

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 75  
5515211

BETWEEN	ALISTER DORAN Applicant
A N D	SOUTH PACIFIC MEATS LIMITED First Respondent
A N D	WAYNE LINDSAY Second Respondent
A N D	DEAN BURGESS Third Respondent

Member of Authority: Helen Doyle

Representatives: Karina Coulston, Counsel for the Applicant  
Rachel Webster, Counsel for the Respondents

Investigation Meeting: 10 and 15 April 2015 at Christchurch

Submissions Received: 22 April, 11 and 13 May 2015 from the Applicant  
6 May 2015 from the Respondent

Date of Determination: 10 June 2015

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**DETERMINATION OF THE AUTHORITY**

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**A I have found that Alister Doran was disadvantaged in his employment by unjustified actions of South Pacific Meats Limited.**

**B I have ordered South Pacific Meats Limited to pay to Alister Doran:**

**(i) The sum of \$1200 gross being lost wages.**

**(ii) A further four days wages reduced or not paid between 29 September and 2 October 2014 (both days inclusive) to be reimbursed at the average daily pay rate for the previous week. Leave is reserved for either counsel to return to the Authority if a figure cannot be agreed.**

**(iii) Compensation in the sum of \$10,800.**

**C I order a penalty in the sum of \$3000 for a breach of good faith that is to be paid by South Pacific Meats Limited into the Authority and then to be paid into the Crown Bank Account.**

**D There are no further awards for penalties or damages.**

**E I have reserved the issue of costs and if not agreed have timetabled for a response.**

### **Employment relationship problem**

[1] Alister Doran commenced employment with the first respondent, South Pacific Meats Limited (SPM) in November 2012. Mr Doran says that he was employed full time as an A-grade beef slaughterman at SPM on a series of individual employment agreements. SPM accepts that Mr Doran was employed on individual employment agreements but says that employment was seasonal as a meat processor and not into a particular position.

[2] Mr Doran is a member of the New Zealand Meat Workers' Union (the Union).

[3] On 30 May 2014, Mr Doran sustained a serious injury at work when he cut his left forearm. He says that SPM and the second and third respondents failed in their duty to him to provide him with medical treatment for his injury beyond immediate first aid.

[4] He says that when he returned to work after a month recovering from his injury, his request, connected to discomfort with the injury, to transfer back to the department he had worked in previously was declined. He was then required to work in another department as a C-grade worker on reduced rates. Mr Doran says that he was then asked to undertake two jobs in an unsafe way and faced disciplinary action

as a result and demotion. Mr Doran says that he was being punished for raising a personal grievance throughout this time.

[5] Mr Doran's relationship with SPM ended when he was dismissed on 31 October 2014 for returning a second positive drug test.

[6] Mr Doran says that he was unjustifiably disadvantaged by the actions and omissions of SPM and the failure to provide him with any medical treatment other than first aid for his serious injury.

[7] Mr Doran seeks the following:

- (a) A penalty for breach of his terms and conditions of employment;
- (b) Compensation for humiliation, loss of dignity and injury to feelings for unjustifiable disadvantage in the sum of \$15,000;
- (c) Reimbursement of lost wages estimated in the sum of \$1,200;
- (d) A penalty for a breach of Mr Doran's terms and conditions of employment with respect to SPM and the other two respondents;
- (e) A penalty for a breach of s.4 of the Employment Relations Act 2000 (the Act) with respect to SPM and the other two respondents;
- (f) Damages for breach of contract against SPM and the other two respondents;
- (g) Damages for breach of statutory duty against each respondent; and
- (h) Costs.

[8] The second respondent, Wayne Lindsay, was at the material time, the human resource and health and safety coordinator for SPM based at the Malvern plant.

[9] The third respondent, Dean Burgess, is the plant manager for SPM based at the Malvern plant.

### **The issues**

[10] The Authority is required to consider the following issues:

- (a) Did SPM fail to provide Mr Doran with medical treatment for his injury incurred on 30 May 2014?
- (b) If there was a failure to provide Mr Doran with medical treatment, was that failure unjustified?
- (c) Was Mr Doran disadvantaged as a result of that failure?
- (d) Was Mr Doran disadvantaged by unjustified actions of SPM on his return to work?
- (e) If there were unjustified actions causing disadvantage what remedies should be awarded and are there issues of contribution?
- (f) Was there a breach of Mr Doran's terms and conditions of employment by the respondents for which a penalty should be awarded?
- (g) Was there a breach of the duty of good faith and should there be a penalty awarded?
- (h) Was there a breach of contractual duty or statutory duty for which an award of damages should be made?

### **Did SPM fail to provide medical treatment to Mr Doran?**

#### ***Relevant documents***

[11] Mr Doran has an individual employment agreement with SPM that provides in clause 22.1 that SPM is committed to providing a safe and healthy working environment for all employees and to meet its obligations in terms of the Health and Safety in Employment Act 1992 and all statutory requirements.

[12] SPM is part of the AFFCO group of companies and a manual sets out health and safety policies and procedures (the manual). SPM provided the manual as part of disclosure and it is document 2 in the applicant's bundle. I am satisfied that is the manual referred to in clause 22.6 of Mr Doran's individual employment agreement as *The Company Health & Safety Manual*. Mr Doran was required under that clause to observe all safety procedures and use protective clothing and equipment as specified in that manual. The contents of that manual I find are incorporated into Mr Doran's terms and conditions of employment.

**30 May 2014**

***The injury***

[13] 30 May 2014 was the Friday before the long weekend of Queens birthday. Mr Doran sliced open his left forearm whilst he was working on the beef slaughterboard. He said that he did not know he had cut himself initially but then realised his wrist was not working. Another beef slaughter employee, Royce King, was working next to Mr Doran and knew it was a bad cut because Mr Doran's hand went limp and he described the hand as *sort of fell over*. Mr King noticed that initially it was not bleeding but that then it bleed a lot. There is dispute about the time the incident. I will return to this matter.

