

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2026] NZERA 302
3374263

BETWEEN PRASATH BALACHANDARIYAR
Applicant

AND CIVTEC LIMITED
Respondent

Member of Authority: William Fussey

Representatives: Applicant in person
Nadine Denton, for Respondent

Investigation Meeting: 17 February 2026 in Christchurch

Last information received: 27 February 2026 from the Applicant
23 February 2026 from the Respondent

Determination: 15 May 2026

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment Relationship Problem

[1] In January 2023, Prasath Balachandariyar interviewed for a job as a Fibre Technician with Civtec Limited (Civtec). Mr Balachandariyar says he disclosed having bronchial asthma and that this meant he was unable to perform underfloor or ceiling work. Civtec do not recall him making this disclosure. Irrespective of who is correct, he was offered and accepted the position which he commenced on 23 January 2023.

[2] In May 2023, concerned about potential operational changes that would mean he had to perform underfloor and ceiling work, Mr Balachandariyar sent an email to his manager regarding his bronchial asthma and the impact this was likely to have on any requirement for him to perform underfloor and ceiling work. Mr Balachandariyar says he was subsequently

reassured there were no operational changes in the pipeline that would require him to perform underfloor or ceiling work.

[3] In April 2024, Mr Balachandariyar suffered a wrist injury at work. Civtec referred Mr Balachandariyar to physiotherapy (and later, hand therapy) while he continued working full-time.

[4] In May 2024, Civtec informed Mr Balachandariyar of operational changes which Mr Balachandariyar understood would require him to perform underfloor and/or ceiling work. Mr Balachandariyar again disclosed his bronchial asthma and the impact this was likely to have on his ability to perform these duties. Civtec asked for, and obtained, medical evidence of Mr Balachandariyar's condition and then sought to explore how the condition could reasonably be accommodated while nevertheless requiring him to perform underfloor and ceiling work.

[5] Mr Balachandariyar agreed that Civtec could investigate suitable mask options that might enable him to perform underfloor and ceiling work, and in June 2024, Civtec wrote to him providing various mask options and asking that his GP advise regarding the most appropriate option. Mr Balachandariyar's GP then referred him to an Occupational Health Physician.

[6] In September 2024, shortly before Mr Balachandariyar's wrist was restored to full health, and while he was waiting on an Occupational Health appointment, Civtec commenced a restructure process, proposing to reduce its workforce from 92 to 68 employees. As part of the proposal, 10 Fibre Build Technicians, 61 Fibre Technicians and 4 Junior Fibre Technicians were to be disestablished, with 50 Fibre Technician and 10 Fibre Civil Technician positions created. Although the proposal retained Fibre Technician positions, these were to be broader in scope than the Fibre Technician positions in the original structure.

[7] Civtec's restructure proposal proceeded, and Mr Balachandariyar was considered for both the Fibre Technician and Fibre Civil Technician roles via a selection process. Among other things, Mr Balachandariyar was marked down for being unable to complete underfloor and ceiling tasks, and as such he did not obtain a high enough score to be offered a position in the new structure. On 21 October 2024, Civtec therefore issued Mr Balachandariyar with two weeks' notice that his employment was to be terminated for redundancy.

[8] Mr Balachandariyar claims that his dismissal was unjustified. He also claims that he was unjustifiably disadvantaged in his employment by Civtec failing to appropriately modify his duties, or otherwise adequately support him, following his wrist injury.

The Authority's investigation

[9] For the Authority's investigation, Mr Balachandariyar lodged a written witness statement. He attended the Investigation Meeting, confirmed his evidence, and answered questions under affirmation.

[10] Civtec also lodged a generic statement it described as a witness statement, albeit it was written from the company perspective rather than any one individual. Ross Inglis, Civtec CEO, appeared as a witness and signed the generic statement as his own. During the Investigation Meeting, I also spoke with Corby Upchurch (Manager) by telephone regarding some aspects of the evidence. Mr Inglis answered questions under oath and Mr Upchurch under affirmation.

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

The issues

[12] The issues for determination are:

- (a) Whether Civtec unjustifiably dismissed Mr Balachandariyar;
- (b) Whether Civtec unjustifiably disadvantaged Mr Balachandariyar; and
- (c) If either grievance is made out, what the remedies should be.

Background

Job Interview

[13] On 13 January 2023, Mr Balachandariyar attended a job interview with Civtec Manager, Steve Brigham, and Health, Safety and Training Coordinator, Theigasen Govender (Mr Govender appearing via video call). Mr Balachandariyar says he was asked about his

health, and he disclosed having bronchial asthma and the impact this would have on his ability to perform underfloor or ceiling work. Civtec do not recall him making this disclosure.

[14] Following the interview, Mr Balachandariyar filled out a form which was predominantly about sizing for PPE clothing, but which opened with the question: “Please state any illness, injury or medical condition that you suffer, or have suffered, which may affect your ability to effectively carry out the functions and responsibilities of the position applied for”, to which Mr Balachandariyar responded: “NA”. This question was then followed with: “Please list any allergies or dietary requirements that we need to be aware of”, to which Mr Balachandariyar responded: “Pineapple”.

[15] Civtec recorded handwritten notes of the interview on a template document with typed questions and space for the interviewer to record responses. The document included no questions about illnesses, injuries, or medical conditions, and many of the questions on the document had no handwritten notes underneath. However, the handwritten notes do indicate that Mr Balachandariyar was happy to undertake civil work.

[16] Mr Inglis says that having sat in on interviews where employees have been asked if they are happy to perform underfloor and weekend work, he would have expected any issues with underfloor and ceiling work to have been flagged if they had been disclosed.

[17] Civtec’s generic witness statement states that Mr Balachandariyar’s bronchial asthma “may have been disclosed during his job interview”; however, Mr Inglis, who was not present at the interview, clarified that Mr Brigham and Mr Govender do not recall this being the case. He said further that the comment in the witness statement was an acknowledgement of Mr Balachandariyar’s position rather than an acceptance of it. Neither Mr Brigham nor Mr Govender have provided evidence.

Bronchial asthma

[18] On 23 January 2023, Mr Balachandariyar commenced employment and was assigned to work alongside an experienced Fibre Technician, Guru Sran. On his first day, Mr Balachandariyar says he informed Mr Sran that he was unable to perform underfloor or ceiling work due to asthma and Mr Sran indicated that he was happy to perform all the underfloor and ceiling work. As such, Mr Balachandariyar was able to work alongside Mr Sran without any concerns.

[19] On 11 April 2023, Mr Balachandariyar was absent on sick leave and advised Team Leader, Tanu Allen, via text message, that his absence was due to asthma.

[20] Mr Balachandariyar says that on 26 May 2023, another Team Leader, Rajwinder Singh, informed him that Civtec was planning to separate him from Mr Sran. Consequently, on the same day, Mr Balachandariyar emailed his Manager, Corby Upchurch, and Team Leaders, Mr Singh and Mr Allen, to inform them that he could not perform underfloor and ceiling work due to his bronchial asthma, and to request that he and Mr Sran not be separated.

[21] Mr Balachandariyar recalls then speaking to Mr Upchurch about this on 1 June 2023, with Mr Upchurch reassuring him that as he was going to be working back-to-back and Greenfield jobs, he would not have to perform underfloor or ceiling work. Mr Upchurch did not request any medical information, and for the next 11 months Mr Balachandariyar continued working as normal, without any issue.

[22] On 3 May 2024, Mr Balachandariyar received a telephone call from Team Manager, Manwinder Uppal, informing him that as of the following week he was required to work alongside another Fibre Technician, Eduardo Javier. Mr Balachandariyar understood that this would require him to perform in underfloor and ceiling spaces and says he again disclosed his bronchial asthma and the impact of this on his ability to undertake those duties.

[23] Shortly after the telephone call, Team Manager, Manwinder Uppal emailed Mr Balachandariyar stating that due to low work volume, and to best manage resources, he and his colleague, Eduardo Javier, would be required to work together. Mr Singh and Mr Upchurch were copied into the email.

