IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 810
3367383

	BETWEEN	ALISTAIR D'SOUZA Applicant
	AND	WATERPRO ENVIRONMENTAL LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Allen Goldstone, advocate for the Applicant Matthew Hutcheson, counsel for the Respondent
Investigation:	On the papers
Submissions:	From the Respondent on 11 August and 22 September 2025 and from the Applicant on 8 September 2025
Determination:	16 December 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns two preliminary questions raised by Waterpro Environmental Limited (Waterpro) about an application to the Authority by its former employee Alistair D'Souza.

[2] Mr D'Souza has asked the Authority to find he was unjustifiably disadvantaged by Waterpro breaching safety obligations owed to him.

[3] He was injured in an accident at work on 4 September 2024. He fell off a ladder resulting in concussion and injuries to his face, shoulder and arm for which he had maxillofacial and wrist surgery. He received accident compensation to assist with his rehabilitation, including payment of weekly compensation when he could not work because of his injuries.

[4] In his application to the Authority Mr D'Souza has asked for an award of compensation for humiliation, loss of dignity and injury to his feelings. He said he felt humiliated and had "lost any sense of dignity" because the company appeared to blame him for the entire incident and, in his view, had "shrugged off" its responsibility for what happened.

[5] Waterpro denied Mr D'Souza's injuries resulted from any breach of health and safety duties by the company. It said the accident occurred after Mr D'Souza borrowed unsuitable equipment at a customer's work site and attempted to carry out work he was not asked to do.

[6] Waterpro said Mr D'Souza's claim for compensation was "barred" because it arose directly or indirectly from a personal injury covered by s 317 of the Accident Compensation Act 2001 (the AC Act). It also said his allegations about inadequate training and not being provided with "a communication device in case of emergency" concerned events which occurred more than 90 days before he raised that grievance. It accepted those earlier events might be examined as part of the context for his later personal grievance but said they could not be pursued as standalone personal grievances.

The Authority's investigation

[7] By agreement with the parties' representative these preliminary issues have been determined 'on the papers', that is by reference to written submissions from them and the statement of problem, statement of reply and some background documents provided by the parties.

[8] This determination is limited to considering what is permitted or possible within the parameters set by the relevant legislation. It is not an assessment, at that stage, of the merits of Mr D'Souza's grievance or whether any remedies would be awarded if the matter proceeded to be investigated and determined.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the ER 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 statutory bar on proceedings and compensation under the AC Act

[10] The AC Act includes the following statutory bar (bold emphasis added):

> **317 Proceedings for personal injury**
>
> (1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for **damages arising directly or indirectly out of**—
> (a) **personal injury covered by this Act**; or
> (b) personal injury covered by the former Acts.
>
> (2) Subsection (1) **does not prevent any person bringing proceedings relating to, or arising from**,—
> (a) any damage to property; or
> (b) **any express term of any contract or agreement** (other than an accident insurance contract under the Accident Insurance Act 1998); or
> (c) the unjustifiable dismissal of any person or **any** other **personal grievance arising out of a contract of service**.
>
> (3) However, **no** court, tribunal, or other **body may award compensation in any proceedings** referred to in subsection (2) **for personal injury** of the kinds described in subsection (1).

[11] There was no dispute Mr D'Souza had suffered personal injury from the accident at work. Such personal injury can include physical injuries, mental injuries resulting from the physical injury and work-related mental injury from being involved in a sudden, single event while at work, even if not following instructions at the time.[1] His doctor's ACC medical certificate described Mr Souza as having physical injuries and acute post trauma stress due to the accident on 4 September 2024.

The scope of Mr D'Souza's personal grievance claim

[12] Waterpro's employment agreement with Mr D'Souza included the following clauses under the heading of Health and Safety:

> [48] The Employer and the Employee will comply with the requirements of the Health and Safety at Work Act 2015.
>
> [49] The Employer will:
> a. Train employees to do their job safely;
> b. Provide safety equipment and protective clothing where appropriate;
> c. Regularly audit systems and practices against relevant WorkSafe New Zealand codes …
>
> [50] The Employee is required to comply with the Employer's health and safety policies, rules and procedures and to take all practicable steps to ensure his or her fitness for work and safety at work and the safety of others in the workplace. …

[1] Accident Compensation Act 2001, ss 26, 21B and 28.

