a final outcome decision had been made to terminate his employment. That meeting was also adjourned and discussions ensued between the Union, Mr Hanif and Ms Clark. These were ultimately unsuccessful and Mr Hanif's employment was terminated on 5 March 2020 in a letter from Ms Clark that referred to her not having received a response from Mr Hanif or his Union representative to the *without prejudice* offer that had been made.

[26] I note here that the privilege which would normally attach to that offer and to the correspondence around it was waived by the references to the offer and to the discussions around the offer in the letter of termination.

[27] Orora entered into an asset purchase arrangement in 2019 for the sale of its fibre packaging business, including the part of the business in which Mr Hanif had been employed. The sale to Opal Packaging New Zealand Limited was completed in April 2020.

[28] The parties attended mediation but were unable to resolve the matters.

The Authority's Investigation

[29] An in-person investigation meeting was held over two days in July 2021. Mr Hanif gave evidence on his own behalf and Ms Aly Tata, a union organiser with E tū, and Mr Vaia Fufaatea, a former employee and former Team Leader with Orora, also gave evidence for him. Mr McOmish and Ms Clark gave evidence for Orora.

[30] In accordance with s 174E of the Employment Relations Act 2000 (the Act), I have not set out all the evidence and submissions I received but I have carefully considered all such

material before reaching conclusions and making findings on facts and relevant issues of law in this determination.

[31] The determination has been issued outside the timeframe at s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Issues

[32] The issues for the Authority to determine are:

- (a) Whether Orora, in its dealings with Mr Hanif:
 - (i) Failed to carry out a fair performance process;
 - (ii) Failed to produce accurate records of meetings held with him;
 - (iii) Unlawfully suspended him; and/or
 - (iv) Pressured him to resign his employment.
- (b) If so, whether any of those actions unjustifiably disadvantaged Mr Hanif in his employment.
- (c) Whether Orora unjustifiably dismissed Mr Hanif; and, if so,
- (d) What remedies are appropriate.

Relevant employment provisions

[33] At the time of his dismissal, Mr Hanif's employment was subject to the Orora Kiwi Packaging/E tū Inc National Collective Agreement 2020 to 2022 (the collective agreement).

[34] The Terms of Agreement provisions of the collective agreement provided, at clause 36, that each division of the company would have "*house rules and a disciplinary procedure, which shall be made known to all employees.*" The applicable house rules and disciplinary procedure were contained in Orora's Employee Information Handbook (the handbook).

[35] Under the heading of *Disciplinary Procedure* the following procedure is set out in the handbook:

Serious breaches of the company rules and/or policies (serious misconduct) may result in your instant dismissal. Formal warnings may be given for less serious misconduct. Three written warnings for less serious misconduct may result in dismissal. The Company will investigate the matter and you will have the opportunity to give your explanation.

[36] Under the subheading *Investigation Procedure* the following is specified:

- The Manager, or a person authorised by the Manager, will briefly examine the allegation to determine whether or not a breach of rules and/or policies is apparent.
- If the initial examination indicates that a serious breach of rules and/or policies may have occurred, the employee(s) involved may be stood down whilst the matter is investigated. During the period of stand down the employee(s) will be paid for scheduled work hours and be required to be available for discussion. (A stand down is not a disciplinary measure.)
- If a breach of rules and/or policies is apparent, there will be a prompt and thorough informal investigation by the Manager or a person authorised by the Manager. Discussions will be held with all persons considered to be able to assist. The employee(s) alleged to have committed a breach of rules and/or policies will be given the opportunity to have the allegations described and the opportunity to give an explanation.

At the conclusion of the investigation:

1. If the Manager determines that no breach of rules and/or policies is proven then no further action will be taken.
2. If the Manager determines that a breach of rules and/or policy is proven, then the appropriate provisions of the Disciplinary Procedure will be applied.

[37] And under the heading *Disciplinary Process*:

In circumstances where the Company determines that instant dismissal is not appropriate, the employee may be given a final warning that any further case of serious misconduct, disobedience or serious neglect, may result in instant dismissal.

1. Unsatisfactory work performance or less serious misconduct, disobedience or breach of your employment agreement will be subject to the following warning procedure:
 - Verbal counselling will be given which will be recorded in writing. Retraining, where necessary, will be undertaken.
 - **Any First Occasion (1st written warning)**
A first written warning will be given in private before a witness. Retraining, where necessary, will be undertaken.
 - **Any Second Occasion (2nd written warning)**
A second written warning referring to any previous written warning and its date will be given. This second written warning will make a clear statement that any further unsatisfactory work performance will result in termination.
 - **Any Third Occasion (3rd written warning)**
Termination.

The giving of a warning is not limited to the repetition of the same offence.

All warnings will be issued in formal surroundings and the employee will be entitled to have another person present as a witness.

A copy of each warning will be kept on the employee's personnel file. Warnings shall expire and cease to have effect six months from the date of their issue.

[38] A list of 11 behaviours followed under the heading of *Less Serious Misbehaviour* and described as being behaviours that constituted less serious misconduct, for which warnings may be issued. The list started with unsatisfactory work, and included failure to clock out when leaving the plant and clocking in when returning; misuse of toilets and equipment or defacing Company property; unsafe acts; wilful waste of time or material; failure to report any accident; and using abusive language.

Unjustifiable Disadvantage***Performance process***

[39] Mr McOmish's evidence was that it became apparent to him soon after he started his role at Orora that the significant quality and waste issues the company had been experiencing for some time originated mainly from the afternoon/night shift on the corrugator. He attributed the wastage problem to Mr Hanif's lack of vigilance regarding quality and failure to take responsibility for addressing the issues. Mr McOmish identified a lack of checks and audits of machinery, products and processes and a failure to follow a process that included analysis and problem-solving to avoid the recurrence of issues. Mr McOmish said this was a fundamental objective of the team leader role but it was not happening on Mr Hanif's afternoon/night shift.