[24] At the Investigation Meeting, Mr Inglis accepted that this operational change would result in Mr Balachandariyar being required to work in underfloor and ceiling spaces. Such requirement was highlighted further when Mr Inglis revealed that Mr Javier had claimed he was unable to work in underfloor and ceiling spaces, due to a shoulder injury. If Mr Javier was injured, Mr Balachandariyar would likely have been expected to perform Mr Javier's share of the ceiling and underfloor work as well.

[25] Mr Balachandariyar responded to the email, noting that he had informed Civtec at his job interview about having asthma and being unable to perform underfloor and ceiling work, and that Mr Brigham had agreed to this. Mr Balachandariyar's email said further that he had

never been required to perform such work as Mr Sran had taken on that responsibility, and he had reminded Civtec about his asthma roughly one year ago, which the company had again accommodated. Mr Balachandariyar said he was happy to provide a medical certificate.

[26] On 6 May 2024, Mr Uppal replied that he would consider the information from Mr Balachandariyar and come back to him later. The following day, Mr Balachandariyar provided Mr Singh, Mr Uppal, and Health and Safety Officer, Tracy Webster, a medical certificate stating: “patient unable to tolerate underground working condition or ceiling work due to a dust allergy”.

[27] On 20 May 2024, Mr Upchurch met with Mr Balachandariyar and provided him a letter acknowledging his medical certificate and requesting he arrange an appointment with his GP to understand how Civtec might better support him at work. In particular, the letter asked Mr Balachandariyar’s GP to respond to a series of questions. Mr Balachandariyar says Mr Upchurch did not recall Mr Balachandariyar’s asthma disclosure from approximately one year prior.

[28] On 23 May 2024, Mr Balachandariyar’s GP responded to say that Mr Balachandariyar was first diagnosed with asthma when he was four years old, his future prognosis was good albeit he was to avoid dust exposure, and face masks may help mitigate but can still trigger asthma flares. The GP added that if Civtec would like further information it could make a private workplace referral to an occupational medicine specialist.

[29] On 30 May 2024, Civtec wrote to Mr Balachandariyar, acknowledging the medical information and inviting him to a meeting the following day. The letter reminded him that Civtec were implementing a new roster effective 10 June 2024 due to the business’ changing requirements and noted that it would be unable to accommodate individual preferences as it may have been able to do in the past.

[30] On 31 May 2024, Mr Balachandariyar met with Mr Upchurch and Senior HR Advisor, Melissa Burrowes. A transcript of the meeting reveals Mr Upchurch did not recall his 1 June 2023 conversation with Mr Balachandariyar regarding Mr Balachandariyar’s asthma disclosure, and it records Mr Balachandariyar explaining that (in addition to being unable to work in underfloor and ceiling spaces) he is unlikely to be able to perform some civil tasks due to the risk of asphalt triggering his condition.

[31] At the meeting, Ms Burrowes explained that the company's position had changed and reduced customer demand meant it was unable to work around the medical condition anymore. Ms Burrowes also said that unless Mr Balachandariyar was able to find a suitable mask enabling him to perform all duties, Civtec may no longer be able to employ him for 40 hours per week.

[32] Mr Balachandariyar was initially reluctant to explore face mask options, explaining that he was admitted to emergency care for an asthma attack in 2017 despite wearing a mask. However, he ultimately agreed to explore face mask options to determine if any would be suitable.

[33] On 26 June 2024, Civtec wrote to Mr Balachandariyar summarising the situation and the 31 May 2024 meeting and proposing various masks for him and his GP to consider. The letter requested his GP's feedback on the masks as well as any other measures that would allow him to work underfloor or in ceiling spaces approximately 2-3 times per day for up to 30 minutes at a time.

[34] Mr Balachandariyar was required to sign the letter to accept that he would arrange an appointment with his GP and obtain a response. Although he was prepared to meet with his GP for such a purpose, and informed Civtec as such, he objected to signing the letter because in his view it did not accurately reflect the substance of the 31 May 2024 meeting. Mr Balachandariyar alleged various inaccuracies, including in relation to the date Civtec first became aware of his medical condition.

[35] On 10 July 2024, following email confirmation that Civtec would pay for his GP appointment, Mr Balachandariyar obtained a medical certificate referring him to an Occupational Health Physician.

[36] On 11 July 2024, Mr Upchurch called Mr Balachandariyar. A transcript of that call indicates Mr Balachandariyar was confused about the referral process while noting his GP's comments that any referral may take 2-3 months. Mr Upchurch commented that Civtec's health provider, Active Health, may be able to obtain a referral sooner and said he would talk to Ms Burrowes about this.

[37] Later that day, per the GP's consultation notes, the GP called Mr Balachandariyar to inform him that two mask fit testing places had declined the GP referral and so he would write

to Civtec to inform them that they would need to liaise directly with those places. The GP's correspondence was addressed to Mr Upchurch and recommended that Civtec "directly approach Mask Fit-testing places which perform this test". The medical certificate also noted: "most workplaces organise this directly...they do not accept referrals from GP as it is occupational health related".

[38] When called during the Investigation Meeting, Mr Upchurch said that he talked to Ms Burrowes about the merits of progressing with Occupational Health but that he was not aware whether any further steps were taken. Mr Upchurch also discussed Ms Webster having undertaken considerable research on the type of mask that may be appropriate.

[39] Following the 11 July 2024 call and the GP's correspondence, Civtec did not take any active steps to progress an Occupational Health referral or to discuss the matter further with Mr Balachandariyar.

[40] In summary, having disclosed his bronchial asthma, Mr Balachandariyar raised concerns when operational changes required him to perform underfloor and ceiling work. Having commenced a process to investigate his medical condition and whether an appropriate mask could enable him to perform such work, Civtec ultimately did not take the necessary steps to progress the Occupational Health referral.

Wrist Injury

[41] On 11 April 2024 (i.e. prior to Mr Balachandariyar's bronchial asthma condition becoming an issue in May 2024), Mr Balachandariyar twisted his wrist while drilling a wall at a customer site. He reported the incident to Ms Webster who appropriately referred him to physiotherapy via Active Health. According to Mr Balachandariyar, Ms Webster then discussed possible task modifications with Mr Uppal.

[42] Mr Balachandariyar's 18 April 2024 physio notes describe Mr Balachandariyar as having experienced severe sharp pain and swelling for three days, and that this had developed into an ache. The notes also record that following the injury, he was using his left-hand for both work and daily life. They also refer to him "performing light duties at work – lifting less than 3kg", and a difficulty with gripping objects in his right hand.

[43] During the 3 May 2024 telephone call with Mr Uppal regarding him being moved to work alongside Mr Javier, Mr Balachandariyar says he also brought up his wrist injury. In

doing so, Mr Balachandariyar says he raised a concern with Mr Uppal about some of his duties not being suitable in light of his injury, such as lifting a 4kg splicer and 3 to 3.5kg cones. Mr Uppal then indicated he needed to further discuss with Ms Webster the impact of Mr Balachandariyar's injuries on the duties of his role.

[44] In response to Mr Uppal's email later that day confirming the operational changes, Mr Balachandariyar again referred to his wrist injury. Following this, however, Mr Balachandariyar did not raise any further concerns with Civtec about his wrist injury and continued to undertake his duties by predominantly using his left hand and doing what he could to avoid any duties that may exacerbate his injury.

[45] Although Mr Balachandariyar says he was generally unhappy about some of the duties he was being allocated, his view was that having discussed his injury with several key Civtec employees there was little benefit in continuing to discuss the issue. Instead, he would perform the work as best he could and use his initiative to avoid or minimise any tasks he was uncomfortable with.

[46] On 8 May 2024, the physiotherapist issued a report which anticipated a further 3-4 weeks' recovery time and set out recommendations. The report specified that Mr Balachandariyar was "currently unable to complete aspects of [his] job as a Fibre Technician" and provided an assessment in table form as to the duties he was able to perform, the duties he could not perform, and the duties he was only able to perform with restrictions.