[13] Mr D'Souza's grievance said Waterpro unjustifiably disadvantaged him, by breaching the duties expressed in those terms of employment in the following ways:

- Failing to provide him with a copy of relevant cleaning procedures;
- Failing to offer any formal training in working at heights;
- Sending him to complete a job at height four days after his work at heights certificate had expired;
- Failing to provide formal training in use of a water blaster;
- Failing to arrange for scaffolding to be erected before the job, resulting in Mr D'Souza having borrow a ladder to use; and
- Failing to provide him with a suitable communication device in case of emergency.

[14] Waterpro denied any such breaches, in fact, occurred. It said Mr D'Souza was sent to clean *inside* a cooling tower at a customer's premises, not its exterior, so no arrangements for scaffolding to work at height were required. It said he had borrowed a ladder from the site manager and a high-pressure commercial water blaster from a contractor and proceeded to carry out work which was not safe. Using the high-pressure water blaster resulted in the unstable work platform of the ladder moving and Mr D'Souza falling heavily. It also said Mr D'Souza was provided with a mobile phone which had an emergency call function and there was a procedure in place provide regular check-ups calls to employees working alone.

[15] Mr D'Souza's statement of problem included a claim for compensation of $50,000 under s 123(1)(c)(i) of the ER Act for humiliation, loss of dignity and injury to his feelings. His statement expressly relied on a letter sent to Waterpro on 27 November 2024, raising his personal grievance, to explain the basis of his claim.

[16] The letter said he had "experienced significant physical injuries as well as immense stress and anxiety from being unable to work and provide for his family" as a result of Waterpro breaching its duties under the Health and Safety at Work Act 2015. The letter included a section written by Mr D'Souza outlining his personal experience. He wrote that he went into "deep shock" when he thought about the accident in which he could have died, felt a lack of support from the company since then, suffered ongoing social and financial effects and felt humiliated that the company appeared to blame him for the incident.

[17] His description did not refer to any effects on him of the alleged safety breaches prior to the accident.

Grievance accepted as open for breaches prior to the accident

[18] Waterpro's submissions accepted Mr D'Souza could seek investigation of a personal grievance for unjustified disadvantage, referring to the company breaching safety duties, but only up to the date of the accident. It accepted this alleged wrongdoing was, at least arguably, "disjunctive" of his subsequent personal injuries in the accident which were covered by the AC Act.

[19] Waterpro disputed, however, whether his claim for a remedy of compensation for the alleged safety breaches was actually "disjunctive" of the injuries incurred in the accident. Rather, Waterpro said Mr D'Souza's description of the basis on which he was seeking that compensation related entirely to the covered personal injuries and their after-effects on him. It said his claim for compensation was, therefore, "moot" and should be dismissed.

[20] Mr D'Souza's submissions accepted he could not seek "additional compensation" for his injuries caused by the 4 September accident as they were already compensated by ACC payments. He submitted, however, that his distress compensation claim, under s 123(1)(c)(i) of the ER Act, was for the "separate and distinct" disadvantage caused by Waterpro's alleged breach of safety duties in the period up to and including 4 September.

[21] Those submissions accorded with the principles described in case law on the application of the bar imposed by s 317 of the AC Act on any prospective awards of compensation under s 123(1)(c)(1) of the ER Act. Those principles confirm a worker is not barred from seeking such compensation where quantifiable breaches, occuring entirely independently or 'disjunctive' of the personal injury, can be established as causing quantifiable loss to the worker.[2]

[22] The word 'disjunctive', in this context, refers to situations where the stress or damage said to be experienced by the worker is not so inherently or inextricably

---

[2] *Robinson v Pacific Seals (NZ) Limited* [2014] NZEmpC 99 at [46] and *Roberts v The Chief Executive of the Department of Corrections* [2024] NZEmpC 24 at [17] and [21].

connected to their physical injuries that it is part and parcel of the personal injury suffered.

