

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 765  
3195159

BETWEEN ANANT SHARMA  
Applicant

AND RODNEY FARM 'N'  
MACHINERY LIMITED  
Respondent

Member of Authority: Jeremy Lynch

Representatives: Applicant in person  
Jim Hogg for the Respondent

Investigation Meeting: 5 and 14 September 2023 at Auckland

Submissions and further 21 and 28 September 2023, 11 and 12 October 2023  
information received: from the Applicant  
19 September 2023 from the Respondent

Date of Determination: 19 December 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Anant Sharma was employed by Rodney Farm 'N' Machinery Limited (Rodney Farm) on 12 July 2021 in the position of Serviceman/Truck Driver – Class 4.

[2] The parties' employment relationship ended in July 2022.

[3] Mr Sharma says he was unjustifiably (constructively) dismissed by Rodney Farm. He does not claim that his employment was disadvantaged by any unjustifiable action(s) on the part of Rodney Farm.

[4] In addition, Mr Sharma says he is owed arrears of wages, arrears of sick leave, and arrears of holiday pay. Mr Sharma also claims that Rodney Farm made an unlawful deduction from his pay, and failed to deduct and/or make compulsory contributions to

KiwiSaver on his behalf, a flow-on effect of which was that he did not receive a government subsidy applied to his KiwiSaver fund.

[5] Rodney Farm does not accept Mr Sharma has a personal grievance. In its statement in reply, Rodney Farm accepts that it is in arrears to Mr Sharma for one day's sick leave, unpaid wages of two hours, and limited KiwiSaver contributions.

[6] On the face of it, Mr Sharma does not appear to have raised his personal grievance with Rodney Farm until he lodged his statement of problem in the Authority on 2 November 2022, some 112 days after the employment relationship ended.

[7] The Authority held a case management conference by telephone with the parties on 25 August 2023 (the August CMC), to address the issue of whether Mr Sharma had raised his personal grievance within the statutory 90-day time period.

[8] The Authority directed that this issue would be addressed at the start of the investigation meeting by way of a preliminary matter.

[9] In addition, Mr Sharma was given the opportunity to seek leave of the Authority to raise his personal grievance out of time.

### **The Authority's investigation**

[10] For the Authority's investigation, a comprehensive statement of problem was filed by Mr Sharma. This contained a number of supporting documents and set out the details of the employment relationship problems he wished the Authority to determine, and set out the effects on him of the alleged employment relationship problems.

[11] As recorded in the directions of the Authority issued to the parties on 13 February 2023, Mr Sharma was given the opportunity to lodge a witness statement, however, he chose not to provide one. Mr Sharma gave extensive oral evidence at the investigation meeting.

[12] For Rodney Farm, witness statements were lodged by Chris Fong and Devend Chandra. In addition, Rodney Farm's Director, Jim Hogg, gave extensive oral evidence.

[13] The Authority was assisted by an interpreter of the Hindi language at the investigation meeting.

[14] The Authority was not able to complete taking the witnesses' evidence on the initial day allocated for investigation. A further (non-consecutive) investigation meeting date was allocated to the matter, and the evidence concluded. Submissions were made at the end of the second and final day of the investigation meeting.

[15] The Authority called for further documents to be provided by both parties. In addition to the requested information, on an unsolicited basis Mr Sharma also provided further documents and information on 11 and 12 October 2023. The Authority provided this additional information to Rodney Farm for comment.

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

### **The issues**

[17] By way of a preliminary matter, the Authority must determine whether Mr Sharma has raised his personal grievance within the statutory 90-day time period.

[18] In addition, the Authority is required to investigate and determine the following issues:

- (a) Is Mr Sharma owed any arrears of wages for hours worked?
- (b) Is Mr Sharma owed sick leave pay?
- (c) Is Mr Sharma owed arrears of annual leave?
- (d) Did Rodney Farm make an unlawful deduction from Mr Sharma's final pay?
- (e) Should Rodney Farm remit arrears of KiwiSaver contributions to the Inland Revenue Department (IRD) on behalf of Mr Sharma?
- (f) If Mr Sharma is found to have raised his personal grievance within the statutory 90-day period, does Mr Sharma have a personal grievance for unjustified disadvantage and/or dismissal?
- (g) If Rodney Farm's actions are not justifiable, what remedies (if any) should be awarded, including:
  - (i) Compensation under s 123(1)(c)(i) of the Act?

- (h) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Sharma that contributed to the situation giving rise to his grievance?
- (i) Should either party contribute to the costs of representation of the other party?

### **Background**

[19] Rodney Farm was incorporated in 2006 and provides repair and maintenance services for farming equipment and motorised machinery from its premises in Te Hana, North of Wellsford.

[20] Mr Sharma was offered employment by Rodney Farm as a Serviceman/Truck Driver Class 4 on 7 July 2021. Mr Sharma began his employment with Rodney Farm on 12 July 2021.

[21] Mr Sharma gave notice of his resignation on 15 June 2022, and his last day of employment was 13 July 2022.

### **Relevant law**

[22] In determining this employment relationship problem, the following law is relevant.

#### *Duty of Good Faith*

[30] Section 4(1) of the Act requires the parties to an employment relationship to:

- (1) The parties to an employ specified in subsection (2) -
  - (a) must deal with each other in good faith; and
  - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
    - (i) to mislead or deceive each other; or
    - (ii) that is likely to mislead or deceive each other.
- (1A) The duty of good faith in subsection (1)—
  - (a) is wider in scope than the implied mutual obligations of trust and confidence; and
  - (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative...

*The test of justification*

[31] In determining whether a dismissal or an action is justified, the Authority applies the test of justification set out in s 103A of the Act. Section 103A provides:

- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
- (3) In applying the test in subsection (2), the Authority or the court must consider—
  - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
  - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
  - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
  - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

...

[32] The Authority applies this test in circumstances of actual dismissal, as well as constructive dismissal.

*Raising a personal grievance*

[33] Section 114 of the Act provides:

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), 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.
- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—

(a) is satisfied that the delay in raising a personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and

(b) considers it just to do so.

...

[34] As provided under s 114(1), a fundamental requirement is that the grievance is raised with the employer, within the statutory 90-day time period.

[35] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Her Honour Judge Holden summarised the applicable principles for raising a personal grievance:<sup>1</sup>

[36] 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 have been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or his preferred process for dealing with it in the 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.

[38] 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 is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[36] However, in *Shaw v Bay of Plenty District Health Board* the Court of Appeal noted that "... not every criticism of an employer, or the culture within a workplace, will obviously constitute a personal grievance."<sup>2</sup>

<sup>1</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36] – [38].

<sup>2</sup> *Shaw v Bay of Plenty District Health Board* [2022] NZCA 241 at [19].

*Nature of the personal grievance may be found to be different*

[37] Section 122 of the Act provides:

Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.

[38] Mr Sharma is therefore potentially able to establish a personal grievance for unjustified disadvantage under s 122, which provides the Authority jurisdiction to find that Mr Sharma has a different type of grievance from that alleged.