[47] The report said that Mr Balachandariyar was not able to "lift and shift loads up to 25kg", "operate vibrating hand tools for prolonged periods", or "climb ladders and work at heights". It also said that although he was able to "conduct repetitive movements with low muscle loading", he was to "avoid right hand twisting, turning, lifting". Its overall recommendations specified (among other things) "no gripping / twisting / turning with right hand" and "taking breaks at work as needed when feeling fatigued".

[48] On 16 May 2024, Mr Balachandariyar signed a form Civtec had issued him which acknowledged that the injury may result in a reduced capacity to complete his usual duties. The document also set out Civtec's responsibilities, including to "follow the recommendations of the physio or GP and ensure allocated work is in accordance with any restrictions imposed".

[49] On 31 May 2024, in an email to Ms Webster about face masks, Ms Burrowes said that Mr Balachandariyar had “mentioned that he is currently on restricted duties” and was “still unable to put any significant pressure on his wrist”. Mr Upchurch was copied into the email.

[50] On 6 June 2024, Active Health provided Ms Webster with a summary from the physiotherapist as to how Mr Balachandariyar was progressing, including recommending that Mr Balachandariyar continue to avoid lifting anything greater than 3kg in his right hand and not take jobs where he is put into positions of increased weight bearing such as crawling on hands and knees (e.g. underground work).

[51] In a 1 July 2024 email from Mr Upchurch to Mr Balachandariyar regarding proposed face mask options, Mr Upchurch commented that Civtec continued to support his recovery from the wrist injury.

[52] Mr Balachandariyar continued to see his physiotherapist on a weekly basis until 11 July 2024, at which point he was referred to a hand therapist. His weekly physiotherapy notes record improvements, difficulties, and recommendations, and generally refer to him performing light duties. They also describe trialling a wrist brace which only lasted two days due to Mr Balachandariyar reported a resulting increase in pain.

[53] On 3 July 2024, Mr Balachandariyar requested the physiotherapist provide his GP a letter stating that he still cannot do work on ladders and underfloor, saying that “work will make him do it even if he says he can’t”. The physiotherapist’s ensuing 4 July 2024 report says that Mr Balachandariyar is to “continue avoiding underground work, crawling, working at heights (requiring ladder climbing) and heavy lifting”.

[54] On 11 July 2024, while discussing the Occupational Health referral, Mr Upchurch also enquired after Mr Balachandariyar’s wrist injury. Mr Balachandariyar replied that it had been painful for the past two days but another colleague, Maddie, had been working with him so he could avoid lifting cones. During this conversation, Mr Balachandariyar did not raise any issue about further modification of his duties being required.

[55] On 15 July 2024, Mr Balachandariyar commenced hand therapy following a referral from the physiotherapist and was given an ultrasound to properly assess any damage. Subsequently, Ms Webster followed up with the Hand Therapist, who informed her that Mr Balachandariyar had experienced some new pain in the forearm.

[56] Ms Webster then asked the Hand Therapist a series of questions, including whether the new pain in the forearm was consistent with the wrist injury or was a new issue, details of any treatment plan, the anticipated timeframe for a full recovery, whether the recovery was progressing as expected, and whether Civtec could progressively reintroduce tasks during the treatment period.

[57] On 12 August 2024, the Hand Therapist responded, explaining that the new pain was still correlated to the initial injury but in a new region. She said the new pain had arisen from Mr Balachandariyar compensating to avoid pain in the original injury area, causing strain elsewhere. She highlighted her concern that Mr Balachandariyar had “never had full release from the tasks that are perpetuating the problem” and that the continued performance of specific tasks such as stripping wires and using a screwdriver were aggravating the tissue and interrupting the healing process (due to the twisting motions). At the Investigation Meeting Mr Inglis rejected the notion that Mr Balachandariyar should not have been using a screwdriver, power drill or corking gun, commenting that the physiotherapist had initially assessed and cleared those tasks providing they did not involve twisting.

[58] The Hand Therapist said further that Mr Balachandariyar should be put on light duties where he is not holding cones, stripping wires, or using a screwdriver, and recommended that a physiotherapist or occupational therapist who specialises in work site assessments undertake a full evaluation of work tasks. She anticipated a full return to duties within three months.

[59] On 22 August 2024, after various follow up from the Hand Therapist, Mr Balachandariyar’s work duties were formally modified to prevent him from undertaking any twisting motions.

[60] On 14 October 2024, following six sessions of hand therapy, Mr Balachandariyar was discharged, with the Hand Therapist reporting: “patient presents with good reduction in pain after work task modification. Good improvements in grips noted and self-report of return to near baseline functional task participation with goals met. Appropriate to continue self-management at this time”.

[61] The Hand Therapist’s cover email to Civtec stated: “I have recommended that he stay in modified tasks avoiding any civil work as those can be aggravating tasks for the wrists but as able over the next month, he should be able to slowly reintroduce”.

[62] In summary, Mr Balachandariyar suffered a wrist injury at work and was referred to a physiotherapist who recommended avoiding some duties and restricting others. However, Civtec did not provide any evidence of having implemented a plan to ensure he complied with the physiotherapist's recommendations. Subsequently he was referred to a hand therapist who was concerned that he was still performing tasks that were aggravating his injuries, and his duties were formally modified. Mr Balachandariyar was later discharged.

Restructure and redundancy

[63] On 5 September 2024, Civtec, via Switch Operations Manager, Nise Williams, sent all affected employees, including Mr Balachandariyar, an email inviting them to a meeting on 6 September 2024 to discuss a proposal to reduce the number of employees in the Christchurch branch.

[64] On 6 September 2024, Mr Balachandariyar was unwell and gave his apologies. Following the meeting, Ms Williams sent out the consultation proposal, job descriptions, and feedback form, and encouraged affected employees to respond by the timeframes outlined in the proposal.

[65] The consultation proposal set out the rationale for change, explaining that Civtec had experienced a significant decline in connection numbers and build/project work from its two major clients, and that increased competition in the tender market was leading to fewer successful project bids. The proposal also noted that despite measures aimed at retaining its workforce such as not replacing roles, limiting overtime and Saturday work, and improving efficiencies, a comprehensive review had shown the company was over-resourced. Consequently, a reduction in staff numbers was necessary.

[66] The proposal was to reduce 92 roles to 68, including disestablishing 10 Fibre Build Technician, 61 Fibre Technician, and four Junior Fibre technician roles, and establishing 50 Fibre Technician and 10 Fibre Civil Technician roles. The Fibre Technician roles in the new structure were to be broader in scope and encompass a wider range of duties than the existing Fibre Technician roles. Although Mr Balachandariyar's position description in his existing employment agreement did not specify a requirement to work in ceiling and underfloor spaces, the new Fibre Technician position explicitly required employees to work "underfloor, in ceiling and within small, confined spaces; working up ladders; crouching; kneeling; squatting; lifting; above head; and working on back".

[67] The proposal specified the current roles that were closely aligned to the new positions, with Fibre Technicians such as Mr Balachandariyar deemed potentially suitable for either Fibre Technician or Fibre Civil Technician roles in the new structure. Nevertheless, employees were also asked to indicate any roles they were interested in.

[68] The proposal also set out the proposed selection criteria for identifying preferred candidates for the new positions, as well as the scorers for each role. It proposed that the same selection criteria be applied to all seven positions in the new structure. Employees were able to provide feedback by 16 September 2024, using a supplied feedback form.

[69] Mr Balachandariyar returned his feedback form noting that he had no feedback on the proposed disestablishment of roles, proposed establishment of new roles, or the proposed selection criteria. The form did not have a section seeking feedback on the rationale for the restructure as a whole; instead asking specific questions about the proposed role changes and selection criteria. However, even without an explicit invitation Mr Balachandariyar could still have provided comment on this had he wished to do so. The form asked Mr Balachandariyar to indicate the roles in the new structure he was interested in and following further correspondence, Mr Balachandariyar sought to be considered for both the Fibre Technician and Fibre Civil Technician roles.