[40] It was as a result of Mr McOmish's discussion of his concerns with Ms Clark that they developed the PIP I have referred to earlier in this determination. The PIP was discussed in a meeting Mr McOmish had with Mr Hanif on 15 April 2019 and both men signed it. It was intended that fortnightly reviews would be held starting from 29 April 2019.

[41] If an employer has concerns about an employee's performance it is reasonable that it reviews that performance and I do not understand that Mr Hanif disputed Orora's right to review his performance and raise with him the concerns it had. Having decided to embark on that process, however, the company was obliged to conduct such a review fairly and in good faith. After considering the evidence of Orora and Mr Hanif, I am not convinced the PIP process was carried out in a manner that fairly assessed Mr Hanif's performance.

[42] There are indications the company, having decided Mr Hanif was not performing up to its expectations, predetermined he was unlikely to do so. The indications start at the outset of the PIP process with Mr McOmish's file note of 15 April 2019, the day the PIP was set in place. The tone and content of the note is negative about Mr Hanif and conveys no optimism about his ability to improve to the file note writer's expectation of him. The comments regarding the "*great pains*" Mr McOmish went to in order to explain that the PIP was not designed to "*trip him up and get him fired*" do not allay a suspicion that this may indeed have been its purpose.

[43] The "*Coaching Notes*" Mr McOmish wrote on 16 April 2019 record his observations of Mr Hanif during a session of "*walking and talking the Corrugator*" with him. The notes are overwhelmingly negative about Mr Hanif; give little indication that any coaching took place; and include Mr McOmish's view, on the second day of the PIP, that Mr Hanif was "*causing serious harm to the business.*"

[44] Mr McOmish's file note for the 6 May 2019 performance review meeting, covering the period from 15 to 29 April, acknowledged Mr Hanif's attempts to "*lift his game*" but also recorded his perception that Mr Hanif was "*still struggling with the basic concepts of leadership*". He described Mr Hanif as having shown "*some minor improvement*", but not to the level Mr McOmish had hoped. As leadership was an area Mr McOmish identified as being difficult for Mr Hanif, it would have been reasonable for the company to explore options for improving that aspect of his role. It is not apparent that this was a priority for the employer despite Mr Hanif saying he had not had training in leadership.

[45] On 28 May 2019 Mr McOmish extended the PIP until 17 July 2019, in light of delays in holding the fortnightly reviews. His PIP review with Mr Hanif on 28 May 2019 recorded "*no real improvement*" and noted concerns over all of the areas he had previously raised with Mr Hanif. Mr McOmish reiterated his concern over Mr Hanif's lack of leadership. His proposed means of addressing this was to give Mr Hanif guidance on what he needed a "*good corrugator Team Leader*" to focus on. Mr Hanif's evidence in relation to the performance review meetings was that anything he said in answer to issues raised by Mr McOmish was viewed by the Production Manager as shifting the blame to someone else and not taking responsibility.

[46] On 28 June Mr McOmish held a further PIP review meeting, again describing that, overall, there had been “*no real improvement*” by Mr Hanif in the six performance review areas. In his file note about the meeting Mr McOmish acknowledged that in the first of the six PIP areas the target had been met. Mr McOmish described this as “*a good improvement*” but qualified that by stating that the overall trend over the PIP period remained above target, and the improvement needed to be maintained. Mr McOmish’s file note also recorded that two other targets of the six had been met and there had been an improvement in another target area.

[47] In light of Mr Hanif’s achievement in relation to four of the six target areas, Mr McOmish’s assessment seemed determinedly negative. That was also the tone of a file note he made of a meeting he and the Shift Manager had with Mr Hanif on 12 June 2019. While Mr McOmish may have had genuine concerns over the issues that were raised with Mr Hanif, his file note reflects an unwillingness to listen to Mr Hanif’s perspective. It also reflects the making of an assumption that Mr Hanif “*could not understand*” a concept; and the dismissal of Mr Hanif’s explanation for another of the matters Mr McOmish had raised on the grounds that the Production Manager “*...could not understand what he was on about or his logic.*”

[48] On 4 July 2019 Mr McOmish made a file note of a short meeting he had with Mr Hanif in which he recorded that he had told Mr Hanif “*no real progress*” had been made with the PIP and that, while there “*were short term improvements from time to time, these were not being sustained.*” As Mr Hanif was about to embark on long service leave, they agreed to defer the final performance review until after that.

[49] Their next meeting to discuss performance took place on 26 September 2019. A union delegate also attended, apparently at Mr McOmish’s suggestion. At this time Mr Hanif was working reduced hours on medical advice following a workplace accident on 4 September 2019 after his return from scheduled long service leave. Unbeknownst to Mr McOmish, Mr Hanif recorded the meeting. A transcript was provided in the Common Bundle of documents prepared for the Authority’s hearing.

[50] The meeting was, by Mr McOmish’s account, robust. His evidence was that at the end of the meeting he expected Mr Hanif to spend a few days thinking about being a leader in the corrugator team and what that meant, and what he needed to be successful. When neither Mr Hanif nor his union representative came back to him after the meeting, Mr McOmish completed

his review comments to conclude the PIP process. He provided them to Mr Hanif at their next meeting on 15 October 2019.

[51] Mr McOmish registered “*below expectation*” comments for five of the six target areas on that PIP review report, with only one target area registered as having met expectation. That one positive comment was qualified by a negative note regarding what happened when Mr Hanif was absent. Mr McOmish recorded on the PIP report that Mr Hanif refused to sign it.

[52] Mr McOmish’s evidence was that there were a number of serious performance issues around Mr Hanif and he discussed these with Ms Clark. At that point they decided to embark on a disciplinary process based on the issues arising from the PIP. I will consider the disciplinary process when determining whether the termination of Mr Hanif’s employment was justifiable and will confine this part of my determination to the performance process up to 15 October 2019.