*Constructive dismissal*

[39] It is well established that an employee may be constructively dismissed by their employer despite no explicit words of dismissal having been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* held that constructive dismissal includes, but is not limited to, cases where:<sup>3</sup>

- (a) an employer gives an employee a choice of resigning or being dismissed;
- (b) an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- (c) a breach of duty by the employer causes an employee to resign.

### **Preliminary jurisdictional issue**

[40] On its face, it appears that Mr Sharma raised a personal grievance for the first time in his statement of problem, which he lodged in the Authority on 2 November 2022. The Authority served a copy of the statement of problem on Rodney Farm on 3 November 2022. If this was the first time Mr Sharma raised a personal grievance with Rodney Farm, it is well outside the statutory 90-day timeframe, and consequently cannot proceed.

[27] In his statement of problem, Mr Sharma complains about a range of behaviours on the part of Rodney Farm.

[28] Mr Sharma's statement of problem sets out that "... I am a victim of constructive dismissal because of being demoted as labour". When questioned by the Authority, Mr Sharma clarified that that series of instances set out in his statement of

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<sup>3</sup> *Auckland Shop Employees Union v Woolworths NZ Limited* [1985] 2 NZLR 372.

problem are listed to support his claim of constructive dismissal. He clarified that he was not claiming that these instances, either separately or collectively, constituted a personal grievance for unjustifiable disadvantage.

[29] However, these complaints (individually or collectively) could in fact constitute a disadvantage grievance. The Authority must also consider whether Mr Sharma has a (validly raised) personal grievance for unjustified disadvantage.

*When was a personal grievance raised for unjustified dismissal?*

[41] Even if Mr Sharma is able to meet the high threshold for establishing a constructive dismissal, he is still required to have raised this as a personal grievance within the statutory 90-day period.

[42] Following the August CMC, the Authority issued written directions to the parties, dated 28 August 2023. Contained in these directions, was a direction providing for Mr Sharma to make an application for leave to raise his personal grievance out of time, should he wish to do so.

[43] Absent an application under s 114(3) of the Act for leave to raise a grievance out of time, regardless of the type of grievance he wishes the Authority to determine, Mr Sharma must have raised his grievance with Rodney Farm within the statutory 90-day time period provided for under s 114(1) of the Act. Because he chose not to make an application for leave to raise his grievance out of time, the Authority can only consider Mr Sharma's personal grievance claim if satisfied that it was raised within the statutory 90-day time period.

[44] Instead, Mr Sharma referred the Authority to a copy of an email sent by him to Rodney Farm on 28 July 2022, which was attached to his statement of problem.

[45] At the start of the investigation meeting, Mr Sharma told the Authority that this email was evidence that he had raised his personal grievance for unjustified (constructive) dismissal within the statutory 90-day statutory timeframe.

[46] The email is in response to an email sent by Jim Hogg, Rodney Farm's director, earlier in the day on 28 July 2022. In Mr Hogg's email, he addresses Mr Sharma's concerns that his final pay had been incorrectly calculated, and records that a deduction

was made from Mr Sharma's final pay, advising "I have charged \$140 for the gate you damaged through incompetence and have agreed to and had 8 months to fix."

[47] Mr Sharma in his reply to Mr Hogg requests a "...detailed summary of my payment so I can tally it with my calculation". His email then goes on to raise a series of issues, all of which are set out in some detail in Mr Sharma's statement of problem, as separate claims.

[48] In addition, Mr Sharma's email sets out "Although I had gone through some life-threatening situation in your company these are some more reason I resigned from your job".

[49] Mr Sharma resigned on 15 June 2022, giving four weeks' notice. His last day of employment was 13 July 2022. Mr Sharma's 28 July email would be within the 90-day statutory timeframe for raising a personal grievance for unjustified dismissal.

[50] However, upon considering the context in which the email was sent, the Authority is not satisfied that Mr Sharma's 28 July 2022 email constitutes the raising of a personal grievance for unjustified (constructive) dismissal.

[51] This is for two main reasons. Firstly, this email thread was commenced by Mr Sharma on 25 July 2022, when he wrote to Mr Hogg, chasing up his unpaid final pay. He asks "...please send me my full and final settlement details i.e. annual holidays paid (details) and last two weeks' pay status."

[52] Mr Hogg responded on 28 July 2022, advising that Mr Sharma "... received four weeks holiday pay and your final wages. No deduction was made for your fraudulent sick leave claim which you should replay ...". Mr Hogg then advises of the \$140 deduction in respect of the damaged gate.

[53] Mr Sharma's 28 July 2022 email (which Mr Sharma says is evidence of him raising a personal grievance) starts off with him requesting of Mr Hogg: "Can you please send me the detailed summary of my payment so I can tally it with my calculation?" This was the purpose of Mr Sharma's email, and not the raising of a personal grievance for unjustified dismissal.

[54] Furthermore, the other hurdle Mr Sharma faces in establishing that this email was sufficient to raise a personal grievance, is that nothing in his email would indicate

that he was alleging a personal grievance that he wanted Rodney Farm ‘to address’, as required under s 114(2) of the Act. The only thing in Mr Sharma’s email which indicates he wanted Rodney Farm to address, is the issue of his final pay, and in particular, his request to be provided with a pay summary or some type of calculation in order that he can understand what his final pay comprises. His email concludes with the request, “Please send my settlement details asap”.

[55] On receiving this email, Rodney Farm would not have been aware that this was in fact a personal grievance for unjustified constructive dismissal (as claimed by Mr Sharma), which it was required to address. This email does not make Rodney Farm aware that Mr Sharma wanted it to address any type of personal grievance. Mr Sharma’s 28 July 2022 email does not comply with the provisions of s 114(1) or s 114 (2) of the Act. As such this email does not raise a personal grievance.

[56] In response to questions from the Authority, at the conclusion of the first day of the investigation meeting Mr Sharma accepted that he had not raised his grievance within the statutory 90-day time period.

[57] However, when the investigation meeting resumed Mr Sharma resiled from this position, telling the Authority that he had raised his grievance in time because shortly after his employment ended, he had contacted Employment New Zealand (ENZ) by telephone and told ENZ about his personal grievance.

[58] ENZ is part of the Ministry of Business, Innovation and Employment (MBIE). A personal grievance must be raised with the employee’s employer.<sup>4</sup> Neither ENZ nor MBIE were Mr Sharma’s employer. A discussion with ENZ or MBIE about a personal grievance does not raise the grievance with Rodney Farm.

[59] Mr Sharma’s personal grievance for unjustified constructive dismissal was raised for the first time 112 days after the employment relationship had ended. This is well past the statutory 90-day time limit under s 114(1) of the Act. Mr Sharma did not make an application for leave to raise his grievance out of time under s 114(3) of the Act. Rodney Farm does not consent to the grievance being raised out of time. Mr Sharma’s personal grievance for unjustified (constructive) dismissal is therefore out of time, and cannot proceed.

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<sup>4</sup> Employment Relations Act 2000, s 114(1).