[70] On 24 September 2024, Ms Williams wrote to Mr Balachandariyar summarising and responding to employee feedback. Several employees had suggested that experience and skills, work quality and output, and broad capabilities and multi-tasking be captured in the scoring criteria. Ms Williams' correspondence noted that these were incorporated within scoring criteria 8 and 9, i.e. "completes all key functional tasks of the role" and "completes physical aspects of the role".

[71] Ms Williams' correspondence concluded by saying that having reviewed and considered all feedback, Civtec had not made any changes to the proposal, which would be implemented without amendment.

[72] On 8 October 2024, Ms Williams sent Mr Balachandariyar a letter confirming the outcome of the scoring process and stating: "Based on the current scoring, you have not scored highly enough to achieve a score that would place you in any of the available positions you have expressed an interest in". The letter also sought his feedback on the scores by 14 October 2024.

[73] The scores were provided as two separate one-page appendices, the first in relation to the Fibre Technician role, and the second in relation to the Fibre Civil Technician role; both used the same criteria and issued the same scores. Mr Inglis explained that objective criteria were assessed by People & Culture compiling relevant information from personnel files and subjective criteria were assessed by the panel for each position reaching scores by consensus. The panel for the Fibre Technician role was Mr Upchurch, Mr Uppal, Ms Williams, Mr Brigham, and Nikhil Gone, and the panel for the Fibre Civil Technician role was Mr Gone and Ms Williams.

[74] There were nine applicable selection criteria, with scores between zero and three available for each criterion and specific scoring rules set out. A maximum score of 27 could therefore be obtained and Mr Balachandariyar was issued a preliminary score of 13. Four of the nine criteria raise issues to be considered.

[75] Criterion 3 was: “Attendance – Excessive Sick Leave Outside of entitlement”. The rules for applying scores to criterion 3 were:

- (a) “Has taken unpaid sick leave (unjustified) = 0”.
- (b) “Has taken unpaid sick leave (justified) = 1”.
- (c) “Has not taken unpaid sick leave = 3”.

[76] Mr Balachandariyar was issued a preliminary score of zero for criterion 3, with sick leave without pay dates set out as 1, 21 and 22 May (presumably, 2024).

[77] Criterion 4: was “Disciplinary – Letter of Expectation / ROC / coaching conversation inc. H&S Incident (Past 6 months)”. The rules for applying scores to criterion 4 were:

- (a) “Has received LOE or other in previous 12 months = 0”.
- (b) “Has received ROC or other in previous 12 months = 1”.
- (c) “Has not received ROC/LOE or other in previous 12 months = 3”.

[78] Mr Balachandariyar was issued a preliminary score of one, with the following comments made: “06/08/24 – ROC for seeking customer feedback outside of normal process / policy” and “20/3/2024 – ROC Non-attendance at toolbox”.

[79] ROC is an abbreviation for Record of Conversation which records an issue of concern in respect of an employee's conduct.

[80] Criterion 8 was: "Completes all key functional tasks of the role". The rules for applying scores to criterion 8 were:

- (a) "Below average = 1".
- (b) "Average/or has potential to meet criteria = 2".
- (c) "Above average = 3".

[81] In the weighting column a highlighted note specified: "Must score a min of 2 to be eligible".

[82] Mr Balachandariyar was issued a preliminary score of one, with the following comments made in relation to the Fibre Technician role: "Good experience and output in the Connect Install space, working alone. Reluctant to complete Fibre Technician activities that do not appeal to him and has no experience with these other activities". Comments in relation to the Fibre Civil Technician role were: "lacks the experience and skill set necessary to work in Greenfield, NE, and handle complex migrations".

[83] Criterion 9 was: "Completes physical aspects of the role". The rules for applying scores to criterion 9 were:

- (a) "Fails to meet required standard on an ongoing basis = 0".
- (b) "Meets required competency = 3".

[84] Mr Balachandariyar was issued a preliminary score of zero, with the following comments made in relation to the Fibre Technician role: "Unable to complete tasks involving dust/fume exposure (underfloor/ceiling, civil/reinstatement work). Chronic breathing problems. He has openly expressed his hesitance to consider options that may enable him to complete tasks that will be necessary for the role". Comments in relation to the Fibre Civil Technician role were identical.

[85] On 14 October 2024, Mr Balachandariyar provided feedback regarding his scoring.

[86] In relation to criterion 4 he disputed the Records of Conversation. He said in relation to the most recent Record of Conversation that on 6 August 2024 he had a meeting with Mr Upchurch and Mr Uppal at which his process for requesting feedback from customers was raised. At the meeting, Mr Balachandariyar was told not to give clients a link to provide feedback but to allow the standard automatic email process to take its course. Mr Balachandariyar says he did not know that his actions were against policy and disputes receiving a valid Record of Conversation in relation to this.

[87] In relation to the earlier Record of Conversation on 20 March 2024, Mr Balachandariyar said that this was incorrect as he had attended the toolbox meeting at 6.30am on that date.

[88] In relation to criterion 8, Mr Balachandariyar commented that he had consistently fulfilled the expectations of that role. Mr Balachandariyar also appeared to interpret the statement that he was “reluctant to complete Fibre Technician activities” as being about both his bronchial asthma and wrist injury and noted that he had done everything asked of him in relation to the respiratory face masks. He did not directly address the comments in relation to the Fibre Civil Technician role but did refer to the role requiring work in dusty environments, again indicating he had understood he was marked down because of his health issues.

[89] Mr Balachandariyar then asked various questions, including what activities Civtec was referring to in relation to the Fibre Technician position, and why he was perceived as unwilling to undertake those activities given that Mr Upchurch and Ms Burrowes had not offered a viable solution to his asthma despite Mr Balachandariyar having done everything required of him. He also queried the reference to his lack of experience with other activities, asking how he could gain experience or demonstrate his abilities in those other activities when he had not been given any relevant opportunities or training.

[90] In relation to criterion 9, Mr Balachandariyar said that the reference to him being unable to complete tasks involving dust/fume exposure was wrong and his daily tasks such as “installing ONTs, managing FTPs, drilling walls, [and] tidying customer sites” consistently exposed him to dust and fumes. He also queried any suggestion that he was unable to perform any civil/reinstatement work, noting that management had never asked him to do any civil/reinstatement work.

[91] He said in relation to his asthma and alleged inability to perform ceiling and underfloor work, that Civtec had suggested some respiratory mask options and his GP had recommended he consult with an Occupational Health Physician, but Civtec had not engaged with him regarding a referral. Mr Balachandariyar also considered that his willingness to consult with his GP about masks contradicted the comment that he had “openly expressed his hesitance to consider options that may enable him to complete tasks that will be necessary for the role”.

[92] On 21 October 2024, Ms Williams wrote to Mr Balachandariyar responding to his feedback and confirming his redundancy. She noted that Mr Balachandariyar had not made any comments on the selection criteria when given an opportunity to provide feedback.

[93] In relation to criterion 4, Ms Williams said the Record of Conversation was located within the BambooHR system and alleged that Mr Balachandariyar was aware of the expectation that clients receive an automatic feedback request email due to his comment that clients often experience delays in receiving an email prompt.

[94] Ms Williams did accept, however, that the Record of Conversation for non-attendance at a toolbox meeting was incorrectly dated 20 March 2024 and had therefore been removed from consideration. Ms Williams noted that this did not change the score for criterion 4 as the 6 August 2024 Record of Conversation meant there continued to be a Record of Conversation on his record during the past 12 months.

[95] In relation to criterion 8, Ms Williams stated that the key functional tasks which Civtec understood Mr Balachandariyar was unable to perform were: “working underfloor and in ceiling spaces” and “working around asphalt due to the fumes”. Ms Williams referred to Civtec having been waiting for further information from Mr Balachandariyar around the referral to the Occupational Health Physician.

[96] Ms Williams also noted that during the same period his wrist injury had precluded him from undertaking several key tasks, including weight bearing on his wrist, and added further: “you have not yet been discharged or cleared for full duties and your recovery from this injury”. Mr Balachandariyar had in fact been discharged a week earlier on 14 October 2024, albeit the Hand Therapist had acknowledged his tasks should remain modified for a further month.