***Reporting the injury and administering of first aid***

[14] After he cut himself Mr Doran reported the injury to Wesley Cameron who was at that time the slaughterboard supervisor. Mr Cameron explained in his evidence that he keeps an accident register in his office for his department but does not use it for more serious incidents such as Mr Doran's which require an accident report to be completed.

[15] There is considerable dispute in this case about the time of the injury. I am not persuaded that the time of the injury on the accident and investigation report of 3.45pm is supported by the evidence. The accident report was never signed by Mr Doran as it was required to be and that I find impacts on the weight I place on the report. The report was signed by Mr Cameron. He says that 3.45 pm was the time he signed the form not when the injury occurred. He did not correct the time unfortunately on that form but now says that the injury occurred at 2pm.

[16] Mr Cameron administered some initial first aid to Mr Doran by way of a gauze pad and pressure which stopped the bleeding. Mr Cameron also assisted Mr Doran to remove his work gear.

[17] Before Mr Cameron took Mr Doran out of the department Mr Doran returned to the slaughterboard floor and advised Mr King that he did not know if Mr King could give him a ride home. I accept at that point Mr Doran was uncertain about what would happen next although in all likelihood anticipated at least a visit to a doctor as

he asked Mr King if he could give him a ride from the doctors to his home. Mr King gave Mr Doran a ride to and from work each day.

[18] Mr Cameron then took Mr Doran down to the first aid room and went to find the first aid officer, Nicketa McConachy who was also at that time the office receptionist. Mr Cameron advised Ms McConachy that Mr Doran had cut himself badly and requested her to administer more first aid which she did.

[19] Both Ms McConachy and Mr Cameron had undertaken through SPM a St John's first aid course. They were able to make an assessment whether they could manage the situation themselves in the event of an incident or whether they needed to involve a doctor or send an employee to hospital. They both concluded, in looking at the wound, that further medical treatment was necessary and the appropriate next step would be for Mr Doran to see a doctor.

[20] Ms McConachy was summoned to give evidence but she did not attend for reasons that I do not need to set out in this determination. Although her evidence would have been helpful in the circumstances it was unlikely the Authority would hear that evidence and it was agreed in discussion with counsel the matter should be investigated and determined without her evidence.

### ***Serious Harm injury***

[21] The injury Mr Doran sustained and the subsequent hospitalisation period was within the definition of serious harm in clause 1.3 of the manual.

### ***Medical Centre appointment***

[22] I am satisfied that a doctor's appointment was made at the Lincoln Medical Centre at 4.15pm in all likelihood by Ms McConachy. There was no evidence before me to support that the medical centre was chosen by Mr Doran or that he made the appointment himself.

[23] Mr Doran did not attend that appointment. He said that he thought that the appointment was for 4.45pm and that as he could not get anyone to transport him to the doctors he asked Mr King for a lift between 4.15 and 4.30pm. I do not find that there can be anything read into the confusion about the time of the appointment as the

evidence supports that Mr Doran may well have been in shock and pain following his injury.

***Who was in charge of Mr Doran after his injury and administration of first aid for the arrangement transport?***

[24] No single person in all likelihood took overall control and responsibility for Mr Doran after his injury and the initial administration of first aid on 30 May 2014. I set out below what occurred when Mr Cameron left Mr Doran with Ms McConachy in the first aid room.

[25] Mr Cameron advised Mr Lindsay that Mr Doran had cut himself with a deep laceration and that he required a doctor. Mr Lindsay advised that he was too busy to deal with the matter. He had wages to do for the next week's pay because he was going on leave the following week. Mr Cameron said in his evidence that it did look like Mr Lindsay had a lot to do. Mr Lindsay explained that he had a longstanding commitment on Fridays to deliver some foetal blood and he recalled this visit from Mr Cameron was about 3.30 pm because another SPM employee, Jerry, had dropped off foetal blood in two chilly bins.

[26] Mr Lindsay, in his written statement of evidence, said that he instructed Mr Cameron to arrange the transport for Mr Doran. Mr Cameron denied that he was told to arrange the transport. He did, before returning to the slaughterboard, conclude that the issue of transport was under control. I shall come to why he was of that view. Ms Coulston noted that the instructing of Mr Cameron to arrange transport had only been recently raised by Mr Lindsay in reply to the third amended statement of problem. Mr Lindsay said that it was not until that point that he had to write a statement and turn his mind to the matter.

[27] The evidence supports that Mr Lindsay would usually assume overall responsibility and carry out or delegate aspects of after injury care. There were others though mentioned in the manual aside from Mr Lindsay's position who could assume responsibility for an injured employee.

[28] The flow chart for serious harm on page 72 of the manual needs to be read in conjunction with clause 6.3 of the manual. Clause 6.3 sets out the steps after the first aider had attended to the injury when there is a medical treatment injury. The flow chart provides that after first aid there should be treatment as necessary by way of

ambulance or transport to the doctor. It had been determined by Mr Cameron and Ms McConachy that Mr Doran required medical treatment beyond first aid and needed to see a doctor.

[29] If Mr Lindsay was not available to arrange a visit to a treatment provider for medical intervention and the transport to the medical centre then clause 6.3 of the manual provides that was to be arranged by the department supervisor [Mr Cameron] and/or the team leader or the plant manager and they must arrange the visit to the medical centre and the transport.

[30] I cannot be confident that Mr Cameron understood the arrangement of transport was over to him and that he had overall responsibility for Mr Doran. He said that he had never seen the clauses in the manual about his role in the event of a need for medical treatment and that it was always Mr Lindsay's role to arrange transport. Mr Cameron said that for the 26 months he had been employed at SPM he had not arranged transport for an injured worker.