[23] The connection is more obvious where a claim concerns circumstances after the accident. Whether before or after the accident, an investigation of the claim must establish the fact of a breach of duties, with a resulting effect of the type compensable under s 123(1)(c)(i) of the ER Act, before turning to an assessment of whether or not that effect is inherently connected to the covered personal injury and therefore excluded from compensation due to the operation of the 'bar' set by s 317(3) of the AC Act.

[24] In Mr D'Souza's case, he is clearly entitled to an investigation of his personal grievance claim about breaches of his terms of employment which allegedly occurred before the accident. If those breaches were to be established, it would then be a matter of assessing his evidence about whether he experienced effects of humiliation, loss of dignity or injury to his feelings before the accident. If occurring before the accident, they would not therefore have arisen directly or indirectly from his subsequently covered personal injury.

[25] While it was theoretically possible to also identify such effects *after* the accident, that were experienced separately or independently from the effects or consequences of the personal injury, it is practically very difficult to do so, as some earlier Authority determinations illustrate.[3]

[26] One useful instance of a similar conclusion is found in *Wang v McConnell Dowell Construction Ltd*.[4] In that determination the Authority accepted Mr Wang could pursue a personal grievance for alleged inadequacies in his employer's health and safety procedures prior to his accident. His ability to recover any remedy was, however, "very limited" because neither damages nor compensation was available for any matters arising directly or indirectly from his personal injury. For instance, he was not able to claim lost earnings and study costs arising after his employment ended because of the injury. Weekly compensation for lost earnings and vocational rehabilitation were available as entitlements under the AC Act and could not be claimed for separately and additionally as remedies in a personal grievance claim. The same limit applied to medical costs and mental injury experienced because of his injuries.

---

[3] See, for example, *Nelson v Open Country Dairy Ltd* [2016] NZERA Auckland 290.
[4] ERA, Auckland, AA 393/10, 31 August 2010.

Outcome not certain and remedies are available

[27] Waterpro submitted Mr D'Souza's claim should be dismissed, at this stage, because an award of compensation could not be made and simply have a finding or declaration that there was a breach of duties would be of no practical utility. Rather, it said, such an outcome would be a waste of the resources of the parties and the Authority. It said these proceedings were moot and should be dismissed as frivolous.

[28] This submission is not accepted for the following reasons.

(i) Premature conclusion

[29] Waterpro's submissions about the likely outcome regarding the prospect of compensation were premature. It relied on Mr D'Souza's personal grievance letter having referred to experiencing emotional effects on him only after the accident. That letter, as already noted, had not referred directly to any effects on him resulting from the alleged failures in safety standards as having occurred before the accident.

[30] At this preliminary stage, the content of his potential evidence on this point is not known. Adopting the reasoning followed by the Employment Court in *Roberts v The Department of Corrections,* the question of whether the alleged breaches caused earlier and independent harm, not then subsumed by the effects of the accident, is a matter of evidence which would have to be provided and tested in an Authority investigation.[5]

[31] Waterpro may be confident that the evidence in such an investigation would show no safety breaches occurred and, even if they did, that any emotional effects only occurred afterwards, due to the accident, so no additional compensation could be awarded. This is not a conclusion that the Authority could, at this stage, fairly reach in advance of hearing and assessing whatever evidence there may be on the issue of the alleged prior breaches and whether any effects resulted from such breaches before the accident.

(ii) Other remedies also available

[32] Contrary to Waterpro's submissions on this point, Mr D'Souza's claim had not only sought a remedy of compensation.

---

[5] *Roberts*, above n 2, at [32] and [33].

[33] His statement of problem did list just remedies of compensation and legal costs but that statement also expressly relied on the contents of his personal grievance letter. Remedies sought in that letter included "immediate action … to resolve the health and safety risks present in the working environment".

[34] Waterpro's submission did accept "the Authority could potentially consider a declaration" because of its discretion under s 160(3) of the ER Act to concentrate on resolving the employment relationship, however described, rather than being bound to treat the matter solely as described by the parties.