[97] At the Investigation Meeting, Mr Inglis said that criterion 8 was about technical know-how and did not relate to Mr Balachandariyar's asthma or wrist injury. When questioned about how that was consistent with Ms Williams' correspondence, Mr Inglis said that it was not consistent, but her comments had been provided in relation to criterion 8 because Mr Balachandariyar had raised the issue in that context. Mr Inglis acknowledged that the wrist injury should not have been considered in relation to criterion 8.

[98] In relation to criterion 9, Ms Williams reiterated that Civtec had not received any communications from Mr Balachandariyar regarding the referral to Occupational Health and referred to his 23 May 2024 medical certificate having advised that he was to avoid dust exposure. Mr Inglis acknowledged that masks would potentially have rectified any issues with underfloor, ceiling and asphalt work, and that if this had worked Mr Balachandariyar may not have been marked down.

[99] Ms Williams concluded her correspondence by saying that Mr Balachandariyar's score for criterion 3 had been increased from a zero to a one but did not explain why. She confirmed that his score was still not high enough to rank him in the top 50 for the Fibre Technician role or the top 10 for the Fibre Civil Technician role. Ultimately his score of 14 left him four marks short of the minimum required for a Fibre Technician role (18) and seven marks short of the minimum required for a Fibre Civil Technician role (21). Consequently, Mr Balachandariyar was provided two weeks' notice of termination in accordance with his employment agreement.

[100] On 22 October 2024, Ms Williams emailed Mr Balachandariyar to advise him of an available opportunity for one fixed-term Fibre Technician which he could express an interest in by 24 October 2024. Mr Balachandariyar chose not to do so, however, as having been marked so low during the selection process, he did not have any confidence he would be genuinely considered for the position.

[101] In summary, Mr Balachandariyar's Fibre Technician position was disestablished, and he expressed interest in the Fibre Technician and Fibre Civil Technician positions in the new structure. In a selection process, Mr Balachandariyar was marked down in relation to completing physical aspects of the role, completing key functional tasks, having been issued a Record of Conversation in the past six/twelve months, and using excessive sick leave. His final (adjusted) score of 14 was too low to be offered a position and his employment was therefore ended for redundancy.

Was Mr Balachandariyar unjustifiably dismissed?

[102] Section 103A(2) of the Act sets out the legal test to justify dismissal. Specifically, the Authority must consider, on an objective basis, whether Civtec's actions in dismissing Mr Balachandariyar were those of a fair and reasonable employer in all the circumstances.

[103] The onus is on Civtec to establish both that it followed a fair process in accordance with the minimum standards of procedural fairness set out in section 103A(3), and that the dismissal was substantively justified.

Procedural fairness

[104] I find that Civtec's restructure process culminating in Mr Balachandariyar's dismissal for redundancy was procedurally fair. Civtec provided a restructure proposal and consulted on that proposal, albeit its feedback form did not explicitly seek feedback on the restructure rationale itself, instead focusing on the appropriate mix of roles across the business and the proposed selection criteria for appointing employees to the new positions.

[105] Civtec then consulted on Mr Balachandariyar's scores under those selection criteria and genuinely considered the feedback it received. Whilst it may have been advisable to interview Mr Balachandariyar before issuing him with preliminary scores, the approach taken was not unfair as Mr Balachandariyar was still given an opportunity to provide his views on those scores.

Substantive justification

[106] In terms of substantive justification, Mr Balachandariyar did not raise any issues regarding Civtec's restructure rationale. I accept that the rationale was both genuine and justified given Civtec's decreased workload and its need to streamline resources.

[107] The issue to consider is how the selection criteria were applied and whether Mr Balachandariyar's scores against those selection criteria were fair and reasonable.

[108] I draw no inference from Mr Balachandariyar's statement on his feedback form that he had no feedback on the selection criteria themselves. There is no obligation on an employee to provide such feedback, nor does employment law prevent an employee who has not done so from subsequently raising concerns. Indeed, any restriction on the ability to raise concerns

would be inconsistent with the object of the Act which requires employers to acknowledge and address “the inherent inequality of power in employment relationships”.¹ In other words, it cannot be expected that employees have a sophisticated understanding of employment law such that not identifying concerns at an early stage is held against them.

[109] I will now consider, in turn, the criteria that raise issues in relation to Mr Balachandariyar’s scores. In doing so, I must consider whether the issued scores were within the range of outcomes open to a fair and reasonable employer. I must do this objectively, that is ensuring I do not substitute my own decision for those of the fair and reasonable employer in all the circumstances.²

Criterion 9 – completes physical aspects of the role

[110] Mr Balachandariyar received a score of zero out of three for completing physical aspects of the role, which both parties accept was due to his bronchial asthma limiting his ability to undertake tasks such as working in underfloor or ceiling spaces, or civil tasks involving asphalt.³

[111] Although both parties were eager to express their views as to whether Mr Balachandariyar’s asthma was raised at the job interview, I do not consider this to be material to my analysis.

[112] Even if Mr Balachandariyar did not raise his medical condition at the job interview, he disclosed it a few months later and it was accommodated for at least a further year before it became an issue. Furthermore, Civtec’s obligation to reasonably accommodate Mr Balachandariyar’s medical condition arose when it was disclosed, irrespective of whether he had failed to disclose it previously.

[113] Nonetheless, I consider it likely that at the interview Mr Balachandariyar did raise having bronchial asthma. Mr Balachandariyar referred to having done so in his May 2023 email and he has remained consistent in that view. In addition, the Civtec employees conducting the interview did not provide any witness evidence to contradict that position. At the same time, I also accept that Mr Balachandariyar made inaccurate statements on his PPE

¹ Section 3(a)(ii).

² *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160.

³ It appears that Mr Balachandariyar’s wrist injury was not considered in relation to criterion 9, as this was not mentioned either in Mr Balachandariyar’s feedback or in Ms Williams’ response.

form (whether intentionally or unintentionally) both when he indicated that he did not have a medical condition and when he failed to disclose his dust allergy when asked whether he had any allergies.

[114] My assessment as to whether Mr Balachandariyar was justifiably issued a score of zero therefore does not involve any consideration as to when his bronchial asthma was first disclosed to Civtec. It only considers whether its impact on his duties was able to justify a zero score.

[115] For the following reasons, I find that a score of zero was not one that Civtec could justifiably have issued.

[116] It was not appropriate for Civtec to conclude that Mr Balachandariyar's limitations due to his bronchial asthma were sufficient to mark him down, without assessing whether those limitations would remain after any reasonable accommodations and/or risk mitigation had been considered.

[117] In other words, it is not appropriate to penalise an employee for being unable to work in ceiling or underfloor spaces due to a condition such as bronchial asthma where the employer could reasonably have accommodated the condition and/or mitigated the risk to an acceptable level and enabled the employee to perform those duties.

[118] I must now therefore consider whether Civtec could have taken appropriate steps to reasonably accommodate the condition and/or reduce the risk to a normal level, which would have enabled Mr Balachandariyar to complete the physical aspects of the Fibre Technician and/or Fibre Civil Technician roles in the new structure.

[119] Civtec had proposed a range of mask options for Mr Balachandariyar to use but claims that he was not genuinely prepared to consider those options, noting both Mr Upchurch's frustration by his lack of uptake, and a general perception that he was "deliberately delaying" the process. If this were true, then Civtec might argue that despite its best efforts to mitigate the risk, Mr Balachandariyar had prevented it from doing so, and he was therefore unable to complete the physical aspects of the role.

[120] I find, however, that it was Civtec rather than Mr Balachandariyar who was responsible for no appropriate mask having yet been found. Although Mr Balachandariyar was initially

hesitant regarding mask use, he nevertheless promptly agreed to explore options. Having done so he attended a GP appointment to investigate those options.