[31] As well as talking to Mr Lindsay Mr Cameron said that he talked to Mr Burgess and told him that Mr Doran had cut himself. Mr Burgess could not recall any discussion with Ms McConachy or Mr Cameron about Mr Doran's injury or transport. He did accept that he had come to know of the injury but could not recall how. I accept Mr Cameron's evidence as likely on this point. In his oral evidence Mr Cameron was clear that his discussion with Mr Burgess did not extend to the issue of transport. He said that while he was telling Mr Burgess about the injury Ms McConachy came in and asked Mr Burgess if she could make a doctor's appointment and Mr Burgess expressed some surprise that she felt she needed to ask him to do that. He also recalled that Mr Burgess and Ms McConachy discussing transport and he thought Mr Burgess was giving her *the OK* to arrange that. Mr Burgess did not recall talking to Ms McConachy about that. I have not, for reasons already explained, heard from her. What I do conclude if there was such a conversation is that there was no evidence to support that Mr Burgess was asked to arrange the transport.

[32] Mr Doran in his written evidence said that Mr Cameron and Ms McConachy told him that Mr Lindsay was too busy to transport him to the doctors and that Mr Doran would have to arrange transport himself. Further he said he was told by

both Ms McConachy and Mr Cameron that Mr Burgess was not interested and had not offered any transport or solutions for getting him medical treatment.

[33] Mr Doran had no knowledge of the discussions that I am about to set out. They do not support an expectation by Mr Cameron or Ms McConachy that Mr Doran sort transport out himself.

[34] Mr Cameron said that he then overheard Ms McConachy and the purchasing officer, Blair Stevenson, discussing transport and felt everything was in hand.

[35] Mr Stevenson had not been called by either party to give evidence and had not been referred to in the written statements of evidence. I indicated to counsel that I would like to talk to him and Ms Webster obtained a telephone number so he could be called on the second day of the Authority investigation.

[36] Mr Stevenson's recollection of the events during the telephone call was helpful and it has assisted me with the likely time of the injury. He said that on 30 May 2014 he was out and about on the plant but visited the material department in the role of purchasing officer. He thought he would have been there about 3.30pm but after 3pm anyway. Mr Stevenson said that he became involved in a discussion about transporting Mr Doran with Ms McConachy. He knew Mr Lindsay could not do the transporting and that Mr Cameron was unable to leave his role. Mr Stevenson said that *in the mix* he did offer his services as a last resort and so did Ms McConachy. He could not recall if Mr Burgess was present or nearby at the time of the discussion. He agreed that he did not make an offer to transport Mr Doran directly to him at that time. Importantly there was no evidence to support Mr Doran was present during this discussion.

[37] Mr Stevenson puts his time at the department in which he undertook the discussion with Ms McConachy after 3pm and more towards 3.30pm. Mr Cameron overheard part of the conversation about transport and said that he was satisfied that everything seemed under control at that stage with transporting Mr Doran. Before Mr Cameron went back up to the beef slaughterboard to undertake his supervisory obligations Mr Doran said he advised him that Mr Lindsay was too busy to take him to the doctors. Mr Cameron said that he did not see Mr Doran again that day.

[38] In total Mr Cameron thought that he had been away from the slaughterboard for 20 minutes to half an hour following the injury before he returned satisfied that

transport was being discussed and arranged. The discussion about transport took place I find in all likelihood between 3pm and about 3.30pm. Mr Cameron's evidence as to his time away from the slaughterboard puts the time of the injury after 2.30 pm in all likelihood and possibly closer to 3.00pm.

[39] Mr King said in his oral evidence, although this was not in his written statement of evidence that he saw Mr Doran in the smoko room between 2.45pm and 2.55pm and he asked him what he was still doing at work. He said that Mr Doran told him he was still waiting for a ride. Considering the evidence in the round I find it unlikely that Mr Doran was in the smoko room at that time.

[40] I find that arranging medical treatment and transport was in all likelihood left to Ms McConachy although her position is not one in the manual named to make such arrangements. The evidence from Mr Cameron about her interactions with Mr Burgess suggested that she was somewhat hesitant with her authority to undertake these matters. I could not be satisfied that Mr Doran knew someone had taken responsibility for arranging transport when he was told that Mr Lindsay was too busy to arrange that himself.

#### ***Mr Doran takes matters into his own hands***

[41] Mr Doran was advised by Ms McConachy that she had arranged a doctor's appointment for 4.15pm but Mr Doran as previously set out was confused about the time. I conclude that after making that appointment and advising Mr Doran, Ms McConachy then left the first aid office and attempted to arrange transport to fit the time of the appointment. I imagine at that point the discussion about transport was quite focused as the appointment time became closer.

[42] Mr Doran was left alone in the first aid office and said that he became distressed that no-one was helping him with transport and went out and had a cigarette. He said that between 3.00pm and 3.15 pm he took matters into his own hands and went to see Mr Burgess. It is likely that this was at or about the time when Ms McConachy was trying to organise some transport for the 4.15pm appointment.

#### ***Mr Lindsay***

[43] Mr Doran said that he did not see or talk to Mr Lindsay after his injury on 30 May 2014. Mr Lindsay disagrees with that. Mr Lindsay said that he had finished the

wages that day and had dropped them off to Stacey Cowan whose desk is in the main office near the entrance to Mr Burgess' office when he saw Mr Doran standing there. He asked Mr Doran why he was still there and that Mr Doran advised that he was waiting to see Mr Burgess. Mr Lindsay said that he got the impression Mr Doran was being evasive. Mr Lindsay said that they discussed the injury and Mr Lindsay recalled Mr Doran was in good spirits. Mr Doran said that he thought he might have damaged a tendon. Mr Lindsay said that nothing was raised with him about transport and if it had been he would have done something immediately by either by calling an ambulance or getting an employee to drive Mr Doran to the doctors.

[44] I find that it is firstly more likely than not that Mr Lindsay did talk to Mr Doran outside Mr Burgess' office and that no mention was made by Mr Doran at that time about transport. There has been consistent reference to this interaction from an early stage – letter from Mr Lindsay to Ms Coulston following raising of personal grievance dated 25 August 2014.