*Potential unjustified disadvantage personal grievances*

[60] Although in his statement of problem, Mr Sharma claimed he was constructively dismissed, and sought to raise a personal grievance for unjustified dismissal, the “Incident and Dues Report” contained within the statement of problem sets out a series of complaints, all of which have the potential to evidence that Mr Sharma had (in fact and in law) raised a personal grievance for unjustified disadvantage.

[61] Mr Sharma sets out 23 complaints which he says show that he was constructively dismissed.

[62] For the sake of completeness, the Authority questioned Mr Sharma about each of his 23 complaints, to assess whether any of them had been raised within the statutory 90-day time period and/or constitute a personal grievance for unjustified disadvantage. The complaints as set out in the statement of problem, and a summary of Mr Sharma’s responses to questions from the Authority are summarised and considered below.

*Complaint 1: Mr Sharma had been employed on the basis that he would be commencing an apprenticeship with Rodney Farm after three months, but no apprenticeship training had commenced*

[63] In response to questions from the Authority, Mr Sharma accepted that nothing in the employment agreement provided for an apprenticeship, and accepted that there is a provision in the employment agreement which records that “This agreement replaces any previous contract, agreement, or arrangement however expressed”.

[64] Mr Sharma may well have hoped for apprenticeship training, but nothing in the parties’ employment agreement provides a contractual entitlement to an apprenticeship.

[65] Mr Sharma did not claim to have raised this as a personal grievance other than in his 2 November 2022 statement of problem.

[66] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

*Complaint 2: Mr Sharma was forced to lie to Mr Hogg by another employee; and he would sometimes have to work with heavy machinery whilst unsupervised.*

[67] In response from questions from the Authority, Mr Sharma said that he had raised the issue of his co-worker forcing him to lie to Rodney Farm about the co-worker's attendance, and also the issue of having to work alone unsupervised. Mr Sharma said he did this verbally, to Mr Hogg, but could not remember when this was. Mr Sharma said he did not suffer any negative consequences as a result of his (allegedly) being forced to lie.

[68] For Rodney Farm, Mr Hogg says neither of these issues were raised with him by Mr Sharma during his employment.

[69] Mr Sharma was employed as a Serviceman/Truck Driver Class 4. The nature of such work means that under the employment agreement, Mr Sharma was required (and indeed had agreed) to work alone as part of his employment (for example when driving a truck).

[70] The Authority is not satisfied that the grounds set out under this complaint could form the basis of a personal grievance. Nor is the Authority satisfied that this issue was raised as a personal grievance within the statutory 90-day period.

*Complaint 3: on 29 July 2021 Mr Sharma was required to travel to Pukenui in Northland for a job. Including travel time, Mr Sharma worked a 16-hour day, but was only paid for eight hours*

[71] Pukenui is some 285 kilometres from Rodney Farm's premises at Te Hana. Rodney Farm accepts that travel time of over three and a half hours each way is reasonable. However, Rodney Farm says that the particular job in Pukenui took no more than two hours to complete, and therefore disputes Mr Sharma's claim that he worked a 16-hour day, including travel time.

[72] The difficulty for Rodney Farm is that it did not keep a proper wages and time record as required under s 130 of the Act. Mr Hogg acknowledged Rodney Farm's inadequate record keepings when questioned by the Authority. This was an appropriate concession to make.

[73] In the absence of any proper wages and time record keeping on the part of Rodney Farm, the Authority accepts Mr Sharma's evidence that he began work at

6.00 am on this day, and arrived home from Pukenui at 10.00 pm that day, some 16 hours later. Under s 69ZD of the Act, for a work period of 16 hours Mr Sharma was entitled to two unpaid 30-minute meal breaks. It is not disputed that breaks were taken, however Mr Sharma should have been paid for 15 hours on this day but was only paid for eight hours. He is entitled to arrears of seven hours.

[74] The Authority finds Mr Sharma is owed wage arrears of seven hours in respect of the Pukenui trip. Rodney Farm is to pay to Mr Sharma the sum of \$161 (gross), being seven hours' pay at Mr Sharma's hourly rate of \$23.00.

[75] This claim was raised for the first time in Mr Sharma's 2 November 2022 statement of problem. This is well outside of the statutory 90-day time limit. As such this claim cannot form the basis of a valid personal grievance.

*Complaint 4: on 8 August 2021, Mr Sharma was injured after falling from a forklift*

[76] Mr Sharma alleges that he was instructed by Rodney Farm to tell his doctor that for ACC purposes, he injured himself in his garden and not by falling from a forklift, so as Rodney Farm could avoid an increased ACC levy.

[77] For Rodney Farm, Mr Hogg strongly denied this allegation.

[78] When questioned by the Authority, Mr Sharma confirmed that apart from the day following the accident, he had never had any other discussions about the injury with Mr Hogg and confirmed that he had not raised this with Rodney Farm as a personal grievance.

[79] This claim was raised for the first time in Mr Sharma's 2 November 2022 statement of problem. This is well outside of the statutory 90-day time limit. As such this claim cannot form the basis of a valid personal grievance.

*Complaint 5: on 12 November 2021 the foreman removed all tools from the yard, meaning Mr Sharma had to bring his own tools, some of which broke during the course of his work but were not replaced by Rodney Farm*

[80] Rodney Farm refutes that every single hand tool was removed from the yard. To support this position, it supplied a comprehensive list of tools that were available at the yard for Mr Sharma's use.

[81] When questioned by the Authority, Mr Sharma confirmed that at no stage was he instructed by Rodney Farm to bring and/or use his own tools; and also confirmed that he was not seeking reimbursement of the cost of replacement for his broken tools.

[82] Mr Sharma said he raised with Rodney Farm the fact that he had broken a drill bit which belonged to him. The Authority accepts that Mr Sharma discussed the broken drill bit with Rodney Farm, but following the approach of the Court of Appeal in *Shaw*,<sup>5</sup> this is perhaps best seen as a 'gripe' and does not meet the requirements for raising a grievance under s 114 of the Act.

[83] This claim was raised for the first time in Mr Sharma's 2 November 2022 statement of problem. This is well outside of the statutory 90-day time limit. As such this claim cannot form the basis of a valid personal grievance.

*Complaint 6: During the Christmas 2021 period, other employees were able to take two weeks' annual leave, but Mr Sharma had to work over this period*

[84] It is common ground that Mr Sharma's employment commenced in July 2021. An employee's entitlement to annual leave arises after the completion of 12 months of continuous service.<sup>6</sup> As Mr Sharma had not completed 12 months' service, he had no entitlement to annual leave.

[85] Mr Sharma confirmed that he was paid full wages for the hours that he worked over this period, and confirmed he was not bringing a wage arrears claim in respect of this period.

[86] There is nothing in the employment agreement which entitles Mr Sharma to annual leave during the Christmas period. Mr Sharma accepts that he raised no complaint about this issue with Rodney Farm at the time.

[87] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

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<sup>5</sup> Above n 2.