[121] Mr Balachandariyar then indicated to Mr Upchurch he was unclear as to whether the GP or Civtec was responsible for the referral and Mr Upchurch said that he would discuss this with Ms Burrowes and Active Health (Civtec's provider). Mr Balachandariyar's GP subsequently also corresponded directly with Mr Upchurch, recommending Civtec approach Mask-Fit testing places to perform the test and noting that such places do not accept occupational health referrals from GPs.

[122] Contrary to Ms Williams' statement in her 21 October 2024 letter that Civtec were waiting on further information from Mr Balachandariyar regarding a referral, I find that Mr Balachandariyar had done everything asked of him in relation to considering mask options. Civtec was ultimately responsible for referring him to the Occupational Health Physician, but it did not do so. It cannot now blame Mr Balachandariyar for that failure.

[123] In assessing Mr Balachandariyar as being unable to complete the physical aspects of the Fibre Technician and Fibre Civil Technician roles without considering how a suitable mask may assist him to perform those duties, Civtec breached its employment obligations to Mr Balachandariyar. Had it taken potential mask use into account, Civtec would presumably have awarded him full marks (three out of three), particularly as it had determined that zero and three were the only applicable scores for criterion 9.

[124] A zero out of three score would only have been appropriate if Mr Balachandariyar had refused to take the necessary steps to explore mask options, or if having been issued a mask it had subsequently become clear he was still unable to perform those duties. Marking him at zero having failed to assess how appropriate mask use may have assisted was premature and unjustified.

[125] For completeness, I note that the way the matter was pleaded it was not necessary for me to consider whether Civtec's actions amounted to unlawful discrimination pursuant to section 104 of the Act.

Criterion 8 - Completes all key functional tasks of the role

[126] Criterion 8 is ambiguously framed in that it is unclear whether it extends to the physical capacity to perform key functional tasks or is limited to technical expertise. Mr Inglis said that

its focus was on technical expertise, and it is arguable that some of the comments Civtec provided alongside the initial preliminary scores substantiate this position. References to “good experience and output in the Connect Install space, working alone” and “lacks the experience and skill set necessary to work in Greenfield, NE, and handle complex migrations” all relate directly to technical expertise rather than physical capability.

[127] The comment “reluctant to complete Fibre Technician activities that do not appeal to him and has no experience with these other activities” is more ambiguous. It is unclear whether the alleged reluctance refers to activities Mr Balachandariyar was unable to perform due to bronchial asthma, i.e. working in ceiling and underfloor spaces, or instead refers to a broader range of tasks he may not have shown interest in. Similarly, it is unclear whether the reference to a lack of experience relates to a lack of exposure having never been required to undertake those duties, an unwillingness to perform certain duties despite being physically able, or an inability to perform those duties due to his physical limitations.

[128] Mr Balachandariyar’s feedback disputed the notion that he was reluctant to complete particular duties and indicated that his lack of experience was due to a lack of exposure. He asked how he could gain experience or demonstrate his ability in those activities when he had not been given an opportunity to do so and noted that if he was expected to take on other responsibilities then it was for Civtec to provide sufficient training. At the same time, he also referred to having consistently fulfilled all his responsibilities and met his KPIs (as indicated by his 2024 performance assessment), and as such he questioned why he was perceived as unwilling to complete Fibre Technician activities.

[129] Ms Williams’ 21 October 2024 letter responded to the feedback regarding criterion 8 by setting out the key functional tasks Civtec understood Mr Balachandariyar was unable to perform (“working underfloor and in ceiling spaces” and “working around asphalt due to the fumes”). Ms Williams also referred to Mr Balachandariyar’s 26 May 2023 email regarding being unable to perform underfloor and ceiling work and his desire to continue working with Mr Sran so that he could avoid such work, and she pointed to a meeting where he had said he was unable to work around asphalt.

[130] Ms Williams indicated that Civtec was waiting for further information from Mr Balachandariyar regarding the Occupational Health referral (which I have addressed above), commented that his wrist injury had precluded him from performing certain tasks, and claimed

he had “not yet been discharged or cleared for full duties and [his] recovery from this injury”. Ms Williams’ response to Mr Balachandariyar’s feedback included nothing relating to technical expertise.

[131] Regardless of the intended meaning of Civtec’s initial comments regarding its preliminary scores for criterion 8, I find that Civtec was predominantly influenced by Mr Balachandariyar’s bronchial asthma and wrist injury. It is clear from Ms Williams’ 21 October 2024 letter she endorsed Mr Balachandariyar’s interpretation regarding him having been marked down due to his health issues.

[132] For the same reasons as articulated in relation to criterion 9, Civtec’s consideration of Mr Balachandariyar’s bronchial asthma without reference to whether an appropriate mask would have enabled the applicable tasks to have been performed, was a breach of its employment obligations.

[133] Civtec’s consideration of Mr Balachandariyar’s wrist injury was a further breach of its obligations. Ms Williams was wrong about Mr Balachandariyar not yet having been discharged, and although the Hand Therapist’s cover email had referred to Mr Balachandariyar requiring a further month without civil work (meaning he had not been cleared for full duties), it was clear that Mr Balachandariyar would shortly have no impediment to using his wrist for all Fibre Technician or Fibre Civil Technician duties.

[134] Consequently, Mr Balachandariyar’s wrist injury simply should not have been considered at all. The wrist injury was temporary, and as such any assessment as to the completion of tasks should have been forward looking as to the duties that could be performed following recovery, particularly as Mr Balachandariyar had been discharged. In summary, Civtec’s assessment (and subsequent conclusion) regarding the wrist injury was both unjustified and unfair.

[135] Had criterion 8 been appropriately assessed, Mr Balachandariyar might have expected a score of either two out of three or three out of three, rather than the one out of three he received. There was certainly potential for a maximum score, particularly given I was provided no evidence of any issues of technical expertise having been raised with Mr Balachandariyar previously.

Criterion 4 – Records of Conversation

[136] Both parties agree that the 20 March 2024 Record of Conversation was inaccurately recorded and did not occur. As such, the only Record of Conversation at issue is the one dated 6 August 2024 in relation to Mr Balachandariyar seeking customer feedback outside of normal process.

[137] If there was a Record of Conversation in August 2024, the one out of three score was correctly recorded; however, if no such Record of Conversation took place, or was otherwise wrongly issued, a mark of three out of three should have been awarded instead.

[138] An “Employee Conversation Record Sheet” (Record of Conversation) dated 6 August 2024 summarises a conversation between Mr Uppal, Mr Upchurch, and Mr Balachandariyar, regarding concerns that Mr Balachandariyar actively provided an email address for customer feedback rather than following the existing process for capturing feedback.

[139] Civtec’s position is that the Record of Conversation was filed in the documents tab of the BambooHR system, however, Mr Balachandariyar says both that he did not receive a notification about this and that at no point had he located the document in BambooHR.

[140] At the Investigation Meeting, Mr Inglis explained that the purpose of a Record of Conversation is to ensure employees are aware of what constitutes unacceptable behaviour, thereby reducing the risk of an employee claiming, during a disciplinary process, that they had not been previously warned that such conduct was unacceptable.

[141] Mr Inglis says further that it is always clear to an employee when they have been issued a Record of Conversation. He says a Record of Conversation is not usually the first conversation Civtec has with the employee about an issue, for example a Record of Conversation may arise the third time an employee fails to wear necessary personal protective equipment.

[142] To assess whether a Record of Conversation could reasonably have been recorded against Mr Balachandariyar, it is necessary to consider what was said during the 6 August 2024 conversation and any relevant discussion or correspondence leading up to it.

[143] On 5 August 2024, Mr Upchurch advised Mr Balachandariyar by telephone call that he wished to “catch up” with him the following day about “a lot of positive feedback” Civtec

had been receiving about him. Mr Upchurch and Mr Balachandariyar then met with each other on 6 August 2024. A transcript of the conversation details the following.