### ***Mr Burgess***

[45] Mr Burgess agrees that he had a discussion with Mr Doran however there are two significant matters in dispute. The first is that Mr Doran said he told Mr Burgess had no transport to get to the doctor but that Mr Burgess was disinterested and did not say anything. Mr Burgess said that Mr Doran did not raise anything about transport with him or ask that he transport him to the doctors although he agreed that there was discussion about the injury. Mr Burgess said that if there had been such an issue raised about transport then he would have sorted it immediately either by calling an ambulance or getting another employee to drive Mr Doran to the doctor.

[46] I find it more likely had Mr Burgess been told that transport was an issue there would have been other questions including the time and place of the doctor's appointment to where transport was required. Mr Doran could not remember if he advised Mr Burgess that a doctor's appointment had been made at Lincoln Medical Centre although he accepted he knew at the time of the conversation where that appointment had been made. Mr Burgess likewise could not recall any discussion about that. I have considered the context of the discussion which I have set out below in some more detail. There was I find in all likelihood an emphasis on getting the *arm fixed* rather than how the injury occurred. That does not sit comfortably with a refusal to assist in getting transport arranged. I accept Ms Webster's submission that it is less

likely to be credible that Mr Burgess would not respond at all to a request for transport from Mr Doran and simply look the other way. It is more likely I find that Mr Doran did not advise Mr Burgess that he had no transport to get to the doctors. Mr Burgess said he simply did not turn his mind to the matter of transport.

[47] The second point of difference between the parties is that Mr Burgess said Mr Doran advised him that he would fail a drug test as he had had a [cannabis] cigarette at 4am that morning because his mother was in hospital and he was stressed. Mr Doran denies saying that he would fail a drug test although agrees that there was a discussion about the fact that he had not slept in a couple of days because of his mother being unwell and in hospital. Mr Doran said that Mr Burgess was disinterested about the issue of transport and told him the main thing was to get *his top man back up and running*. Mr Burgess did accept that there was some discussion about the injury. Mr Doran said that he told Mr Burgess he could not move his wrist. Mr Burgess recalled Mr Doran was pale but chatty and agreed that possibly he was in shock at that time.

[48] There was provision for an employee to be drug tested after an incident or accident. It is expressed in the manual that this testing can take place at either the hospital or home of the employee. It is common ground that testing did not occur. Mr Lindsay said that Mr Burgess had asked him to carry on a drug test on Mr Doran but he was too busy to do so. Mr Burgess could not recall that request having been made of Mr Lindsay.

### ***What then?***

[49] Mr Doran left Mr Burgess' office. He said that he then spoke to two employees, David and Rob who were having smoko about getting a ride to the doctors but they were still working. In his oral evidence Mr Doran said that he tried to call his mother and had a cigarette. People started walking out of the plant at 4.20pm and he asked if he could get a ride but without a positive response. He then went back into the plant and found Mr Kingi who agreed to take him into the doctors and then they walked out together. Mr Kingi said in his oral evidence that when he came out of work he found Mr Doran still in the smoko room and agreed to take him to the doctor and they walked out of the plant together to the road to wait for Mr Kingi's wife to come with the car. This was about 4.30 pm.

[50] Mr Stevenson said that as he was leaving about 4.30pm he saw Mr Doran in the car park and asked if he was *ok* although Mr Doran did not recall that. He could not recall when questioned by Ms Webster if Mr King was with him although I accept that given the timing there is a possibility of that.

[51] I agree with Ms Webster's submission that the oral evidence about meeting in the smoko room was a departure from the written evidence of Mr King and Mr Doran. In their written evidence they both state that they were outside the plant when they met up about 4.30 pm and Mr Kingi agreed to take Mr Doran to the doctors. Ms Webster asked the Authority to pay careful attention to the inconsistencies in the evidence of Mr King and Mr Doran. I could not be satisfied from the evidence, inconsistencies aside, it takes the matter as far as Ms Webster submits to support pre-arrangement of transport.

[52] As Mr Kingi and Mr Doran were waiting for Mr Kingi's wife to come with the car Mr Lindsay drove past. He said that it did cross his mind why Mr Doran was still there and although he accepted in his evidence he should have stopped but he was in a hurry to get the foetal blood dropped off.

### ***Doctor and hospital***

[53] Mrs King arrived at SPM at about 4.45pm in the vehicle and Mr Doran was taken to the Lincoln Medical Centre. It was by that time 5pm and the centre was closed.

[54] Mr Doran called and spoke to a female employee in the office at SPM, I find it unlikely that it was Ms McConachy, and asked if he should go to Christchurch Hospital as the medical centre was closed. The employee said that she would check with Mr Burgess and then advised Mr Doran it was ok to go to hospital. Mr Burgess could not recall being asked about that. Mr Doran arrived at hospital at about 6pm and was admitted that evening.

[55] Mr Doran had surgery to his forearm on 2 June 2014 and was then discharged. Mr Doran required a full month off for recovery and then returned on light duties for a period of time until 18 August 2014.

[56] Mr Doran's nerve was lacerated but the cut missed the tendons. He has permanent nerve damage to his arm as a result of the injury.

***Was there a breach of SPM's obligations to Mr Doran on 30 May 2014 to provide medical treatment?***

[57] Mr Lindsay and Mr Burgess properly accepted that the situation with Mr Doran could have been handled better. The plant is some distance from the hospital in Christchurch or a medical centre and where there is a need for medical intervention, as there will be with a serious harm injury, the manual provides that transport must be arranged to the medical centre/physiotherapist or hospital.<sup>1</sup> There was an obligation therefore to arrange transport. Four positions are named in the manual to arrange such transport. Ms McConachy was not one of them.