[53] As noted earlier, I do not find the performance review process to have been undertaken fairly. While it took place over a six month period, and entailed several meetings with Mr Hanif to discuss progress, the evidence makes clear that the Production Manager formed a negative view of him from an early stage which he was unwilling to change. The performance review he conducted on 28 June 2019 in particular demonstrates that he fell short of providing an objective assessment of Mr Hanif.

[54] This, amongst other factors, resulted in Mr Hanif being subjected to a disciplinary process that ultimately led to his dismissal. To that extent it disadvantaged him in his employment.

Records of meetings

[55] Mr Hanif claims that during meetings with Mr McOmish between April and September 2019, the employer failed to take accurate records and thereby failed properly to record his responses. Mr Hanif denied Mr McOmish’s claim that he had given him a copy of the notes after each meeting.

[56] In submissions on behalf of Mr Hanif, Mr Smyth said the notes Mr McOmish took of the meetings he had with Mr Hanif were inaccurate, not given to Mr Hanif for comment and frequently contained the subjective opinions of Mr McOmish for the sole purpose of portraying

Mr Hanif in a poor light. In Mr Smyth's view the objective was to accumulate paperwork against Mr Hanif to encourage him to resign.

[57] Mr Harrison, in submissions on behalf of Orora, said there was no legal requirement to make verbatim notes of meetings during either the PIP process or the disciplinary process but it was important that notes that were taken were provided to Mr Hanif. Mr Harrison said Mr McOmish asserted he had done this after each meeting.

[58] I accept Mr Harrison's submission regarding the lack of a legal requirement to take verbatim notes of meetings although I note that the good faith obligations of the Act would require an employer to ensure notes that were taken did not misrepresent those meetings.² I am not persuaded that Mr McOmish gave Mr Hanif copies of all the notes he took of their meetings over performance matters. I do accept that Mr Hanif saw the notes Mr McOmish had written on the original performance review document of 15 April 2019, as he had signed it in the designated place for the employee's signature. I also accept he saw, but did not sign, the performance review document of 15 October 2019 on which Mr McOmish noted Mr Hanif's refusal to sign. I do not accept Mr McOmish's evidence of having given to Mr Hanif copies of all the notes he took of their meetings during the PIP process for the following reasons.

[59] Firstly, I consider it likely Mr McOmish would have asked Mr Hanif to sign or initial the notes to indicate he had read them. Mr Hanif had signed only the 15 April 2019 performance review document. Secondly, if he had given Mr Hanif a copy of the 15 April 2019 file note he had written, and the 16 April 2019 coaching notes, I consider it highly unlikely Mr Hanif would have accepted the comments Mr McOmish had made without taking issue with them. There was no evidence from Mr McOmish of Mr Hanif querying or rejecting those comments at the time. The third reason is the subjective, overwhelmingly negative nature of the notes which suggests they were not intended for sharing with Mr Hanif.

[60] Having accepted Mr Hanif's evidence, and Mr Smyth's submission, that Mr McOmish did not give him a copy of the notes at, or shortly after, the time they were prepared, it does not follow, however, that I accept the objective was to accumulate paperwork against Mr Hanif to encourage him to resign. There are other possible explanations such as, for example, that the

² Section 4 of the Act refers.

notes were designed as a memory prompt for Mr McOmish to use for review purposes at a later date.

[61] I do not find there is sufficient evidence to support Mr Hanif's submission that the notes kept by Mr McOmish of their meetings were designed to encourage his resignation. In any event I am inclined to view the notes that Mr McOmish made and did not provide to Mr Hanif at the time as forming part of the factual matrix in determining whether Mr Hanif was unjustifiably dismissed rather than constituting a personal grievance for disadvantaging him in his employment.

[62] I dismiss Mr Hanif's claim over this matter.

Was Mr Hanif suspended from his employment?

[63] Mr Hanif claims his employer suspended him from his employment on 29 October 2019. Orora denies the claim. Mr McOmish's evidence is that on that date he handed Mr Hanif a signed letter and an accompanying document headed with Mr Hanif's name and "*Preliminary Disciplinary Investigation Report 07 October*". The letter invited Mr Hanif to a disciplinary meeting to take place on 1 November 2019. It referred to nine possible breaches of company policy/procedures and informed Mr Hanif:

The company is viewing your actions seriously and you need to be aware that your breaches may result in disciplinary action up to and including dismissal.

[64] The letter ended by informing Mr Hanif that:

During the investigation you are to remain offsite at the company's expense until such time as the matter is resolved.

[65] Mr McOmish said he told Mr Hanif he would be on "*discretionary leave*". He said he did not use the word "*suspension*" and his understanding was that the discretionary leave would be in place until the disciplinary meeting, which was at that time scheduled for 1 November, but subsequently delayed until 13 November, 2019.

[66] Mr Hanif's evidence is that, while he was working his shift on 29 October 2019, Mr McOmish instructed him to go home, handing him a signed letter and the investigation report dated 07 October 2019. Mr Hanif said Mr McOmish did not seek his comment, or mention discretionary leave, or give him any time to seek advice. His understanding was that he was

being suspended from his employment. He did not know the period of suspension was to be paid until a Union representative advised him it would be paid.

[67] I note here that two versions of the Invitation to a Disciplinary Meeting letter were included in the common bundle of documents prepared for the Authority's hearing. One was the 29 October 2019 letter version signed by Mr McOmish and the other was an unsigned version dated 30 October 2019 that was obtained on Mr Hanif's behalf by his legal representative under a Privacy Act request for personal information.

[68] The unsigned version contained, amongst other matters, a differently worded last sentence:

During the investigation, and so that you can properly prepare for the meeting, I have organised discretionary paid leave, so you are not required to attend work until this meeting time.

[69] I will return to this matter shortly when considering another of Mr Hanif's claims.