[144] Mr Upchurch started the meeting by informing Mr Balachandariyar he had received “lots of good feedback” from customers. He then advised Mr Balachandariyar not to send out links for customers to complete feedback but to inform them that they should receive an automatic email. He commented further that the automatic email is sent approximately one week after the work is completed, and Mr Balachandariyar responded that this often did not happen and there were instances where customers had not received an automatic email even two to three weeks later. Mr Upchurch also made some suggestions as to how Mr Balachandariyar might frame Civtec’s mistakes when talking to a customer. The meeting concluded with Mr Upchurch complimenting Mr Balachandariyar that he is “doing a great job” and “it has been really cool to see all that positive feedback”.

[145] At no point in the meeting did Mr Upchurch advise Mr Balachandariyar he would be issued with a Record of Conversation, and from the way the issue was discussed it is likely this was the first time Mr Upchurch had raised these concerns with Mr Balachandariyar. Although Mr Balachandariyar may have been aware that customers often receive an automatic email, I am satisfied that prior to this meeting Mr Balachandariyar did not know there was an issue with him actively sending out the link in advance.

[146] In addition, although Civtec filed a number of policies and an employee handbook during the Employment Relations Authority process, the company did not point me to any policy that prohibited the proactive sending out of links to customers. Nor did Ms Williams refer Mr Balachandariyar to any relevant policy or other agreement following his request for one as part of his feedback on the preliminary scores.

[147] On balance, I find that Mr Balachandariyar only became aware of the Record of Conversation through the restructure process. My basis for this finding is that he was never informed that he was going to be issued with a Record of Conversation; if he had been notified earlier, it is likely he would have queried it at the time; and he appeared genuinely surprised by Civtec’s assertion, when first assessing him against the selection criteria, that he had been issued a Record of Conversation.

[148] I also find that the Record of Conversation was not fairly issued. The 6 August 2024 conversation was framed around positive feedback, and it was not reasonable for Mr

Balachandariyar to be penalised for conduct he had not been informed was inappropriate (and could not reasonably have known was inappropriate), given the issue had not been raised with him previously.

[149] Although the “Performance Management; Bullying, Harassment and Discrimination; and Disciplinary Policy” describes a letter of expectation or Record of Conversation as something that “may be used to set [a] clear performance expectation” which is “placed on the employee’s personnel file”, Mr Inglis’ comments that a Record of Conversation is only issued where an employee ignores previously communicated expectations indicate that issuing a Record of Conversation to Mr Balachandariyar in these circumstances was premature.

[150] Although Mr Upchurch was entitled to instruct Mr Balachandariyar to cease sending links to customers (irrespective of whether such a requirement is set out in a policy), it was not appropriate to issue a Record of Conversation for a first breach of a requirement he had not yet been made aware of, particularly given the potential for a Record of Conversation to adversely affect his employment as occurred in the restructure selection process.

[151] Having found that it was not fair or reasonable to issue a Record of Conversation in the circumstances, Mr Balachandariyar should have been issued a score of three out of three, rather than one out of three.

[152] Finally, I note that it will not always be appropriate to reassess issued Records of Conversation or other disciplinary outcomes. For example, where an employee accepts an outcome, they cannot reasonably later claim that it was unfair. However, in Mr Balachandariyar’s circumstances – where he was not verbally informed of the outcome, stated that he did not receive it in writing, and raised concerns about its justifiability – it is appropriate to consider whether it was properly issued.

Criterion 3 – attendance: excessive sick leave outside of entitlement

[153] During the relevant period, Mr Balachandariyar took three days’ unpaid sick leave in excess of his statutory entitlement. Although, initially assessed as unjustified sick leave in the context of his preliminary score for criterion 3, this was later changed to justified, albeit Ms Williams did not explain why. When queried as to whether any of the unpaid sick leave days related to Mr Balachandariyar’s wrist injury, Mr Inglis said that he did not know.

[154] If the three days' unpaid sick leave did relate to the wrist injury (such absences having occurred within a few weeks of the injury and likely being connected), it was not justified to have marked Mr Balachandariyar down for them.

[155] Selection criteria in a restructure process should be used as a forward-looking assessment of the suitability of a person to a particular role. Previous absences due to a temporary work-related injury the employee has since recovered from should have no bearing on that assessment.

[156] Had the absences not been counted against Mr Balachandariyar, he would have been entitled to a score of three out of three rather than one out of three.

Overall assessment

[157] I find that Mr Balachandariyar was unjustifiably dismissed. For Mr Balachandariyar, the restructure process effectively and unreasonably became a de facto medical incapacity process with up to three of the four selection criteria unfairly marked down due to issues around a workplace wrist injury and a long-term medical condition (bronchial asthma).

[158] If a wrist injury or medical condition such as bronchial asthma is expected to have a long-term impact on an employee's ability to undertake their duties, this should be assessed through a medical incapacity process rather than through the backdoor of a restructure selection process.

[159] Mr Balachandariyar was issued a preliminary score of 13/27, which then rose to 14/27 due to an increase in his attendance score, albeit no explanation was given for the increase. Had Civtec assessed the four criteria at issue appropriately, Mr Balachandariyar could have received up to a further nine points, taking him to a potential score of 23. The lowest scoring successful candidates received scores of 18 and 21 for the Fibre Technician and Civil Technician roles respectively and so Mr Balachandariyar was comfortably at the level required and could have expected to be offered both positions.

Unjustified disadvantage

[160] I must now determine whether Civtec unjustifiably disadvantaged Mr Balachandariyar by failing to adequately modify his duties or otherwise properly support him following his wrist injury.

[161] Before undertaking that analysis, I first pass comment on the witnesses, as it is the unjustified disadvantage claim in which I have most relied on an assessment of witness evidence.

[162] Mr Balachandariyar provided a detailed chronology of relevant events throughout his employment. These were largely corroborated by the documentary evidence. Civtec's witness statement did not set out a chronology, instead providing generic responses and assertions. Although in some instances this did not materially impact the factual analysis given the extensive documentation supplied by both parties, it would have assisted me if the company had set out, from its perspective, how it had supported Mr Balachandariyar's recovery.

[163] Mr Inglis was a helpful and considered witness, however, his involvement in the matter was somewhat at arms-length. Although he may have been aware of some of the issues at the time they arose, he was generally not directly involved in the employment processes.

[164] In putting forward Mr Inglis as its sole witness, this limited Civtec's ability to speak authoritatively on the facts. Mr Inglis' lack of direct involvement with Mr Balachandariyar meant he was unable to provide a first-hand account of any ongoing interactions between Mr Balachandariyar and his Team Leader or Manager regarding any modifications to his duties following his wrist injury. While I was able to make a telephone call to Mr Upchurch for a short conversation, this was only of limited assistance.

[165] Overall, Civtec undertook some positive steps in supporting Mr Balachandariyar to recover from his wrist injury. This includes referring him to physiotherapy through its provider (which it paid for), facilitating a subsequent referral to hand therapy (which it again paid for), and ensuring he was remunerated for the time spent attending appointments. In addition, Ms Webster appropriately sought regular updates from the health professionals and passed at least some of these on to Mr Upchurch. Civtec also formally modified Mr Balachandariyar's duties from 22 August 2024, on the insistence of the hand therapist.

[166] Despite these positive steps, and for the following reasons, I nevertheless find that, on balance, Civtec did unjustifiably disadvantage Mr Balachandariyar in failing to adequately support him in recovering from his wrist injury.

[167] I find that Civtec did not adequately consult Mr Balachandariyar following his wrist injury and the physiotherapist's initial assessment. Mr Balachandariyar could reasonably have

expected his manager or team leader to collaborate with him on a plan to ensure he avoided (or at least minimised) those tasks which might exacerbate his injury and implement regular check-ins to ensure he continued to be assigned appropriate duties. However, there is no evidence that any such discussion took place.

[168] Even when, on 8 May 2024 (a few weeks after the injury), the physiotherapist provided a report specifying the duties Mr Balachandariyar was unable to perform and the types of wrist movements he was advised to avoid, Civtec did not provide any evidence of Mr Balachandariyar's manager or team leader arranging to discuss with him how his duties could best be managed. I therefore find that Civtec failed to comply with the requirement to clearly communicate Mr Balachandariyar's tasks while injured pursuant to clause 3.2(h) of Civtec's Injury and Illness Management Policy.