[58] Properly analysed the failure to arrange or provide transport occurred because no single person assumed responsibility for medical treatment for Mr Doran. There were assumptions made about who was doing what. Mr Cameron for example felt that transport was under control and returned to his role. There was then some indifference as to why Mr Doran may still have been on site from Mr Lindsay and Mr Burgess. That was notwithstanding knowledge of the potential seriousness of the injury. Mr Burgess, for example, agreed that there was some discussion with Mr Doran about the nature of the injury. I find it likely that Mr Doran talked about loss of feeling in his hand and inability to move his wrist. He recalled Mr Doran was pale as did Mr Lindsay even if he was chatty and agreed he could have been in shock. Mr Lindsay said that he understood Mr Doran believed that he may have cut a tendon. Neither questioned who was in charge of Mr Doran getting medical treatment. Mr Doran wandered the plant with a serious injury for quite some period of time. He did not receive appropriate medical treatment until he was hospitalised which even allowing for the dispute about the time when the injury occurred was some hours later.

[59] I do not find that the evidence though supports that SPM refused to provide transport to Mr Doran. There were elements of Mr Doran's written evidence that I find on closer examination were views he had formed without being aware of the complete picture. I am satisfied that there was an attempt by Ms McConachy to arrange transport for Mr Doran and there was no evidence to support a refusal rather there was a misguided belief that someone else was arranging transport.

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<sup>1</sup> Clause 6.3 of the manual

[60] The failing on SPM's part was that Mr Lindsay, Mr Cameron and/or Mr Burgess did not arrange transport to a treatment provider and take responsibility for ensuring that transport was actually provided. Instead the issue of transport was left to Ms McConachy who was not a senior manager to try to arrange. For whatever reason transport was not provided, and the fact that Mr Doran missed the doctor's appointment and was still on the plant after 4.15pm went unnoticed as nobody took responsibility for the situation.

[61] I find that there was a breach on the part of SPM in that it failed to provide medical treatment beyond first aid for Mr Doran by not arranging/providing transport to the doctors. It was required to do that in the manual. I did explore whether an ambulance should have been called. Mr Lindsay said that on earlier occasion it has taken an ambulance an hour to arrive at the plant. If Mr Doran had been transported to the appointment at the doctors at 4.15pm for assessment of his arm then I find that would have been appropriate. From there he would in all likelihood have been referred to hospital.

***Was the failure to provide medical treatment justifiable?***

[62] The Authority needs to assess the justification of the action or inaction by SPM in accordance with the test in s. 103A of the Act. The test is whether SPM's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[63] There is a flavour in the submissions and the evidence from SPM that Mr Doran may have been intentionally evasive about attending his medical appointment and transport. This was in all probability linked with the disclosure Mr Burgess said was made to him by Mr Doran, that he had smoked cannabis before the incident. Mr Doran denied that he had said that. SPM could, and should have, in accordance with the manual tested Mr Doran for drug use following a serious harm incident. If there was a disclosure it cannot detract from the obligation to provide medical treatment.

[64] I agree that there are periods of time when it was unclear what Mr Doran was doing. He did not seem to return to the first aid room but rather went to the smoko room and outside for a cigarette. If Ms McConachy had returned to the first aid room

with an offer of transport she may not have been able to find him but I do not know if that was what occurred.

[65] Mr Doran said that he relied on advice from Mr Cameron that Mr Lindsay was too busy to provide transport so did not ask him to assist. He said that he did not go to see Mr Cameron again because he was doing his job on the slaughterboard. I do have to weigh in assessing these matters that Mr Doran had sustained a serious injury and his thought processes may not have been normal or rational. Importantly he had never been told in all likelihood who was taking responsibility for him and had concluded no-one was.

[66] Mr Lindsay, Mr Burgess and Mr Cameron or a team leader did not arrange transport for Mr Doran so that he could obtain medical treatment as required to do in the manual, the terms of which are incorporated into the employment agreement. Mr Doran was required to report his injury and the responsibility was then for SPM to arrange a visit to a treatment provider and transport. An appointment was made with a doctor but no transport was provided.

[67] I find that the breach was unjustified.

***Was Mr Doran disadvantaged by the breach by SPM of its obligation to arrange transport to a medical provider?***

[68] I am satisfied that Mr Doran was disadvantaged by the failure to provide medical treatment in a timely manner. His injury was serious, he could not feel his hand or move it. He should have been transported to a medical centre as soon as possible and should have been monitored until that time. As he was unclear about whom, if anyone had taken responsibility for this, he felt that no-one at SPM cared about him and that he was left on his own to arrange transport.

***Conclusion on claim that SPM failed to provide Mr Doran with medical treatment***

[69] Mr Doran was unjustifiably disadvantaged by the failure on the part of SPM to arrange and ensure transport for him to a medical centre following a serious harm injury. He has a personal grievance for which he is entitled to remedies. I shall return to that matter after considering Mr Doran's return to work.

**Was Mr Doran disadvantaged by unjustified actions of SPM on his return to work?**

***Telephone call from Mr Lindsay on 3 June 2014***

[70] Mr Doran said in evidence that on 3 June he was telephoned by Mr Lindsay and told he wanted Mr Doran back at work so he could help operate a drop rail with his uninjured arm. Mr Doran had a medical certificate for 14 days leave at that time.

[71] Mr Lindsay did not accept that he made that call. He was on leave that week in Invercargill and his cell phone records show that he did not make any call on 3 June from his company cell phone.

[72] The evidence does not satisfy me that there was a phone call on that day.

***Transfer to the Beef Boning Room***

[73] Mr Doran was off work fully for about a month and then returned on light duties. By 11 August he was working 6 hours per day and from 18 August was working normal hours on full duties. Before he had injured himself he had agreed that he would be transferred from the beef slaughterboard to the boning room. The day he injured himself was his last day on the beef slaughterboard.

[74] There were on Mr Doran's return weekly rehabilitation meetings with Mr Lindsay and monthly meeting with Paul Garvey who was from WorkAon. SPM have an ACC partnership programme with WorkAon. Mr Doran expressed concern that no-one contacted him from SPM whilst he was in hospital or on medical leave. There was in all likelihood an attempt to contact Mr Doran (document 3 of the respondent bundle) after 3 June. The evidence did support if not a meeting, at least a telephone call with Mr Doran and Mr Lindsay on 13 June 2014.