[35] Again contrary to Waterpro's submission, a potential finding about a breach of safety standards was not a 'moot' issue. Such a finding could also be grounds for the Authority exercising its remedial option to make a recommendation for action by an employer where a workplace practice is found to be a significant factor in a personal grievance.[6] Failures in observing safety duties under the terms of an employment agreement could be an appropriate instance to make such a recommendation.

[36] Additionally, the absence of monetary remedies is not, on its own, grounds for dismissing a proceeding. As the court observed in *Roberts*:[7]

> … [I]t would seem to be adverse to public policy to deny an employee a means of addressing a breach or breaches of a collective agreement simply because monetary damages were minimal. Breaches of collective agreement terms can have a broader impact on the workplace and employment relationships than that which can be measured in purely financial terms. It would not be in the interests of justice if such claims were shut down prematurely.

[37] The same principle applies to the circumstances of an individual employment agreement where breaches of the terms of that agreement (about providing training, safety equipment and following safety guidelines) are said to have given rise to a personal grievance of unjustified disadvantage. Addressing the concerns in relation to that individual worker may, similarly, have a broader impact in workplace practices and employment relationships.

---

[6] Employment Relations Act 2000, s 123(1)(ca).
[7] *Roberts*, above n2, at [36].

(iii) Issues in claim not frivolous

[38] As apparent from reasons already given, Mr D'Souza's claim did not meet the threshold for dismissing a proceeding as frivolous. [8] While there may be difficulties in establishing the evidence of emotional harm connected to the alleged breaches prior to the accident, the claim is not so lacking in legal merit so that it is impossible to take seriously.[9]

Some parts of the claim are contextual in a single grievance

[39] Waterpro submitted some elements of Mr D'Souza grievance about the alleged safety breaches prior to the accident was out of time to be raised as standalone grievances. Rather, it submitted, those elements could be considered only as part of the context for his grievance.

[40] This submission appeared to relate mainly to his claim that he had asked for and been declined provision of an emergency communication device in 2023. It may also relate to his allegation that training on safety matters was not adequate.

[41] Mr D'Souza submitted those alleged breaches were part of an ongoing course of conduct, rather than a single historical event, and so continued into the 90-day statutory period prior to raising his grievance.

[42] On either account, the facts of what happened would need to be examined. As presently before the Authority, there is a single personal grievance in which evidence about the provision of an emergency communication device and the safety training procedures are relevant to whatever findings may be made and, if any, whatever remedies could be considered.

Outcome

[43] For the reasons given, the Authority may continue to investigate Mr D'Souza's personal grievance for unjustified disadvantage, if he wishes to go ahead with investigation of that application.

---

[8] Employment Relation Act 2000, Sch 2, cl 12A.
[9] *Gapuzan v Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre* [2014] NZEmpC 206 at [58].

[44] If an investigation is to continue, the issues for resolution include:

(i) Did Waterpro breach safety duties, as alleged, prior and up to 4 September 2024?

(ii) If so, did Mr D'Souza experience humiliation, loss of dignity and injury to his feelings arising from those breaches *prior* to the accident or, if post accident, in a way not inherently connected to the personal injuries suffered in the accident?

(iii) If so, what compensation should be awarded under s123(1)(c)(i) of the ER Act?

(iv) If Waterpro is found to have breached safety duties, should any recommendations be made to it about workplace practices?

[45] As already noted, if Waterpro is found not to have breached safety duties, issues (ii), (iii) and (iv) would not require resolution.

Costs

[46] Costs are reserved. If the matter proceeds to a substantive investigation, costs would be considered at that stage. If it does not proceed, the parties are encouraged to resolve any issue of costs between themselves. If they cannot do so, Mr D'Souza may lodge a memorandum on costs as the effectively successful party on the preliminary issues. From the date of service, Waterpro would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[47] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[10]

Robin Arthur
Member of the Employment Relations Authority

[10] See www.era.govt.nz/determinations/awarding-costs-remedies.