<sup>6</sup> Holidays Act 2003, s 16(1).

*Complaint 7: On 10 February 2022, Mr Sharma sent a text message to Mr Hogg, advising that there were no tools in the yard. Mr Sharma received no reply to his text message*

[88] When questioned by the Authority, Mr Sharma confirmed that he suffered no negative consequences as a result of the alleged shortage of tools at the yard. He confirmed he was paid his full wages during this period, and that Rodney Farm made no allegations of inadequate performance of his duties.

[89] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day period.

*Complaint 8: From time to time Rodney Farm would deduct hours from Mr Sharma's pay without reason; and Rodney Farm failed to pay him sick leave on 16 February 2022 when he stayed home from work to look after his sick son*

[90] Mr Sharma did not provide any detail around his claim that from time to time Rodney Farm made deductions from his pay. He could not advise the Authority when the alleged deductions occurred, or any information as to quantum, nor does he say he raised this with Rodney Farm, other than in his 2 November 2022 statement of problem.

[91] Rodney Farm says it paid Mr Sharma correctly.

[92] In respect of the claim for sick leave from 16 February 2022, Rodney Farm accepts that sick pay was (initially) not provided for this day. Mr Hogg explained that this was because Rodney Farm had not been made aware of the reason for Mr Sharma's absence. He said that Rodney Farm promptly paid Mr Sharma sick pay for this day, within one day of being advised of the reason for his absence.

[93] Mr Sharma confirmed that the sick pay for 16 February 2022 was paid to him the day after he raised this with Rodney Farm. Mr Sharma also confirmed that, apart from bringing this issue to Rodney Farm's attention in February 2022, he had not raised this as an issue with Rodney Farm on any subsequent occasion.

[94] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

*Complaints 9 and 10: on 14 March 2022 Mr Sharma requested a copy of his employment agreement, payslips, and KiwiSaver details; and Rodney Farm failed to make KiwiSaver deductions and/or contributions on behalf of Mr Sharma*

[95] Rodney Farm does not dispute that Mr Sharma asked for payslips, and it accepts that these should have been provided at the time of Mr Sharma's request but were not.

[96] However, other than his initial request, Mr Sharma did not raise this issue with Rodney Farm until his 2 November 2022 statement of problem. This is well outside of the statutory 90-day time limit.

[97] When questioned by the Authority, Mr Sharma confirmed that he had been provided with a copy of his employment agreement shortly after requesting this from Rodney Farm. Mr Sharma said that the copy Rodney Farm provided him was not signed, however he accepted that he may not have requested a signed copy (and merely asked for 'a copy') from Rodney Farm.

[98] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

[99] The issue of KiwiSaver deductions is addressed later in this determination. However, the Authority finds that this particular claim has not been raised as a valid personal grievance.

*Complaint 11: Mr Sharma was forced by the foreman to buy tools because there were no tools available in the yard for him to use. As a result of this, Mr Sharma had to bring his own tools to use and was not provided with any compensation for the breakage of his tools*

[100] This complaint is essentially a repeat of Complaint 3. Mr Sharma confirmed that at no stage was he required to bring his own tools, nor did he suffer any negative treatment as a result of the alleged lack of tools at the yard. Mr Sharma also confirmed that at no stage did he ever ask Rodney Farm to reimburse him for the cost of his broken tools.

[101] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

*Complaint 12: From July to December 2021, Mr Sharma was working 8.00 am to 5.00 pm (with a 30-minute unpaid meal break). He should have been paid 42.5 hours per week but was only paid for 40 hours per week*

[102] This is a claim for arrears of wages, which is addressed later in this determination.

[103] Mr Sharma accepted he had not raised this issue as a disadvantage grievance.

[104] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

*Complaint 13: Mr Sharma's apprenticeship did not commence until eight months after his employment had started*

[105] As already noted in this determination, Mr Sharma had no contractual entitlement to an apprenticeship.

[106] The Authority finds that this particular claim cannot form the basis of a personal grievance.

*Complaint 14: On 1 March 2022 Mr Sharma was sent to Auckland to pick up a delivery, in a truck with no current registration. After Mr Sharma had collected the delivery, the rear door of the truck broke. Mr Sharma was unable to reach the site foreman that day because he was absent. As a result, Mr Sharma had to make the return trip in the truck, driving very slowly because of the broken rear door*

[107] When questioned by the Authority, Mr Sharma confirmed that the truck had a current warrant of fitness at the time. In addition, Mr Sharma said that when he was unable to reach the site foreman to advise of the broken rear door, he telephoned Mr Hogg and informed him. Mr Sharma accepted this was the only time he had discussed this issue with Rodney Farm.

[108] When questioned by the Authority, Mr Sharma advised that he did not consider this complaint was relevant to his personal grievance claim.

[109] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

*Complaint 15: On 16 March 2022 Mr Sharma went to Whangarei for a job. While he was there he injured his foot. It was pointed out to Mr Sharma by an employee at the Whangarei site he was visiting, that he was not wearing correct safety footwear. Mr Sharma raised this issue with Rodney Farm but Rodney Farm did not provide him with safety boots*

[110] The issue of not being provided with appropriate safety footwear after requesting it is addressed further on in this determination.

[111] In terms of the injury to his foot, Mr Sharma confirmed he is not claiming that this is related to a personal grievance.

[112] The Authority finds that this particular claim (the injury) does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

*Complaints 16 and 17: On 18 March 2022, Mr Sharma met with Mr Hogg and requested steel-capped safety boots, however, instead of an agreement for Rodney Farm to provide safety boots, Mr Sharma was accused of dishonesty; and on 19 March 2022 Rodney Farm declined to provide safety boots on the basis that this was not a term of the employment agreement*

[113] On the issue of safety boots, Mr Hogg accepted that Rodney Farm should have provided Mr Sharma with safety boots, but did not. Rodney Farm has an obligation to provide PPE (including safety footwear if appropriate),<sup>7</sup> so this was an appropriate concession to make.

[114] Mr Chandra gave evidence that he had given Mr Sharma a pair of safety boots which had belonged to his brother-in-law. The boots were second-hand and he described them as being “not in perfect condition.”

[115] Although he recalled that the boots he gave Mr Sharma were Size 7, he said he was unsure of Mr Sharma’s shoe size and accepted that the boots could well have been the wrong size. He said he gave these second-hand boots to Mr Sharma in January 2022.

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<sup>7</sup> Health and Safety at Work (General Risk and Workplace Management) Regulations 2016, reg 15.

[116] Mr Sharma says he accepted the boots from Mr Chandra, but they had holes in them, and they hurt his feet because they were the wrong size. However, he wore them because he had not been provided with appropriate safety boots by Rodney Farm.

[117] On 17 March 2022, Mr Sharma sent Rodney Farm an email requesting safety boots. He says in his email:

This is with a kind request that since I joined the company I have not received any safety shoes so I was using my own. Now they are not good, and I was told by the digger operator who was present at the time accident in Whangarei, that the shoes I was wearing are not proper safety shoes either. But I keep working. Now every day when I wear those shoes my leg hurts and I had to take sick leave.