[75] Mr Doran was returned to full duties on or about 9 August 2014 and was put in the beef boning room as agreed. He said the cold temperature caused him a lot of pain in his arm and he went to see Mr Lindsay to see if he could be transferred back to the beef slaughterboard. He said that Mr Lindsay told him that he had talked to Mr Burgess and they would not transfer him back to the slaughterboard. Mr Lindsay vaguely recalled such a conversation and agreed he did suggest Mr Doran put on more clothes. There was no agreement to transfer at that stage.

[76] I could not be satisfied that at the time of that conversation, which I have concluded in all likelihood was between 9 and 12 August 2014 Mr Lindsay had a copy of the letter from Mr Doran's hand therapist, Rebecca Darby. That letter although dated 27 June 2014 was date stamped as received by WorkAon on 11 August and by SPM on 14 August 2014. I have no reason to question the authenticity of the date stamps. The letter provided amongst other matters that Mr Doran due to the nerve trauma is likely to struggle with a full day in cold conditions.

[77] I could not be satisfied that the difficulties as described in evidence by Mr Doran of wearing a steel mesh glove over the cut were clearly advised to Mr Lindsay when he complained that first time of the cold. Mr Lindsay said in his evidence that that sort of difficulty/discomfort with the glove would be plausible but was not explained by Mr Doran in that way at the time he talked to him about the cold. He suggested more clothing because the cold in the beef boning room can take some time getting used to.

[78] In any event Mr Doran obtained a medical certificate on 11 August and on 12 August spoke again to Mr Lindsay about transferring out of the boning room. Mr Lindsay directed him to Mr Burgess. Agreement was reached that Mr Doran be transferred because of the sensitivity of his left arm to the cold conditions. If there was a transfer request on 9 August 2014, a Friday, there was only a short period of working until following the obtaining of a medical certificate on Monday 11 August and a transfer was agreed on 12 August. Document 7 in the respondents' bundle, a record of leave was never formally referred to during the investigation meeting. The records, if they are correct, indicate that Mr Doran may have had a day's sick leave on 11 August and have taken non -authorised leave on 12 August 2014.

[79] I do not find any unjustified actions that caused disadvantage leading up to the transfer from the beef boning room on the part of SPM.

### ***Punished because of raising personal grievance***

[80] By 12 August 2014 a personal grievance had been raised by Mr Doran about the matters on 30 May 2014. Mr Burgess knew of this. Mr Burgess asked Mr Doran when they were discussing a transfer from the boning room on 12 August 2014 if he thought what he had done in raising a personal grievance was fair. Mr Doran said that it was and that Mr Burgess did not want to discuss the matter further.

[81] Mr Doran wanted to be transferred back to the beef slaughterboard but said he was told by Mr Cameron that his job was not available and he was not allowed to work in the department. Mr Doran was transferred to the sheep slaughterboard where he was given a labouring job which was a C grade job with C grade wages. Mr Doran had, before he injured himself had an A grade job and was paid A grade wages on the beef slaughterboard. The different in wages is about \$300 per week and Mr Doran spoke to Mr Burgess about his unhappiness with the situation. Mr Burgess directed him to talk to the sheep slaughterboard supervisor, Grant Holland, about the situation and Mr Holland advised that no A grade job was available.

[82] Mr Doran said that he lost about \$1200 in wages during that time and believed that he was demoted because the company wanted to punish him for raising a personal grievance. Mr Burgess denied that.

[83] One of the issues that I raised with counsel was whether Mr Doran had been appointed to a particular position at an A grade rate. Ms Webster addressed this in her submission and said that his employment agreement does not support that he was not. She referred me to clause 6.2 that provides as follows:

*All employees may be transferred within and/or across departments and to any tasks within their ability at the discretion of the company and dependant on the company's operational requirements.*

[84] The reference to the pay rate in the agreement is *as per rate schedule for task being completed.*

[85] I do not find that Mr Doran was appointed to work in a particular role at a particular rate at SPM. He could be transferred across departments and to any tasks at the discretion of the company and dependent on its operational requirements.

[86] Mr Burgess said in his evidence that there were issues with Mr Doran's attitude and poor attendance and that was why he did not want Mr Doran back in beef slaughterboard. He said that he had attended disciplinary meetings with Mr Cameron and Mr Doran because Mr Doran would not listen to Mr Cameron. Mr Burgess said that Mr Cameron used to say *that the good Mr Doran is outstanding when in the right mood but the bad Mr Doran is not even worth being at work.*

[87] Mr Doran did not accept that those issues had been raised with him previously and said that he did not have any warnings about them. I do note a final written

warning on 16 May 2014 for unacceptable attendance (document 8 of the respondent bundle). If those issues were the reason for not agreeing to a transfer for Mr Doran back to beef slaughterboard it was not properly put to Mr Doran. He could not respond as he was entitled to do in accordance with good faith obligations and fairness. Had the concerns been put and Mr Doran had an opportunity to respond to them then he would either have understood, even if he disagreed with the reason why he could not return to beef slaughterboard. He may have been able to alleviate the concerns and go back even on a trial basis.

[88] I could not be satisfied from the evidence though that the refusal to transfer to beef slaughterboard was simply because of historical concerns although I accept Mr Burgess' evidence that he had these concerns. The timing of the refusal to transfer Mr Doran to beef slaughterboard coincided with the raising of a personal grievance. There was an absence of any clear explanation to Mr Doran why he would not be transferred to the department he had worked in since commencing at SPM and that supports in all likelihood that it was historical concerns together with a measure of annoyance about the grievance being raised that led to the refusal. I reach that conclusion particularly because Mr Doran had a very high skill level in that department.

[89] It was unjustified not to give Mr Doran an opportunity to respond to the historical concerns about his attitude and other issues before concluding he could not return to beef slaughterboard and it was unjustified I find to as part of the consideration to take the raising of a personal grievance into account.