[70] Mr McOmish confirmed in the course of the Authority's investigation meeting that he had handed the signed version of the 29 October 2019 letter to Mr Hanif. Ms Clark's evidence was that she had prepared the unsigned version, which was held on the company's file. She said that was the version "*intended for sign off*" and she thought Mr McOmish may have signed a draft version of the document that she had shared with him before finalising. It was unclear why a copy of the unsigned version was retained on the company's personnel file for Mr Hanif while a copy of the signed letter was not.

[71] In any event, according to Orora, Mr Hanif was not suspended: he was given discretionary paid leave so that he could talk with his union before the disciplinary meeting scheduled at that stage for 1 November 2019.

[72] I disagree. Mr Hanif was at work and wishing to remain at work. I prefer his evidence that Mr McOmish did not mention discretionary leave when he gave him the letter instructing him that he was "*to remain offsite at the company's expense*" until the matter was resolved. Even if he had, which I do not accept, Mr Hanif had not requested discretionary leave, paid or unpaid. Sending him away from the workplace in such circumstances was effectively, whether or not the respondent labelled it as such, a suspension. As Judge Holden succinctly put it:

A suspension occurs when an employee is prevented from working and is sent away from the workplace, but his or her employment remains on foot.³

[73] The company submits the point of putting Mr Hanif on discretionary leave was to give him an opportunity to take advice from the Union before the disciplinary meeting. In my view, while it may have been appropriate to offer Mr Hanif a period of paid leave to do that, it was not appropriate to give him no choice in the matter and no opportunity to comment, instead instructing him to leave the workplace and remain offsite.

[74] I note Orora has not made submissions on its right under the Disciplinary Procedure outlined in its House Rules at Part 1, clause 7 of the handbook, to stand Mr Hanif down during its investigation. I will address the issue as it was clear from Ms Clark's evidence that Orora believed it had the right to act as it did.

[75] I take a different view from Orora for two reasons, the first being that the “*stand down*” provisions apply to matters described as “*serious misconduct*” in the handbook. Although the employer described its concerns over possible breaches as “*serious*”, those concerns were all related to performance issues. The handbook distinguishes between matters constituting serious misconduct and lesser serious misconduct. “*Unsatisfactory performance*” comes within the lesser serious misconduct category for which a warning process applies.

[76] The second reason is that labelling an action a “*stand down*” and stating it is not a disciplinary measure in the handbook does not change the nature of the action. Where, in circumstances such as those that applied to Mr Hanif, an employer requires an employee to exit the workplace and not return “*until such time as the matter is resolved*”, the stand down is in effect a suspension.

[77] The Court of Appeal has referred to suspension as a “*drastic measure which if more than momentary must have a devastating effect on the [employee] concerned*.”⁴ The Employment Court confirmed that “*(it is well-established that a suspension of an employee from employment is a disadvantageous action as far as the employee is concerned*”⁵.

[78] The general rule is that an employee must be given the opportunity to comment on a proposal to suspend him or her before the suspension is effected. However, as former Chief

³ *Hong v Auckland Transport* [2019] NZEmpC 54.

⁴ *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA) at 521.

⁵ *Sefo v Sealord Shellfish Ltd* [2008] 178 at 188 (paragraph 40).

Judge Colgan observed, there is “no immutable rule requiring that an employee must be told of the employer’s proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so”⁶ The court noted:

*Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer’s conduct. In many cases that will call for advice and discussion before determining to suspend; in others, it may not.*⁷

[79] In Mr Hanif’s situation, no evidence was provided that established good reason to suspend him without giving him the opportunity to be heard and I find the suspension to have been unjustifiable. As he was paid for the period he was required to be away from the workplace, Mr Hanif suffered no financial disadvantage. I note, however, that he visited his GP in the days following the suspension and his medical certificate recorded his “acute stress reaction”. Some of that stress would relate to the impending disciplinary meeting, but the manner of his departure from the workplace during his shift would also have contributed to it. Mr Hanif’s oral evidence about his departure that day left no room for doubt as to the effect it had upon him.

[80] I find that his unjustifiable suspension disadvantaged Mr Hanif in his employment.

Pressure to resign

[81] I have already found there is insufficient evidence to establish that notes made by Mr McOmish of his meetings with Mr Hanif were made with the objective of pressuring Mr Hanif to resign. There was undoubtedly pressure placed on Mr Hanif to decrease waste on his shift and increase productivity but the evidence does not support a proposition that this was part of a plan to gain Mr Hanif’s resignation.

[82] It is undisputed that Orora made an offer in February 2020 to Mr Hanif, through his Union representative, that he could resign and be paid one month’s pay in lieu of notice. The evidence is clear that the offer was prompted by the Union and was an alternative to the prospect of dismissal for Mr Hanif.

⁶ *Graham v Airways Corporation of New Zealand* [2005] ERNZ 587 at 613.

⁷ Above at 614.

[83] In those circumstances I do not find the offer to have been pressure on Mr Hanif to resign. This claim is dismissed.

Breach of good faith/personal grievance

[84] In the course of his submissions on behalf of Mr Hanif, Mr Smyth introduced a new cause of action, seeking remedies for a breach of good faith that also amounted to an unjustified disadvantage. The breach of good faith was alleged to be Orora's action in holding in its records the unsigned letter dated 30 October 2019 inviting Mr Hanif to a disciplinary meeting.

[85] I have considered the different versions of the letter as part of Mr Hanif's claim to have been unjustifiably suspended from his employment, a claim that was included in his statement of problem.

[86] It is inappropriate to raise a new cause of action in submissions when the respondent has had no notice of the claim under after the applicant's claims have been investigated. It would also be a breach of natural justice and I decline to consider the matter further.

Unjustifiable Dismissal

[87] The determination of this issue entails an objective consideration of whether Orora's actions, and how it acted, in dismissing Mr Hanif were what a fair and reasonable employer could have done in all the circumstances at the time as set out in s 103A of the Act. A number of factors are to be considered, including whether Orora made its concerns known to Mr Hanif before dismissing him; whether Mr Hanif had the opportunity to respond to those concerns; and whether Orora took his responses into consideration before dismissing him.