Would it not be nice if you can provide me with a good safety boot so I need not to take off from work often. I already conveyed this message to [Devend]. So my request with you is, if you have any budget for the same, please let me know so I can add some money and buy the John Bull (the best quality) safety boot that will keep me fit and will go for a long time.

Kindly look into the matter and do needful at earliest.  
Any help would be highly appreciated.

Regards

Anant

[118] Mr Sharma's evidence is that, on the morning of 18 March 2022 he met with Mr Hogg at Rodney Farm's premises and discussed with him the issue of PPE, and in particular of safety boots.

[119] Mr Sharma says that at this meeting Mr Hogg was non-committal about whether Rodney Farm would provide safety boots. In addition, Mr Sharma says that Mr Hogg accused him of dishonesty in respect of his claimed leg injury at the Whangarei site.

[120] On the evening of 18 March 2022, Mr Sharma sent Mr Hogg a further email in which he sets out:

Hi Jim,

As per our discussion in the morning where you mentioned that I am dishonest, can we please have a one-to-one meeting to discuss my dishonesty and other issues which I mentioned in my previous email?

[121] In response to questions from the Authority, Mr Sharma clarified that the "other issues" mentioned in [his] previous email," referred to his request for safety boots.

[122] In response to questions from the Authority, Mr Hogg accepted that he had accused Mr Sharma of being dishonest but said that this was not in relation to the workplace injury but was to do with Mr Sharma's qualifications and experience, which Mr Hogg said appeared to be overstated by Mr Sharma. Mr Hogg said he regretted his choice of words.

[123] In its statement in reply, Rodney Farm sets out:

Company policy has always been that employees supply their own PPE, including Steel Cap Safety Boots. The company has now changed its policy to supply Steel Cap Safety Boots to all wage and salary earners the company employs from time to time.

[124] It is an employer's obligation to provide personal protective equipment to workers.<sup>8</sup> Where the PPE is provided by the employer, or by an individual employee, it is the employer's obligation to ensure that any such PPE is of a suitable size and fit, and maintained, repaired, or replaced so that it continues to minimise the risk to the worker who uses it.<sup>9</sup> Both parties agree that despite the issue of safety boots being raised by Mr Sharma in March 2022, Rodney Farm did not provide safety boots to Mr Sharma.

[125] Mr Hogg explained to the Authority that following these discussions, he advised Mr Sharma that if Mr Sharma wanted safety boots, he could buy some from The Warehouse, and give Rodney Farm the receipt for reimbursement. Mr Hogg confirmed that he did not receive a receipt from Mr Sharma for reimbursement of safety boots, so he infers from that that Mr Sharma did not buy any safety boots. He made no follow up enquiries with Mr Sharma about this issue, despite Rodney Farm's obligations under health and safety legislation.

*Was a personal grievance raised for unjustified disadvantage?*

[126] This was clearly a matter of significant concern for Mr Sharma. He raised this in writing with Rodney Farm on 17 March 2022. He then met with Mr Hogg on 18 March 2022 to discuss the issue of safety boots. He then sent Rodney Farm a further email in relation to the meeting on 18 March 2022.

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<sup>8</sup> Health and Safety at Work (General Risk and Workplace Management) Regulations 2016, reg 15(2).

<sup>9</sup> Above n 8, reg 17(1)(a) and 17(1)(b).

[127] The Authority finds that the nature of Mr Sharma's complaint was a personal grievance within the meaning of s 103(1)(b) of the Act, and that his written and face to face communications with Rodney Farm complied with s 114 subs (1) and (2) of the Act, by conveying the substance of his complaint to Rodney Farm.<sup>10</sup>

[128] The Authority is satisfied that the 'totality of the communications' discloses that Mr Sharma raised a personal grievance for unjustified disadvantage with Rodney Farm by email on 17 March 2022.<sup>11</sup> It is clear that he alleged a personal grievance that he wanted Rodney Farm to address.

*Finding as to disadvantage grievance*

[129] Mr Sharma has established a personal grievance for unjustified disadvantage. Rodney Farm's failure to provide appropriate safety boots affected Mr Sharma's employment to his disadvantage.

[130] A fair and reasonable employer complies with its statutory obligations.<sup>12</sup>

[131] Rodney Farm's refusal to provide Mr Sharma with safety boots was inconsistent with its obligations under health and safety legislation, as well as with its obligations of good faith under the Act (and in particular its obligation to active and constructive in maintaining a productive employment relationship).<sup>13</sup> In refusing to provide Mr Sharma with safety boots, Rodney Farm has not turned its mind to any of the factors set out in s 103A(3) of the Act. This was not what a fair and reasonable employer could have done in all the circumstances at the time this action occurred.<sup>14</sup>

[132] Rodney Farm's action affected Mr Sharma's employment to his disadvantage, and is unjustifiable.

*What remedies (if any) should Mr Sharma receive?*

[133] Mr Sharma has established a personal grievance for unjustified disadvantage. He is therefore entitled to a consideration of remedies.

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<sup>10</sup> Above n 1, at [37].

<sup>11</sup> Above n 1, at [36].

<sup>12</sup> *Tan v Morningstar Institute of Education T/A Morningstar Preschool* [2013] NZEmpC 82 at [53].

<sup>13</sup> Above n 4, s 4(1A)(b).

<sup>14</sup> Above n 4, s 103A(2).

[134] The Authority is satisfied that Rodney Farm's failure to provide safety boots was the cause of significant concern for Mr Sharma. He gave evidence that he was reprimanded by the foreman of a site he was visiting, for not having appropriate safety boots. His evidence was that he suffered physically as a result of not being provided with appropriate footwear. In addition, he gave evidence of experiencing anxiety as a result of Rodney Farm's refusal to provide him with safety boots.

[135] Mr Sharma's evidence establishes that he has experienced harm under each of the heads in s 123(1)(c)(i) of the Act.

[136] In *Wikaira v Chief Executive of the Department of Corrections* the Employment Court confirmed that it was desirable that awards of compensation pursuant to s 123(1)(c)(i) of the Act "...should be, although not over generous, nevertheless fair, realistic and not miserly".<sup>15</sup> Having regard to the particular circumstances of this case, an award of \$5,000.00 under s 123(1)(c)(i) of the Act is appropriate to compensate Mr Sharma for his humiliation, loss of dignity, and injury to feelings.

#### *Contribution*

[137] Where the Authority determines an employee has a personal grievance, it is required under s 124 of the Act to consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance and if the actions so require, reduce remedies that otherwise would have been awarded.

[138] To be taken into account as contributing behaviour, the actions of the employee must be both causative of the outcome and blameworthy.<sup>16</sup> The Authority is satisfied that Mr Sharma did not contribute in a blameworthy way to the circumstances which led to his employment being unjustifiably disadvantaged.

[139] There is to be no deduction from the compensation awarded to Mr Sharma at paragraph [136] for reason of contribution.