[90] I find unjustified actions on the part of SPM in relation to that matter.

[91] Mr Doran was disadvantaged I find as a result of that unjustified action and his job changed from grade A to C and his pay rate reduced as well.

### ***26 August 2014***

[92] On this day Mr Doran was asked when the lamb/sheep chain finished early if he would help out in the beef slaughterboard by the 2IC, Bevan Webb. Mr Burgess then spoke to Mr Webb and Mr Webb told Mr Doran that Mr Burgess did not want him on the beef slaughterboard. When later Mr Burgess was questioned by Mr Doran about his action he said that it was in the best interests of the company and that he had

a bad attitude. Mr Doran was only going to undertake work in the beef slaughterboard for the afternoon rather a longer term transfer.

[93] I find that Mr Burgess demanding his removal on this occasion did have an element of punishment because it is difficult to see why Mr Burgess would be troubled about a very limited placement for one afternoon on the beef slaughterboard. There was nothing to support that Mr Doran had done anything else at that time to justify such an intervention. On the balance of probabilities I find such action was connected to dissatisfaction over the raising of a personal grievance.

[94] That was unjustified and caused Mr Doran disadvantage and some embarrassment. The action on this day I find strengthens my earlier view that the dissatisfaction about the grievance was part of the reason for the earlier refusal of a transfer to beef slaughterboard.

#### ***26 September – 3 October 2014***

[95] On Friday 26 September 2014 Mr Doran said he was asked to do two work tasks at the same time for the A grade wage rate by the sheep slaughterboard supervisor Grant Holland. He told Mr Holland that there was not enough time to do both tasks and comply with the EU regulations. He said that Mr Holland warned him that if he did not do both tasks he would be demoted back down to a C grade rate. Mr Doran then struggled doing both jobs for the rest of the day.

[96] When Mr Doran returned to work after the weekend on Monday 29 September 2014 he found that he had been placed on a C grade job and taken off his A grade job gutting. He was also given a letter that he had to attend a meeting for failing to follow supervisor's instructions the following day. Mr Doran said that he spoke to Mr Holland and said that he did follow his instructions.

[97] On 30 September 2014 Mr Doran's meeting was adjourned and he then received a letter from Mr Lindsay that advised the disciplinary meeting was rescheduled for 2 October 2014. Further as his employment term was to expire as of that date the offer of employment for the upcoming season would be on hold pending the outcome of the investigation and his employment status would be casual. Mr Doran said that he had already accepted the offer and I was provided with a copy of an unsigned offer made to him for the season from 1 October 2014 to 31 December 2014.

[98] There was a meeting on 2 October and Mr Lindsay advised he would let Mr Doran know the outcome. Events were then overtaken when on 3 October 2014 Mr Doran returned a positive drug test and his employment was terminated on 31 October 2014.

[99] I did not hear from Mr Holland. I do however conclude from what took place that in effect Mr Doran faced action of a disciplinary nature before he had even attended the disciplinary meeting and given his explanation. He was removed from the A grade work he was doing on 29 September 2014 and another worker was trained to do his job even though Mr Doran told Mr Holland he did carry out his instructions. His pay rate dropped back again to a C rate. He then had an offer for the new season put on hold until the outcome of the investigation and his employment status reduced to casual in circumstances where Mr Doran said that he had accepted the new seasonal agreement. Mr Doran received no work for 1 October 2014 or 2 October 2014. His pay records show for 1 October he was on unpaid suspension although I could not find an entry for 2 October.

[100] I find that the actions of SPM over that period from and including 26 September 2014 where Mr Doran was removed from his A grade role without having an opportunity to explain and have his explanation considered about the events on 26 September 2014 were unjustified. He then without any opportunity to be heard had his employment offer put on hold from 1 October and his status reduced to casual. No further work was offered.

[101] Mr Doran was disadvantaged as a result of these actions.

[102] Mr Doran has a personal grievance that the actions of SPM as set out above were not what a fair and reasonable employer could have done in all the circumstances at the time. He is entitled to consideration of remedies.

### **Remedies for unjustified action causing disadvantage grievance**

#### ***Lost wages***

[103] The lost wages claim by Mr Doran is \$1200. That relates to the reduction of the pay rate as Mr Doran was for about one month working in a C grade role in the sheep slaughterboard. I accept Ms Webster's submission that Mr Doran was not employed to a position and at a particular pay rate. SPM was entitled to transfer him

across department and to any tasks within his ability. I have found that there were unjustified actions that caused Mr Doran disadvantage at the time he requested a transfer to beef slaughterboard. He would I find in all probability have been paid at an A grade rate if he had been transferred back to beef slaughterboard.

[104] Under s. 123(1) (b) of the Act once there is a grievance Mr Doran is entitled to reimbursement of a sum equal to the whole or any part of wages or other money lost. I would have assessed lost wages on the basis of a loss of chance approach if I had not been satisfied that there was an element of punishment as a result of the raising of a personal grievance. That is because even if the reason for refusal to transfer had been put fairly for explanation there was only a chance Mr Doran would have been able to persuade Mr Burgess that he should be transferred back to beef slaughterboard. That is not the only reason I have found for the refusal to transfer Mr Doran back to beef slaughterboard. There was an element of punishment. I find in those circumstances that there should be full reimbursement of lost wages as claimed. I am satisfied of the basis for the amount of the claim.

[105] Subject to any issues of contribution I order South Pacific Meats Limited to pay to Alister Doran the sum of \$1200 gross being lost wages under s. 123 (1) (b) of the Act.

[106] Mr Doran is entitled to lost wages between 29 September to 2 October 2014 (both days inclusive) to be assessed on the average daily pay rate for the previous week when his wages were reduced or he was not offered work. The parties may be able to assess and agree quantum for this short period failing which leave is reserved for either party to return to the Authority.

[107] There was a belated claim by Ms Coulston for lost wages after the positive drug test and before dismissal. I could not be satisfied that given the reading Mr Doran would have returned a clear test before his dismissal. Accordingly I make no award for that period.