[88] In submissions for Mr Hanif, Mr Smyth observed that the reason for dismissal is not normally a matter for contention as it is normally set out in the letter of termination of employment. In the current instance, Ms Clark's letter of 5 March 2020 informing Mr Hanif of his dismissal referred to their meeting on 23 January 2020 at which the employer presented a proposal to dismiss him for "*poor performance in your role of Team Leader and breach of trust and confidence*".

[89] Ms Clark's letter noted that proposal had been for Mr Hanif's feedback and that she had subsequently met separately with him and his Union representative, and that there had been a request to present a without prejudice offer. She referred to the employer's response to that

request; to Mr Hanif's failure to respond to it; and to his Union representative's advice that she had received no instructions on the employer's offer from Mr Hanif. Ms Clark also referred to Mr Hanif's failure to update the employer on his medical clearance status since his last medical certificate had expired in February 2020. She went on to say that she had:

“therefore made the decision to terminate your employment, as per my proposal, having received no feedback at all from either yourself or your representative, who I know has been seeking your instructions.”

[90] In Mr Smyth's submission, while the timing of the dismissal appeared to be Mr Hanif's failure to agree to resign his employment, the reasons for termination were “*poor performance and breach of trust and confidence as per (Ms Clark's) proposal*” of 23 January 2020. Mr Smyth notes the Outcome Proposal document provided to Mr Hanif states that:

“On review of the information provided and discovered during our discussions it is clear that whether through misunderstanding or intentionally the employer has been misled (sic).

[91] Four bullet points followed, concerning Mr Hanif's constant denial of knowing how to scan reels; the discrepancy between statements he had made regarding his practice when changing the line-up on the corrugator; his conflicting accounts regarding return to work; and his working reduced hours when he was medically cleared to work full time.

[92] The document then stated that this had become an issue of Mr Hanif's performance as a team leader, trust that he would/could do his job and be accountable for it, and that he would tell the employer the truth in all circumstances.

[93] In Mr Smyth's submission, the reason given by the employer for dismissing Mr Hanif was that he had misled it, as set out in the four bullet points. It was not poor performance and he submits performance issues raised by the employer are irrelevant to the Authority's determination of the matter. Mr Smyth noted that, when he asked Orora for written reasons for Mr Hanif's dismissal, he received four reasons that differed from those set out in the Outcome Proposal of 23 January 2020.

[94] Mr Harrison, in submissions for Orora, said the reason for the company's decision to dismiss Mr Hanif was articulated in the matters identified following the outcome of the 13 November 2019 disciplinary meeting. He referred to Ms Clark's letter and enclosures to Mr Hanif of 12 December 2019 in which she set out the findings from the 13 November 2019

disciplinary meeting; Ms Clark's investigation report, which was enclosed with the 12 December 2019 letter; and Mr McOmish's notes of, and further findings from, the 13 November 2019 disciplinary meeting.

[95] The 12 December 2019 letter from Ms Clark to Mr Hanif set out the serious employment concerns the company wished to address with him. These comprised, in particular, three of the matters discussed in the 13 November disciplinary meeting. They were:

- (a) failure to ensure the Corrugator afternoon shift complied with company direction that all reels are to be scanned;
- (b) failure to follow the programmed corrugator line-up such that it caused key production lines to run out of work for over six hours; and
- (c) poor quality performance resulting in excessive waste.

[96] Additionally, Ms Clark's letter referred to "*a range of discrepancies in accounts*" given by Mr Hanif to the employer and others that suggested he "*may have been misleading and/or deceitful*" in relation to his responses and his medical condition. The discrepancies were identified in Ms Clark's report, which she attached to her letter.

[97] The report contained Ms Clark's conclusions, as set out in [22] above, in which she asserted that Mr Hanif had breached his obligation of good faith towards his employer; found it highly likely he had misled the Union and possibly also the Occupational Therapist (OT) engaged by the ACC.

[98] The third document Mr Harrison referred to was Mr McOmish's notes and findings from the 13 November 2019 disciplinary meeting. The document went through six of the nine bullet points discussed in that meeting and concluded that Mr Hanif had breached Orora's policies and procedures in relation to those six issues. Mr McOmish recommended the company proceed to disciplinary action on the basis of three of the issues, which are the three listed in Ms Clark's letter of 12 December 2019.

[99] I accept Mr Smyth's submission that the reasons for Mr Hanif's dismissal given in Ms Clark's letter of 5 March 2020 differed from those subsequently provided by the company in Mr Harrison's letter of 9 April 2020. I am satisfied, however, that Mr Hanif did have the opportunity to comment on the three matters Mr Harrison cited as being reasons for his dismissal and on the "*misleading/deceitful*" conclusions in Ms Clark's report at the 18 December 2019 disciplinary meeting. That is indicated by the notes taken by the Union.

[100] I am not satisfied that Mr Hanif's dismissal was justified, however. Despite being on a PIP for six months, and ultimately being dismissed for many of the matters that arose during that process, he was not given any warnings during that time. As I have already observed when considering the issue of Mr Hanif's unjustifiable suspension from employment on 29 October 2019, the company's handbook distinguishes between matters constituting serious misconduct and lesser serious misconduct. Unsatisfactory performance comes in the latter category for which the process is verbal counselling, followed by a first written warning and, where necessary, retraining. A second such occasion will require a second written warning referring to the first warning and stating that any further unsatisfactory work performance will result in dismissal. A third occasion will result in termination.

[101] While issues were raised with Mr Hanif while he was on a PIP, he was given no verbal or written warnings during that time. The disciplinary process following the completion of the PIP was carried out over several months, but the company's records indicate Mr Hanif was working reduced hours, or was receiving ACC weekly compensation as a result of the workplace injury he sustained on 4 September 2019, for much of that time.