*Complaints 18 and 19: On 25 May 2022 Mr Sharma was asked to operate a forklift without a correctly functioning brakes; and on 26 May 2022 Mr Sharma was forced to operate the same forklift without functioning brakes; and was instructed to move an*

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<sup>15</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237].

<sup>16</sup> *Goodfellow v Building Connexion Limited t/a ITM Building Centre* [2010] NZEmpC 82.

*unregistered and unwarranted trailer from Rodney Farm's premises to a customer's yard*

[140] In response to questions from the Authority, Mr Sharma confirmed that despite having concerns about the forklift being unsafe due its brakes, he nevertheless operated the forklift for several hours before voicing his concern to anybody. Mr Sharma did not raise his concerns with anybody until the following day, several hours after he had commenced operating the defective forklift.

[141] In addition, despite providing several photographs of the forklift and the trailer to support his claims that both items were mechanically deficient, Mr Sharma confirmed to the Authority that the photographs were provided for the first time in his statement of problem. Despite expressing his displeasure at the tasks he was being asked to perform, he did not raise or seek a response in relation to either of these issues until he lodged his statement of problem on 2 November 2022, well past the statutory 90-day time limit.

[142] The Authority is satisfied these claims do not form the basis of a personal grievance for unjustified disadvantage, and nor were they raised within the statutory 90-day time period.

*Complaint 20: On 27 May 202 Mr Sharma was required to remove rust from steel beams, but was not provided with safety glasses, earmuffs, gloves, or a dust mask; and the hammer he was given to perform this task had inadequate jerk protection which resulted in Mr Sharma requiring sick leave*

[143] When questioned by the Authority, Mr Sharma confirmed that he was wearing PPE, including his own helmet and gloves.

[144] Rodney Farm's evidence was that all the necessary PPE was available for Mr Sharma to use, however he chose to bring some of his own items of PPE.

[145] The removal of rust from a steel beam would appear to be a task reasonably contemplated by the parties' employment agreement.

[146] Mr Sharma told the Authority that he had not raised this particular complaint with Rodney Farm in writing. He said he thought he might have had a verbal discussion with Mr Hogg about this issue but could not recall when and could not say with certainty that any discussion had occurred. He appeared to accept that he had not raised this as a personal grievance for unjustified disadvantage.

[147] For Rodney Farm, Mr Hogg's evidence was that this issue had not been raised until Mr Sharma's statement of problem was received in November 2022. This is well past the statutory 90-day time limit.

[148] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

*Complaint 21: in May 2022 Rodney Farm failed to pay Mr Sharma sick leave; and he was exploited and harassed by Mr Hogg and the site foreman*

[149] Mr Sharma's evidence was that in his opinion, being asked to work alone is a form of harassment. This was strongly refuted by Rodney Farm, whose evidence was that it is not uncommon for its employees to work by themselves, and that such practice was commonplace within the industry. Driving a truck is one such duty contained in the parties' employment agreement.

[150] The Authority notes that the employment agreement clearly contemplates working alone. The employment agreement records "The Employee must recognise that the Employer and Employee's place of work is not under the direct supervision of the Employer." As such the Authority is not persuaded that this is a form of harassment.

[151] Mr Sharma was unable to give any other examples of what he considered to be exploitation or harassment.

[152] Mr Sharma confirmed that he did not raise his claims of exploitation and harassment during May 2022 with Rodney Farm until he lodged his statement of problem in November 2022. This is well past the statutory 90-day time limit.

[153] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

[154] Rodney Farm accepts it owes Mr Sharma one day's unpaid sick leave in respect of this complaint.

[155] Rodney Farm is ordered to pay Mr Sharma arrears of one days' sick leave from May 2022. For the sake of clarity, Rodney Farm is to pay to Mr Sharma the sum of \$184.00 (gross), being eight hours' pay at Mr Sharma's hourly rate of \$23.00.

*Complaint 22: On 15 June 2022 after he had given notice of his resignation, Rodney Farm tasked Mr Sharma with removing rust from steel beams using an angle grinder*

[156] Mr Sharma confirmed to the Authority that under his employment agreement, this type of work was within the scope of his duties. He also confirmed to the Authority that the first time this complaint had been raised with Rodney Farm was in his statement of problem of November 2022. This is well past the statutory 90-day time limit.

[157] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

*Complaint 23: On 4 July 2022, to harass Mr Sharma, Rodney Farm required him to work underneath a truck using a power wrench; and he was injured while completing this task*

[158] Mr Sharma told the Authority that in his view, upon learning of his resignation, Rodney Farm set out to harass him because the company wanted him to leave. His evidence was that he told the foreman he was resigning, the foreman told him he was going to “teach you a lesson”.

[159] Rodney Farm strongly refuted the allegation of harassment. Rodney Farm’s evidence was that the tasks Mr Sharma had been asked to undertake were well within the scope of his role.

[160] It was clear that Mr Sharma did not enjoy performing this particular task. He told the Authority that in his opinion, Rodney Farm had assigned him this particular task because it wanted to make him end his employment.

[161] The difficulty with this position however, is that by this stage, Mr Sharma had given notice of his resignation, and his employment was already coming to an end.

[162] The Authority is satisfied that assigning this particular task to Mr Sharma was not a form of harassment. It was a reasonable instruction to give to an employee in Mr Sharma’s position.

[163] In addition, Mr Sharma confirmed to the Authority that the first time this issue was raised with Rodney Farm was when he lodged his statement of problem in November 2022. This is well past the statutory 90-day time limit.

[164] The Authority is satisfied this does not form the basis of a personal grievance for unjustified disadvantage, and nor was it raised within the statutory 90-day time period.

### **Arrears claims**

[165] When the investigation meeting resumed for its second and final day, Rodney Farm conceded it had not paid Mr Sharma's sick leave correctly. In addition, Rodney Farm accepted that Mr Sharma was owed arrears of wages (for hours worked but not paid). These were appropriate concessions for Rodney Farm to make.

#### *Wage arrears*

[166] Rodney Farm accepts that Mr Sharma is owed wage arrears for the period beginning 12 July 2021 until 26 February 2022. Mr Sharma alleges 51.5 hours were not paid to him.

[167] As already noted in this determination, Rodney Farm accepted it did not keep a compliant wages and time record. Nor did it provide payslips to Mr Sharma during his employment. As such, the Authority is entitled to rely on the calculation provided by Mr Sharma of his wage arrears.

[168] The arrears claimed by Mr Sharma are not unreasonable, and he was able to provide the Authority with a detailed calculation showing the days on which he says he was not paid for all the hours he worked.

[169] Rodney Farm is ordered to pay to Mr Sharma the sum of \$1,185.50 (gross), being a sum equal to 51.5 hours of unpaid wages, at Mr Sharma's hourly rate of \$23.00.

#### *ACC related issues*

[170] Mr Sharma seeks arrears of unpaid sick leave 4 July 2022 to 10 July 2022; and from 11 July 2022 to 17 July 2022 because he says he was off on ACC during this period as a result of an injury.