### ***Compensation***

[108] Mr Doran seeks the sum of \$15000 compensation. Mr Doran said that he felt humiliated by his treatment on the day of his injury when no-one would take him to the doctors. He said he was worried that he was going to have permanent damage to his arm and could not move his hand or feel his wrist. Then after he returned to work

he was treated badly and felt humiliated going from being regarded as one of the best workers to a labouring role and was singled out, picked on and treated unfairly and his pay was reduced. Some of the matters relied on I find about loss of income are related more to the effect of the dismissal. The Authority is not dealing with that so I have not had regard to those matters.

[109] I accept that Mr Doran was humiliated on the day of the injury in that he was left for a considerable period of time after his injury before being able to organise transport. He thought no-one had assumed responsibility for him. On his return to work he felt badly treated by SPM and that he was being punished because he had raised a grievance about the events on 30 May 2014. To an extent I have found he was. Subject to any issue as to contribution I assess a global award for compensation in the sum of \$12,000.

### ***Contribution***

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

[111] I do not find any issues of contribution after Mr Doran returned to work. The only matter that I find is to be considered is whether Mr Doran contributed to the grievance on 30 May 2014 by, as I have found, not telling Mr Lindsay or Mr Burgess there was an issue with transport. That was I find in all likelihood causative of further delay. The more difficult issue is whether that was blameworthy conduct.

[112] I accept that Mr Doran at that time was likely to have been in shock and pain and his thought process was probably not as clear as a result. He was able though to describe his injury and talk about what he considered may have contributed to it. He had a duty as did SPM to ensure his own safety and getting medical treatment was part of this. I find that there should be a moderate reduction in the compensatory award in all the circumstances of 10%. I have taken into account that SPM had the clear obligation to assume responsibility for him and arrange transport to obtain medical treatment. That did not occur. I have also taken into account that whilst

Mr Lindsay and Mr Burgess were aware of the possible seriousness of the injury neither established with Mr Doran who was arranging medical treatment for him.

**Orders made for unjustified action causing disadvantaged grievance:**

[113] I order South Pacific Meats Limited to pay to Alister Doran the sum of \$1200 gross being lost wages under s.123 (1) (b) of the Act.

[114] Mr Doran is entitled to four days further wages which were reduced or not paid between 29 September and 2 October 2014. They should be reimbursed at the average daily pay rate for the previous week. If counsel cannot agree a figure then leave is reserved to return to the Authority.

[115] Taking contribution into account I order South Pacific Meats Limited to pay to Alister Doran the sum of \$10,800 compensation without deduction under s.123 (1) (c)(i) of the Act.

**Penalty for breach of Mr Doran's terms and conditions of employment against each respondent**

[116] The penalty claim is essentially for the same conduct that I have already compensated Mr Doran for and that is a matter that is to be taken into account. I have not found the more serious allegation/breach alleged made out that there was a refusal to provide access to medical care by either Mr Lindsay or Mr Burgess. The manual specifically addresses a possibility that Mr Lindsay in his role may not be able to make arrangements and others can do so. I do not find that the omissions from that point were deliberate or wilful acts but rather resulted from confusion, assumptions and at times careless or negligent indifference.

[117] I also accept Ms Webster's submission that the evidence does not support that Mr Lindsay and Mr Burgess incited, instigated, aided or abetted any breach. Rather that they did not turn their minds to the issue, made certain assumptions, or were indifferent.

[118] I do not award a penalty for breaches of Mr Doran's terms and conditions of employment.

**Penalty for a breach of s.4 of the Act against each respondent**

[119] A penalty may be awarded for breaches of good faith under s.4A of the Act if the failure was deliberate, serious and sustained.

[120] The claim is that there were breaches on 30 May 2014 and the treatment following Mr Doran's return to work after his injury.

[121] I accept Ms Webster's submission that only a party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty under the Act. Mr Lindsay and Mr Burgess are not parties as specified in s.4 (2) of the Act.

[122] I have therefore confined my consideration to whether there should be a penalty for a breach of good faith awarded against SPM. The threshold is a high one and I am not satisfied in this case that the breaches were deliberate on 30 May 2014 even if they were serious.

[123] The behaviour after Mr Doran returned to work breached good faith obligation under s.4 of the Act. These were serious breaches. There was a measure of deliberateness about the failure to transfer Mr Doran back to beef slaughterboard and removal of him from that department, demotion and treating him as a casual. The conduct I find was sustained for the period Mr Doran returned to work until 2 October 2014. These breaches I find at least in part arose from dissatisfaction with Mr Doran about the raising of a personal grievance.

[124] I find that there should be a penalty imposed for a breach of good faith in the circumstances as raising a personal grievance should not result in breaches of duty toward an employee as I have found in this case.

[125] Mr Doran has already been compensated for this breach and I do not order the whole or part of the penalty be payable to him. I have also taken those awards into account in setting the amount of the penalty.

[126] I order a penalty in the sum of \$3000 for a breach of good faith is to be paid by South Pacific Meats Limited into the Authority and then to be paid into the Crown Bank Account.

**Damages for breach of contractual duty against each respondent**

[127] There have been awards made for lost wages and compensation under the personal grievance and I am not additionally required to consider the issue of damages. The case did not proceed on the basis of an assessment of damages.

**Damages for breach of statutory duty against each respondent**

[128] There was no evidence of any breach of statutory duty aside from alleged breaches under the Health and Safety in Employment Act 1992 which obligations were incorporated into the employment agreement.

[129] I am not satisfied that the Authority has jurisdiction to consider breaches under that Act.

**Costs**

[130] I reserve the issue of costs. The parties may be able to agree costs on the basis of the usual daily tariff. Failing agreement being reached Ms Coulston has until 26 June to lodge and serve submission as to costs and Ms Webster has until 17 July to lodge and serve submission in response.

Helen Doyle  
Member of the Employment Relations Authority