[102] Mr McOmish's "further findings" following the 13 November 2019 disciplinary meeting refer to his having accessed Mr Hanif's training records. Mr McOmish referred to the incident that had been raised with Mr Hanif on 12 June 2019 which, according to his Preliminary Disciplinary Investigation Report of 7 October 2019, caused key production lines to run out of work for over six hours. This was one of the four matters for which Mr Hanif was dismissed. In Mr McOmish's "*further findings*" report he commented that he had reviewed the PIP notes and it was "*clear that [Mr Hanif] has been advised on multiple occasions to NOT change the lineup.*" That implies Mr Hanif had received that advice on multiple occasions before the incident that was the subject of the 12 June 2019 meeting.

[103] That was not an accurate reflection of the PIP notes. The first time Mr McOmish is recorded as raising the line-up as an issue was 12 June 2019 in the meeting he held with Mr Hanif and the Shift Manager. It was the fourth of five issues he raised in that meeting and it related to an incident that had occurred on Mr Hanif's shift on 31 May/1 June 2019. Mr McOmish recorded in his file note about the meeting that he found the line-up conversation difficult because he "*could not understand what [Mr Hanif] was on about or his logic*".

[104] It was neither fair nor reasonable of the employer to use the 31 May/1 June 2019 incident as one of the four reasons for dismissing Mr Hanif on the basis that he had been advised on multiple occasions to not change the line-up when, at the time the incident occurred, there is no evidence Mr McOmish or anyone else had given such advice to him. The incident may have warranted a warning at the time after proper investigation, but none was given. I find it was not the action of a fair and reasonable employer to dismiss Mr Hanif for serious misconduct nine months later, in part for that incident.

[105] Mr Smyth submits blame was unfairly apportioned to Mr Hanif for matters outside his control and no tools were provided to him to resolve the issues he was raising with his employer during and after the PIP period. These included mechanical issues with the corrugator, and a problem he was unable to identify with the reel scanning operation. In Mr Smyth's submission the employer rejected Mr Hanif's representations and there is no evidence it investigated his concerns, choosing instead to blame him for his lack of leadership skills. He characterised the meetings between Mr McOmish and Mr Hanif as them talking past each other which Mr Hanif viewed as Mr McOmish not having an open mind.

[106] I accept that submission and find it likely from my consideration of all the evidence in written and oral form presented in the lead up to, and during, the hearing of this matter that, although much talking took place between Mr Hanif and Mr McOmish, there was not a commensurate amount of listening. Mr McOmish's speaking style is direct and to the point: Mr Hanif, whose first language is not English, has a more discursive style of speaking. The onus was on the employer to identify and ameliorate any communication barriers and it is my view that its failure to do so contributed to the unjustifiability of Mr Hanif's dismissal.

[107] I am not persuaded from Orora's evidence that there was a proper investigation into the concerns Mr Hanif raised in response to the matters for which he was dismissed. I return again to the "*further findings*" made by Mr McOmish following the 13 November 2019 disciplinary meeting. Mr McOmish recorded that Mr Hanif stated, when asked about the employer's finding that he had failed to ensure all reels were scanned, that he had not been trained and he did not know how to find out if reels had been scanned. Mr McOmish recorded that, when asked if he knew what PCS was, Mr Hanif said he did not. Mr McOmish dismissed Mr Hanif's response in his further findings by stating that Mr Hanif used PCS every day at work and had done so for 20 years. He did not record that PCS was a computer software system and that Mr Hanif had acknowledged he used the computer daily but did not recognise the

letters “PCS” as representing the software he used on the computer. While this is only one example, it represents the company’s tendency to assume Mr Hanif was being deceitful in statements he made about his ability to operate machinery.

[108] Another example concerns the conclusions Ms Clark, who was the decision maker in the matter of Mr Hanif’s dismissal, reached over Mr Hanif’s return to work following his workplace injury on 4 September 2019. This was included in her Summary of Findings in the Investigation report attached to her letter of 12 December 2019 in which she concluded there were “*many falsifications and irregularities in these events*”. Ms Clark’s findings recorded that Mr Hanif did not return to work as required by his medical certificate of 26 September 2019.

[109] Orora’s own record of Mr Hanif’s attendance indicates he worked, in accordance with his medical certificate of 12 September 2019, for four hours a day in the days before and after 26 September 2019, until the end of the month. Mr Hanif’s medical certificate of 26 September 2019 certified him as able to work normal hours on restricted duties for the month of October 2019. Mr Hanif’s evidence was that his GP told him that if he was uncomfortable after four hours he should go home. He said he worked between 4 and 5 hours a day in October 2019.

[110] Orora’s record of Mr Hanif’s attendance that month shows him as having worked four hours each working day. However, a parallel column of the record reveals that Mr Hanif was paid for varying hours daily, ranging from four hours to six hours and twenty one minutes. The only days in October 2019 Mr Hanif was paid for four hours were the day before he was suspended from his employment by Mr McOmish part way through his shift; the day that suspension occurred; and the two following days. On all other days he was paid, and therefore it is reasonable to assume he worked, for more than four hours daily.

[111] I find this gives credence to Mr Hanif’s evidence that, despite the medical certificate, his doctor advised him to work only as long as he was comfortable. Further support is given by his GP’s next medical certificate of 24 October 2019. This certified Mr Hanif fit to work for six hours a day on restricted duties from 1 to 13 November 2019. Another medical certificate, on 31 October 2019, certified those hours and restricted duties for the rest of November 2019. There is no record of this particular matter being raised in the 18 December 2019 disciplinary meeting notes taken by the Union or by Orora.

[112] I find there was no justification for the company to conclude that Mr Hanif did not return to work on 26 September 2019, in line with his medical clearance to do so. A check of Orora's records of Mr Hanif's days and hours of work would have shown that to be untrue.

[113] Another finding made by Ms Clark in the Investigation Report she attached to her 12 December 2019 letter to Mr Hanif was that he advised the OT he was not returning to work and would not participate in the SAW programme initiated by ACC. There was nothing to indicate when Mr Hanif was found to have given that advice to the OT, who did not give evidence to the Authority.