[171] The pay slip for this period (prepared by Rodney Farm in February 2023) records Mr Sharma's final pay comprising wages for two days of work during the week beginning Monday, 4 July 2022.

[172] Mr Sharma's evidence is that he was injured while working under a truck on 4 July 2022. He says he continued to work the rest of his shift, and worked the next day because he was experiencing little by way of pain as a result of the injury at that stage. This is consistent with the information recorded on the February 2023 payslip. Mr Sharma worked (and was paid for working) on Monday 4 July 2022, and Tuesday 5 July 2022. Mr Sharma cannot claim arrears for these two days because he received pay for the hours he worked on these days.

[173] However, on 6 July 2023 Mr Sharma attended a medical clinic at Snells Beach, and obtained a medical certificate. The medical certificate records that Mr Sharma experienced a thoracic sprain after becoming stuck under the chassis of a truck on 4 July 2022. The medical certificate lists an ACC file number, and excuses Mr Sharma from work from 6 July 2022 until 13 July 2022.

[174] In terms of Mr Sharma's ACC claim, Rodney Farm was liable to pay Mr Sharma for the first week he was unable to attend work. This is calculated from the Date of First Incapacity (DOFI).<sup>17</sup> Mr Sharma's DOFI is 6 July 2022, being the date he obtained a medical certificate for his injury. The medical certificate clearly sets out that Mr Sharma's injury was a work injury. As such, Rodney Farm should have paid Mr Sharma the first week of compensation, at 80 percent of his expected earnings for the first week following the injury.

[175] But for the workplace injury, Mr Sharma could have expected to work his usual 40-hour week. Eighty per cent of 40 hours is 32 hours, at \$23.00 per hour. Accordingly, Rodney Farm is ordered to pay to Mr Sharma the sum of \$736.00 (gross). This covers Mr Sharma's absence on Wednesday 6 July 2022, Thursday 7 July 2022, and Friday 8 July 2022.

[176] Although Mr Sharma is seeking arrears for 9 and 10 July 2022, Saturday and Sunday are not usual working days for Mr Sharma so he cannot claim wage arrears for 9 and 10 July 2022.

[177] Monday 11 July 2022, and Tuesday 12 July 2022 also form part of the first week compensation period for which Rodney Farm is liable, and are captured in the \$736.00 gross amount Rodney Farm is ordered to pay to Mr Sharma above.

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<sup>17</sup> Accident Compensation Act 2001, ss 97 and 98.

[178] Mr Sharma's last day of employment was 13 July 2022. He therefore cannot seek wage arrears in respect of 14 to 17 July 2022 as the employment relationship had ended.

[179] However, Mr Sharma did remain an employee of Rodney Farm on 13 July 2022. In an email to Rodney Farm of 21 July 2022, Mr Sharma said "I was on ACC" from the week beginning Monday 11 July 2022. It is inferred from this statement that Mr Sharma had complied with his obligation to lodge his claim with ACC,<sup>18</sup> and had been accepted for cover by ACC. 13 July 2022 falls outside of the first week compensation Rodney Farm was obligated to pay to Mr Sharma. Mr Sharma would have been in receipt of ACC compensation from 13 July 2022. Other than first week compensation, Rodney Farm is not obligated to pay Mr Sharma while he is off work for an injury covered by ACC.

*Unauthorised deduction from final pay*

[180] From Mr Sharma's final pay, paid on 13 July 2022, Rodney Farm has deducted the sum of \$340.00, being the costs of repairs to the main gate at its premises, allegedly caused by Mr Sharma.

[181] Under the employment agreement, Rodney Farm is entitled to deduct the cost of a debt owed to it by Mr Sharma, but only after first consulting with Mr Sharma prior to making the deduction.

[182] Rodney Farm accepts that no consultation occurred, it simply made a unilateral deduction from Mr Sharma's final pay.

[183] On the face of it, this would appear to be a clear breach of the provisions of s 4 of the Wages Protection Act 1993. Mr Sharma could have sought a penalty in relation to Rodney Farm's unlawful deduction. However, there is no such application before the Authority.

[184] The amount of, and alleged reasons for the deduction were disputed by Mr Sharma. Mr Sharma should have received this sum in his final pay. The issue of holiday pay is addressed below.

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<sup>18</sup> Accident Compensation Act 2001, s 48.

*Holiday pay*

[185] The anniversary of Mr Sharma's start date was 12 July 2022. Mr Sharma's evidence was that he did not take any annual leave during his employment with Rodney Farm. Rodney Farm accepted this. Therefore, s 24 of the Holidays Act 2003 (the Holidays Act) applies when calculating Mr Sharma's holiday pay for the period of 12 July 2021 to 12 July 2022. For this period, Mr Sharma is entitled to holiday pay calculated based on the greater of either Mr Sharma's ordinary weekly pay as at the date at the end of his employment, or Mr Sharma's average weekly earnings during the 12 months prior to the last pay period before the end of his employment. Mr Sharma's ordinary weekly earnings comprise 40 hours per week at \$23.00 per hour. This gives a gross weekly amount of \$920.00. The weekly average method of calculation provided under s 24(2)(b) of the Holidays Act results in a greater amount, so is the method of calculation Rodney Farm must use.

[186] Rodney Farm provided a copy of Mr Sharma's final pay slip. This appears to have been prepared in February 2023, some seven months after the end of Mr Sharma's employment. This payslip shows that Rodney Farm had calculated Mr Sharma's holiday pay based on 144 hours of accrued leave, or a gross amount of \$3,312.00.

[187] From the summary of weekly earnings spreadsheet provided by Rodney Farm, Mr Sharma was paid for a total of 2,110.5 hours during his employment. At \$23.00 per hour, this equates to total gross earnings of \$48,541.50.

[188] To this sum, must be added the arrears ordered under this determination:

- (a) Wage arrears of \$161.00 (gross) set out at paragraph [74] above;
- (b) Unpaid sick pay of \$184.00 (gross) set out at paragraph [155] above;
- (c) Wage arrears of \$1,185.50 (gross) set out in paragraph [169] above;
- (d) First week compensation of \$736.00, set out in paragraph [175] above.

[189] Mr Sharma's therefore earned the sum of \$50,808.00 during the preceding 12 months.

[190] \$50,808.00 divided by 52 gives an average of \$977.07 (gross) per week.

[191] Rodney Farm accepts that Mr Sharma did not take any annual leave during his employment. He is therefore entitled to payment for four weeks annual leave. Four weeks at \$977.07 (gross) per week is \$3,908.28 (gross).

[192] For 13 July 2022, s 25 of the Holidays Act applies, being a period of employment (albeit only one day) before further entitlement to annual leave has arisen. As set out above, this day falls outside the first week compensation period for which Rodney Farm is liable. Mr Sharma says he was in receipt of ACC cover for this day. There is no information before the Authority of in relation to this. However, the Authority notes that ACC compensation payments do not form part of gross earnings for the purposes of calculating holiday pay under s 25 of the Holidays Act.<sup>19</sup> Given this, it is likely that no holiday pay is owed to Mr Sharma in respect of 13 July 2022.