[169] I acknowledge that Mr Upchurch described a more structured process for employees with injuries generally, detailing a process of working with the Health and Safety Team to understand any restrictions and arrange a regular check-in. However, he was unable to provide any evidence Civtec followed any such structured process with Mr Balachandariyar, only saying that he is sure "it will have happened".

[170] Indeed, neither Mr Balachandariyar nor Civtec provided evidence of regular check-ins, albeit from time-to-time, in meetings about other work-related matters (such as the 11 July 2024 meeting between Mr Upchurch and Mr Balachandariyar regarding the Occupational Health referral for mask-fitting), Mr Balachandariyar was asked how his wrist injury was progressing.

[171] Civtec breached its obligations under the signed 16 May 2024 document to "follow the recommendations of the physio or GP and ensure allocated work is in accordance with any restrictions imposed", as well as clause 3.3(b) of its Injury and Illness Management Policy, by failing to adhere to the physiotherapist's recommendation in her 8 May 2024 report to "avoid right hand twisting, turning, lifting".

[172] The Hand Therapist's 12 August 2024 comments confirm that Mr Balachandariyar's continued performance of tasks such as wire stripping and using a screwdriver were aggravating the tissue and delaying healing. Civtec's failure to take him away from duties such as manual screwdriving, which requires a twisting motion of the wrist, negatively impacted Mr Balachandariyar's recovery and fell short of adequate support. It is also notable

that there was a ten-day delay between the Hand Therapist's comments and the formal modification of duties on 22 August 2024, indicating again that Civtec may have prioritised ongoing work over properly addressing Mr Balachandariyar's wrist injury and recovery.

[173] The physiotherapist's appointment notes do refer to Mr Balachandariyar performing light duties or avoiding particular tasks; however, it is not clear whether these comments reflect an unverified assumption that Civtec had adjusted his duties (i.e. because the physiotherapist had communicated those expectations), or if there was a factual basis for her statements. Certainly, neither party has provided evidence that an agreed plan was being followed or even that Civtec was conducting any additional recording of his duties so that it could monitor his progress or take note of any adverse reactions.

[174] The physiotherapist's notes refer to actions such as Mr Balachandariyar lifting with his left hand only and the 8 May report recommends "selected or alternate duties including: activities that avoid lifting [more than] 3 kg (when using both hands)". Although Mr Balachandariyar was largely able to avoid using his right hand for lifting items heavier than three kilograms (e.g. using his left hand to lift four-kilogram splicers and cones that were heavier than three kilograms), it is likely this was more a result of his own initiative than from anything that Civtec had implemented. Indeed, Civtec did not put forward any evidence of any steps it had taken to ensure compliance with the physiotherapist's recommendations.

[175] In addition, although the 11 July 2024 meeting transcript regarding the Occupational Health referral records Mr Balachandariyar informing Mr Upchurch he was temporarily working alongside a colleague who was performing some of the more onerous tasks for him, there is no evidence as to whether this was at Civtec's instruction or was merely a fortunate circumstance.

[176] It is also instructive that approximately three weeks after the wrist injury, Mr Uppal directed Mr Balachandariyar to work alongside Mr Javier, which he was aware would have required Mr Balachandariyar to perform work in underfloor and ceiling spaces. Although the instruction was rescinded due to Mr Balachandariyar's repeated disclosure of bronchial asthma, it is likely the wrist injury had not been considered in issuing the direction. This despite there being an obvious concern that crawling on hands and knees could exacerbate the wrist injury.

[177] Although Mr Balachandariyar informed Mr Uppal of the wrist injury in his reply (in a way that implied Mr Uppal did not already know about it), it would be surprising if a Team Manager who Mr Balachandariyar regularly reported to did not already know of the wrist injury. If he did not, this would only serve to underline a concerning lack of communication within the business regarding supporting Mr Balachandariyar's recovery.

[178] In any event, Mr Balachandariyar clearly felt under pressure to perform underfloor and ceiling work, despite the wrist injury, otherwise, on 3 July 2024, he would not have asked the physiotherapist to write to his GP about his wrist injury continuing to render him unable to "do work on ladders and under floors"; nor would he have made the accompanying comment that Civtec will make him do such work even if he says he cannot.

[179] Having found that Civtec unjustifiably dismissed and unjustifiably disadvantaged Mr Balachandariyar, I now consider remedies.

Remedies – unjustified dismissal

[180] In relation to the unjustified dismissal, I turn to consider the appropriate lost wages and compensation remedies pursuant to section 123(1)(b) and 123(1)(c)(i) of the Act.

Lost Wages

[181] Mr Balachandariyar lost remuneration as a result of his unjustified dismissal. Pursuant to sections 123 and 128 of the Act, if an employee has a personal grievance and they have lost remuneration because of that grievance then they are entitled to the lesser of their actual lost remuneration or three months' ordinary time remuneration.

[182] This is subject to the employee's duty to take reasonable steps as are appropriate in the circumstances to mitigate loss. Mr Balachandariyar did so by promptly securing work as an Uber driver.

[183] I must therefore award Mr Balachandariyar the equivalent of three months' ordinary time remuneration as his actual loss was considerably higher. I do have the discretion pursuant to section 128(3) to award greater than this amount; however, I decline to do so on the basis that Mr Balachandariyar considered there to have been suitable roles he could have applied for in other areas of New Zealand, including Auckland, Twizel and Wanaka, but he did not. For personal reasons, Mr Balachandariyar chose to remain in Christchurch where he says

comparable opportunities were limited “because Civtec was the primary contractor and business partner under the Enable broadband network”.

[184] Although he was often requested to work extended hours, Mr Balachandariyar’s “ordinary hours of work”, as set out in clause 8.1 of his employment agreement, were 40 per week. He was paid an hourly rate of \$27.95.

[185] I therefore award \$14,534 (gross) ordinary time remuneration, this being Mr Balachandariyar’s weekly ordinary time remuneration (40 hours multiplied by a rate of \$27.95) multiplied by 13.

Loss of dignity and injury to feelings

[186] In assessing any amount of compensation that should be awarded, my task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of Civtec’s unjustified actions. Various Employment Court decisions provide guidance on this exercise of quantification.⁴

[187] Mr Balachandariyar described the dismissal as having a significant impact on his wellbeing, causing distress and emotional strain. This was exacerbated by the potential impact on his career given the specialist skills he had developed and the limited opportunities he described for continuing to use those specialist skills. Although Mr Balachandariyar did not provide any medical evidence of the impact, it is clear from the way he talked about the dismissal that he suffered a moderate level loss of dignity and injury to his feelings.

[188] Consequently, I award \$20,000 compensation pursuant to section 123(1)(c)(i) of the Act.

Remedies – unjustified disadvantage

[189] In relation to the unjustified disadvantage, I turn to consider the appropriate compensation remedy pursuant to section 123(1)(c)(i) of the Act.

⁴ See *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; *Richora Group Ltd v Cheng* [2018] NZEmpC 113; and *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101.

Loss of dignity and injury to feelings

[190] Mr Balachandariyar's impact evidence was largely focused on his dismissal; however, I am satisfied that he did suffer a loss of dignity and injury to his feelings from the failure to adequately modify his duties or otherwise properly support him following his wrist injury.

[191] I assess this to have been at a low level, and I consequently award \$3,000 compensation.

Contribution

[192] I am required by section 124 of the Act to consider the extent to which Mr Balachandariyar's actions contributed towards the situation that gave rise to the personal grievance.

[193] I find that they did not contribute to the grievance and so I do not award any reduction to the remedies.

Outcome and costs

[194] Civtec unjustifiably dismissed and unjustifiably disadvantaged Mr Balachandariyar. Civtec are ordered to pay Mr Balachandariyar:

- (a) \$23,000 compensation pursuant to section 123(1)(c)(i) of the Act; and
- (b) \$14,534 (gross) in lost wages.

[195] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[196] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Balachandariyar may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Civtec will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[197] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment.⁵

William Fussey
Member of the Employment Relations Authority

⁵ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1