[114] I am sceptical of Ms Clark's finding as the documents provided by the parties in the Common Bundle included the ACC SAW plan, progress and completion report. That document referred to the OT's observations of Mr Hanif and his completion of a questionnaire that the OT noted indicated he was a suitable candidate for a Pain Management Programme. The documentation recorded that Mr Hanif was awaiting an MRI scan followed by a specialist review and that the SAW plan may require amendment depending on the outcome.

[115] It seems from the SAW documentation that the planning of Mr Hanif's gradual return to full-time duties was put on hold on 5 December 2019 for two reasons: one being that, on 19 November 2019, Mr Hanif's GP declined the SAW program until after Mr Hanif's MRI and specialist review. The other reason was that on 5 December 2019 Orora's Health and Safety advisor advised ACC that the alternative duties the company had previously offered as part of Mr Hanif's gradual return to work were no longer available. It had already been established that his afternoon/evening shift was not suitable during his rehabilitation to full time work.

[116] The SAW documentation reports the programme was closed on 24 January 2020 after Mr Hanif had provided a letter to the OT that outlined he no longer had a position at Orora to which he could return. That was the day after Mr Hanif had attended a meeting at which Ms Clark informed him a final outcome decision had been made to terminate his employment. The SAW documentation recorded that, after several attempts were made by ACC to contact Orora, it was agreed with Mr Hanif's case manager the SAW programme would be closed.

[117] Mr Hanif's evidence of having participated in the SAW programme until Orora's withdrawal of alternative duties is consistent with the SAW documentation. Ms Clark's finding that he had advised the OT he would not cooperate with the SAW programme is not consistent with that documentation.

[118] I turn to Ms Clark's letter of 12 December 2019 notifying Mr Hanif of the issues Orora believed to be of a serious nature that constituted possible breaches of company policy by him, including poor quality performance resulting in excessive waste. According to Mr Harrison this was one of the reasons for Orora's dismissal of Mr Hanif.

[119] Ms Clark's attached Investigation report did not refer to this matter but Mr McOmish's notes of the 18 December 2019 meeting record the following:

- Documents had been provided regarding waste on the afternoon shift
- There is a statistical differential of five tonne between day shift and afternoon shift
- The differential is greater when [Mr Hanif] is present
- [Mr Hanif] believes the waste is not his doing
- Reviewed sign off sheet on the copar, which had [Mr Hanif's] signature on it

[120] The Union record of the disciplinary meeting made no reference to the waste issue being raised.

[121] In Mr McOmish's evidence to the Authority he referred to the waste issues and the target set in the PIP and to Mr Hanif's failure to take responsibility to manage his team and oversee the quality issues raised during the PIP process. Mr McOmish's evidence was that all the waste and quality matters had been raised with Mr Hanif before, and his responses to those issues in the 18 December 2019 disciplinary meeting were similar to his previous responses when Mr McOmish had raised them.

[122] One of those matters was identified by Mr McOmish as having taken place in early April 2019. His evidence was that the quality and waste issues mostly came about because of a failure to correct problems earlier accompanied by a lack of checking and reporting that were part of the processes and also part of the Team Leader's obligations.

[123] It was clear from Mr McOmish's evidence that he had formed a view at an early stage that Mr Hanif was to blame for such problems and that he (Mr Hanif) had refused to change his way of operating. Mr McOmish noted this as a reason for instigating the PIP that was put in place from 15 April 2019. The quality and waste matters that formed part of the company's reasons for dismissing Mr Hanif had all been canvassed previously, either before or during the PIP process and were up to 11 months old at the time Mr Hanif was dismissed.

[124] I have already found the performance review process was not undertaken fairly. After considering the evidence from the company, I am not persuaded the disciplinary process was undertaken fairly either. There was, by Mr McOmish's account, considerable reliance placed on the performance process. Matters discussed during that process were revisited, and formed part of the reasoning for Mr Hanif's dismissal. Those matters had not resulted in warnings after their initial raising which suggests they were not viewed as seriously at the time as they were later.

[125] For all the above reasons, I conclude Mr Hanif's dismissal was not the action a fair and reasonable employer could take in all the circumstances at the time.

Summary

[126] I have found Mr Hanif was unjustifiably disadvantaged in his employment by Orora's unfair treatment of him in the course of the PIP it placed him on between 15 April and 15 October 2019. I have also found the employer unjustifiably disadvantaged Mr Hanif by suspending him from his employment on 29 October 2019 and unjustifiably dismissed him on 5 March 2020.

Remedies and contribution

[127] Mr Hanif is not seeking lost wages as he was in receipt of ACC weekly compensation at the time of the Authority's investigation meeting. He seeks compensation for his personal grievances and believes a global award of \$35,000 to be appropriate for his unjustifiable dismissal and the unjustifiable actions by his employer that disadvantaged him in his employment.

[128] Mr Smyth submits the following factors support an award of this magnitude:

- Mr Hanif's long employment with Orora;
- the egregious nature of the employer's conduct in undertaking the dismissal and was motivated by an imminent sale of the business;
- the dismissal was summary; and
- the evidence from Mr Hanif of the psychological harm he suffered arising from his dismissal, including anxiety, a deep sense of shame and of having let his family down.

[129] Mr Hanif also seeks compensation for loss of a benefit under s 123(1)(c)(ii) of the Act. His claim is in three parts: the first relating to sick leave. Mr Hanif seeks payment of 20 days' sick leave under clause 37.9.1 of the collective agreement. That clause provides that employees with six months' current continuous service shall be paid up to 20 days accumulated and unused sick pay. The provisions apply in the case of redundancy. Mr Hanif had 65 days of sick leave available to him at the time of his dismissal.

[130] Mr Smyth submits the entitlement exists in addition to any redundancy or severance pay and that, if Mr Hanif is entitled to be paid one of those payments, he is also entitled to be paid the 20 days' unused and accumulated sick pay.