[193] Rodney Farm paid Mr Sharma final pay of \$2,736.53 (net) on 13 July 2022. This amount included an authorised deduction of \$340.00 as set out above. For this reason, and because of the various arrears awarded above, this calculation is incorrect.

[194] Rodney Farm is to recalculate Mr Sharma's final pay. His annual leave has been calculated as \$3,908.28 (gross). He is entitled to receive this sum, less applicable PAYE, less the net amount paid by Rodney Farm on 13 July 2022. There is to be no deduction in respect of the damaged gate.

#### *KiwiSaver*

[195] At the time he commenced his employment with Rodney Farm, Mr Sharma was enrolled in the KiwiSaver Scheme.

[196] Rodney Farm accepts it failed to make any KiwiSaver deductions from Mr Sharma's wages, and also failed to make any employer contributions for the period of Mr Sharma's employment.

[197] Rodney Farm says it should not be liable for Mr Sharma's unpaid KiwiSaver deductions and contributions until 22 February 2022. Rodney Farm says that Mr Sharma raised the issue of KiwiSaver with it on 22 February 2022, and it accepts it should have been making deductions and contributions from that point.

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<sup>19</sup> Holidays Act 2003, s 14(b)(ii).

[198] However, Mr Sharma's evidence is that he completed a KiwiSaver form at the commencement of his employment and passed this to his supervisor. Mr Sharma says that he indicated on the form that he wished for Rodney Farm to make a three per cent employee contribution deduction from his wages. Rodney Farm should have been facilitating these deductions, and making employer contributions of three per cent from the commencement of Mr Sharma's employment.

[199] Rodney Farm appeared critical of Mr Sharma in relation to the KiwiSaver issue. In its statement in reply, Rodney Farm sets out,

As much as the employer has a responsibility for meeting KiwiSaver obligations, so does the employee. Mr Sharma states he provided the company with his KiwiSaver paperwork but there is no record of said paperwork being received by the company....

[200] Rodney Farm accepts that it did not provide payslips to Mr Sharma during his employment. Having completed his KiwiSaver form at the start of his employment, it was a reasonable assumption for Mr Sharma to make that Rodney Farm was correctly applying KiwiSaver requirements. Without payslips he was entitled to rely on Rodney Farm to comply with KiwiSaver requirements.

[201] Mr Sharma's evidence is that having completed and handed to the foreman his KiwiSaver form, he did not become aware that Rodney Farm was not making KiwiSaver deductions or employer contributions until 22 February 2022. Mr Sharma says that he first learned of the KiwiSaver issue when he contacted IRD in February 2022 as part of an application he was making with his bank for finance to buy a property.

[202] Mr Sharma told the Authority that at the time he commenced his employment with Rodney Farm, he already enrolled in the KiwiSaver scheme. He says he had already worked for at least one previous employer, and made KiwiSaver contributions during such employment. The Authority is satisfied that Mr Sharma was therefore sufficiently well versed in how the KiwiSaver scheme operated. Despite Rodney Farm saying it never received Mr Sharma's KiwiSaver form from the site foreman, it is more likely than not that Mr Sharma did complete such a form and handed this to his supervisor. Having previously enrolled and participated in the scheme, the Authority finds it more likely that Mr Sharma would have wanted to keep contributing to the

scheme. The obligation to ensure KiwiSaver obligations were being met was Rodney Farm's, not Mr Sharma's.

[203] In addition, despite accepting it was aware of the KiwiSaver issue from February 2022, Rodney Farm took no steps to address this matter.

[204] Mr Sharma has a statutory entitlement to participate in the KiwiSaver scheme. Rodney Farm should have made KiwiSaver deductions, together with compulsory employer contributions from the commencement of Mr Sharma's employment.

[205] Accordingly, Rodney Farm is ordered to remit to IRD to be applied to Mr Sharma's KiwiSaver account, an additional three per cent of the sums awarded above (save for the compensation awarded at paragraph [136]) to account for its failure to make employer contributions.

[206] But for Rodney Farm's failure to make employee deductions, Mr Sharma would have been contributing three per cent of his wages towards his KiwiSaver. He is already in receipt of these funds and may choose to apply this sum to his KiwiSaver if he wishes. No order is made in respect of the three per cent employee contribution. How this is resolved is a matter for Mr Sharma.

[207] Mr Sharma also seeks to be compensated for the loss of the government subsidy which was not provided in the absence of contributions to his KiwiSaver scheme.

[208] Under the statutory KiwiSaver scheme, the Crown will match an employee's contributions to their KiwiSaver scheme, by providing that person with member tax credits, to a maximum value of \$521.43 per KiwiSaver year.

[209] Mr Sharma says that but for Rodney Farm's failure to contribute to his KiwiSaver scheme, he would have received the maximum \$521.43 applied to his scheme. He is entitled to this.<sup>20</sup>

[210] Rodney Farm is ordered to remit an additional sum of \$521.43 to IRD, to be applied to Mr Sharma's KiwiSaver scheme.

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<sup>20</sup> *Ritson-Thomas T/A Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [77] – [82].

**Summary of orders**

[211] Within 28 days of the date of this determination, Rodney Farm must pay to Anant Sharma the following amounts:

- (a) compensation in the sum of \$5,000.00 (without deduction) under s 123(1)(c)(i) of the Act;
- (b) wage arrears of \$161.00 (gross);
- (c) wage arrears (unpaid sick leave) of \$184.00 (gross);
- (d) wage arrears of \$1185.50 (gross);
- (e) first week compensation of \$736.00 (gross).

[212] In addition, Rodney Farm is to recalculate Mr Sharma's final pay, and within 28 days of the date of this determination, pay to him holiday pay in the sum of \$3,908.28 (gross), less applicable PAYE and other compulsory deductions, less the amount of final pay already paid to Mr Sharma on 13 July 2022.

[213] Finally, within 28 days of the date of this determination, Rodney Farm is to perform the necessary calculations and remit to IRD to be applied to Mr Sharma's KiwiSaver:

- (a) compulsory employer contributions of three per cent of Mr Sharma's gross earnings (being \$50,808.00) to be applied to his KiwiSaver scheme; and
- (b) Compulsory employer contributions of three per cent of Mr Sharma's total gross holiday pay; and
- (c) an additional net amount of \$521.43 being the member tax credit that would have been applied to Mr Sharma's KiwiSaver scheme, but for Rodney Farm's breach of the provisions of the KiwiSaver Act 2006.

**Costs**

[214] As both parties were self-represented, the Authority's preliminary view is that costs should lie where they fall.

[215] Costs are usually to reimburse the cost of professional representation.

[216] The parties are encouraged to resolve this issue between them.

[217] If this is not possible, Mr Sharma is to lodge and serve a costs memorandum within 10 working days of the date of this determination, and Rodney Farm may lodge and serve any reply memorandum within a further 10 working days.

Jeremy Lynch  
Member of the Employment Relations Authority