[131] Mr Smyth seeks to use the remainder of his available accumulated sick leave to top up his ACC weekly compensation, which was set at 80 percent of his remuneration. Mr Smyth submits that, while Mr Hanif had not applied for this top up during his employment, it had been open for him to do so. He acknowledges this would have required the employer's approval but submits it would have been unjustified on the employer's part to refuse.

[132] Mr Hanif claims the employer contribution to his KiwiSaver superannuation plan in relation to any sick leave that is payable. Mr Smyth submits that, as sick leave is treated as wages, superannuation contributions can be claimed on any sick leave paid.

[133] The second part of Mr Hanif's claim to compensation for loss of a benefit relates to a Southern Cross benefit. No information was provided about this benefit, and no submissions made about the claim. I note it is not a contractual entitlement under the collective agreement and nor does it feature in the Employee Handbook.

[134] The third part of Mr Hanif's claim is for 22 weeks' severance pay. Mr Smyth bases his submissions on a 2021 determination of the Authority.⁸ In that case the Authority determined Orora employees who were employed under the collective agreement and who transferred to the new owner when the business was sold were entitled to severance pay equal to half of the appropriate redundancy payment.

[135] Orora submits Mr Hanif's ACC entitlements limit what he can recover by way of reimbursement under the Act. Mr Harrison notes that Mr Hanif's income after his dismissal was unaffected as he had been, and remained, in receipt of ACC weekly compensation. Mr

⁸ *E tū Incorporated v Orora Packaging New Zealand Ltd* [2021] NZERA 169

Harrison submits Mr Hanif cannot claim benefits he would not have received in any event had the employer decided not to terminate his employment. This also applies to an award for a loss of a benefit under s 123(1)(c)(ii) of the Act. Those provisions of the Act require a causal link with the personal grievance as the loss that can be claimed is restricted to a benefit the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

[136] Mr Harrison notes that the collective agreement does not provide for the top-up to his ACC weekly compensation and submits, if Mr Hanif had wished to apply to his employer for this, he had adequate time to do so during his employment. He did not lose that opportunity as a result of his personal grievance, and nor could it have reasonably been expected to be obtained if the grievance had not arisen in Mr Harrison's submission.

[137] In relation to the claim for severance compensation, Mr Harrison submits that Mr Hanif could not reasonably have been expected to obtain that severance payment as it would require a degree of certainty that he would be in employment at the time of the business ownership change and that he would have been made an offer to transfer to the new owner. That was unlikely in his submission, given the injury Mr Hanif had sustained and its effect on his ability to undertake the duties of team leader or operator. Those factors, and the length of time he had been on ACC, made the termination of Mr Hanif's employment inevitable.

[138] Regarding the compensation sought for hurt and humiliation, Mr Harrison submits that, while the dismissal was summary, it followed a long exhaustive PIP process and options being made available to Mr Hanif to step down from the team leader role or to resign on one month's notice. Orora rejects Mr Hanif's dismissal being classified as egregious or motivated by the impending sale of the business as it was caused by performance issues and a breakdown in trust of Mr Hanif.

[139] The company submits any compensation awarded should be subject to deduction for Mr Hanif's contribution, in particular, because:

- Mr Hanif failure to meet performance expectations formed part of the reasons for his dismissal;
- He failed to communicate his absences to his employer in a manner that would have helped preserve trust and confidence in him; and
- He failed to represent accurately the extent of his training and did not engage in addressing his leadership of the team which contributed to the breakdown in relations.

[140] After carefully considering the parties' submissions and evidence, I accept that Mr Hanif suffered humiliation, loss of dignity and injury to feelings from his dismissal and from the performance process I have found to have been unfair and from the unjustifiable suspension imposed on him. I find an award of compensation to be appropriate and, taking all factors into account, including that, while Mr Hanif was mainly successful in his claims, he did not succeed in all of them, I consider a global amount of \$28,000 to be a fitting amount.

[141] I have considered, but do not accept Mr Hanif's claim to be paid 20 days' sick leave under the collective agreement redundancy provisions. At the time of Mr Hanif's dismissal, and for the preceding three months, he had been in receipt of ACC weekly compensation. According to the company's records, which I did not understand Mr Hanif to dispute, his last day in the workplace had been 5 December 2019.

[142] Mr Hanif's argument to entitlement to the payment of 20 days' sick leave under clause 37.9.1 of the collective agreement rests on the premise that, but for the dismissal, he would still have been in employment at the date of sale of the business. I do not accept that premise. Mr Hanif was receiving weekly compensation payments from ACC at the time which means he was unfit for work. He had been off work for three months at the time of his dismissal which I understand took place some weeks before the business changed owners.

[143] I am unwilling to speculate whether Mr Hanif's employment would have remained afoot at the date of sale of the business. Without that certainty I cannot find he has a claim to the payment of 20 days' sick leave.

[144] For the same reason, I find Mr Hanif has no claim to the 22 weeks' severance payment he has claimed.

[145] I also decline Mr Hanif's claim to use the sick leave he had available to top up his ACC weekly payments. There is no entitlement to such a top up under the collective agreement and no reference to it in the Employee Information Handbook. It may be a discretionary matter for the employer to consider on a case by case basis but it does not appear to be an entitlement. I have no jurisdiction to fix new terms and conditions of employment for Mr Hanif, which is in effect what he is asking me to do.⁹

⁹ Section 161(2) of the Act refers.

[146] Finally, I do not consider that Mr Hanif contributed to the situation that gave rise to his personal grievances and there will be no deduction from the sum awarded.

Orders

[147] Orora Packaging New Zealand Limited is ordered to pay Mr Hanif \$28,000 in compensation for the humiliation, loss of dignity and injury to feelings he sustained as a result of his personal grievances. The payment is to be made without deduction, under s 123(1)(c)(i) of the Act.

Costs

[148] Costs are reserved. 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 Hanif 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 Orora would 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.

[149] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁰

Trish MacKinnon
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.