IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 290
5569618

	BETWEEN	BOYD NELSON Applicant
	AND	OPEN COUNTRY DAIRY LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Schofield, counsel for the Applicant Mark Hammond and Karina McLuskie, counsel for the Respondent
Investigation Meeting:	18 and 19 May 2016
Submissions:	23 May 2016 from the Applicant and 27 May 2016 from the Respondent
Determination:	25 August 2016

DETERMINATION OF THE AUTHORITY

A. Open Country Dairy Limited (OCD) took reasonable measures to accommodate Boyd Nelson when he returned to work on limited duties and hours after a serious workplace accident. In managing those measures OCD did not unlawfully discriminate against Mr Nelson on the grounds of disability or otherwise unjustifiably disadvantage him.

B. OCD's decision to terminate Mr Nelson's employment due to medical incapacity, and how OCD made that decision, was not unjustified.

C. Mr Nelson was disadvantaged by OCD's failure to provide him with outplacement assistance during his notice period.

D. In settlement of his personal grievance for unjustified disadvantage OCD must pay Mr Nelson the sum of $2000 to compensate him for loss of a benefit and a further $1000 for injury to his feelings caused by its failure to offer outplacement assistance.

E. The Authority could not investigate and determine Mr Nelson's other claims for compensation for losses and for distress resulting from the accident due to the statutory bar on such proceedings under the Accident Compensation Act 2001.

F. Costs are reserved.

Employment Relationship Problem

[1] On 31 March 2015 Open Country Dairy Limited (OCD) gave Boyd Nelson notice his employment was to be terminated on the grounds of medical incapacity. Mr Nelson was employed as a maintenance technician at OCD's factory at Waharoa. He had worked there since February 2011.

[2] Mr Nelson's dismissal occurred about 22 months after he was seriously injured in a workplace accident and some 10 months after he had returned to work on light duties under a graduated return to work programme (the GRTWP) arranged by ACC.

[3] On 16 May 2013 Mr Nelson fell down a five metre shaft after he entered a dark compartment to change a filter in the factory's ventilation system. He suffered serious spinal and pelvic injuries and a broken ankle. He had emergency surgery followed by a six week stay at the Otara Spinal Unit. His injuries, and associated bowel and bladder problems, required ongoing specialist care and an intensive rehabilitation programme over the following months.

[4] By February 2014 ACC considered Mr Nelson had regained sufficient functional capacity to perform 'light' work and could return to normal work through a GRTWP as his strength and activity tolerance increased. Darren Stone, OCD's Waharoa site manager, agreed to ACC's request for Mr Nelson to return to work under a GRTWP. He confirmed Mr Nelson could initially work in parts of the factory

that were on one level, including its cheese plant, workshop and office. The plan suggested Mr Nelson start by working three hours for two days a week and, over a five week period, build up to working four hours for five days a week. The plan suggested the graduated increase in hours (from six to 20 a week) be reviewed after six weeks.

[5] Mr Nelson returned to work under the GRTWP on 20 May 2014, which was just over a year after his accident. His medical certificate at that time said he was initially fit for three hours work a day for two days a week. Over the following weeks he had difficulty increasing his hours due to ongoing pain and fatigue but by the end of June 2014 he was working four hours for four days a week (a 4:4 week). Around mid-August he increased his hours to four hours for five days a week (a 4:5 week) but was not able to sustain hours at that level. On 21 August 2014 Mr Nelson's GP gave him a medical certificate restricting him to a 4:4 week for the following six weeks, for review by 2 October 2014. Further certificates issued on 1 October 2014, 23 December 2014 and 2 February 2015 extended the restriction to 2 March 2015. Each of those three medical certificates identified the physical restrictions as including lifting and prolonged sitting, walking or standing. As a result of those restrictions Mr Nelson remained on a 4:4 week from 24 August 2014 until OCD terminated his employment on 31 March 2015 (that is a little over seven months).

[6] On 6 November 2014 Mr Stone wrote to Mr Nelson asking for information from him, ACC, his doctors and his physiotherapist about the prognosis for his return to full-time work. Mr Stone wrote that OCD supported Mr Nelson's return to full time work as soon as possible as it was not able to keep his position open indefinitely. Mr Stone told Mr Nelson he wanted reports that would indicate:

1) What your prognosis is for your full return to work as an engineer?
2) When will you be able to return to full time work?
3) If there will be any restrictions on your ability to do your job long term?
4) If there will need to be any further medical interventions (operations or treatments)?
5) If you will be on any medication that will affect your job as an engineer as you will be working around machinery?

[7] Mr Nelson told Mr Stone he was compiling the requested reports but by the end of November had not provided the information OCD sought. Mr Stone then took steps to arrange a meeting with Mr Nelson in early December. After a meeting on 16

December, at which both parties were accompanied by their legal representatives, Mr Nelson's lawyer sent OCD assessments of Mr Nelson made by four doctors and one physiotherapist on various dates between 29 April 2014 and 16 December 2014. He also provided an initial occupational assessment report from a consultant to ACC dated 12 August 2014.

[8] In providing that information Mr Nelson's lawyer specifically criticised an assessment made by occupational medical specialist David Ruttenberg on 5 September 2014. Mr Nelson felt Dr Ruttenberg's examination of him was too cursory for the firm conclusions drawn. Under the heading "Current restrictions and limitations" Dr Ruttenberg wrote:

> Mr Nelson is fit for work within biomechanical restrictions currently. He will not manage given the ongoing impairment in his pre-injury role and where there is a need for standing and walking, balancing and climbing up and down ladders.
>
> Heavy lifting and carrying would also be a difficulty for him currently.
>
> He is in my opinion fit for work within these restrictions and at a ground level.
>
> He should with appropriate support be able to increase to full time capacity in such work roles.

[9] Under the heading of "Recommendations for management and rehabilitation" Dr Ruttenberg included the following view:

> Mr Nelson is currently working a 16 hour week. While he could increase work hours it is my feeling that he would probably not manage in his pre-injury role and there are significant safety concerns still in this regard today.

[10] Dr Ruttenberg also suggested "a functional capacity evaluation" be carried out to objectively document Mr Nelson's physical and functional capacity and "enable further opinion to be offered on fitness not only for his pre-injury role but prospective work roles in the future".

[11] The documents provided to OCD included a medical certificate from Mr Nelson's GP issued on 4 December 2014. The certificate addressed the five questions asked in Mr Stone's letter of 6 November about Mr Nelson's capacity. The GP's answers indicated Mr Nelson's long term prognosis for full recovery was "good", but the time frame for recovery sufficient to return to full time work, was "uncertain" and "could take more than a year". He also said it was "uncertain to predict" what restrictions might exist on Mr Nelson's ability to do the job long term but anticipated

no need for further medical operations or treatment. He also said Mr Nelson's medication could cause sedation but noted it was taken in the evenings rather than in morning before he started work.

[12] OCD then asked to see the report of a specialist Mr Nelson was due to see on 27 January 2015. It also asked that the specialist address the five questions identified in Mr Stone's 6 November letter. For that purpose it included the following description of tasks it described as included in Mr Nelson's role:

> Lifting weight about your waist and above your shoulders
> Having flexibility to bend
> Stamina to complete five days of eight hour shifts
> Stamina to be part of the on-call roster covering all site areas
> Ability to work in confined spaces
> Ability to work at height including working in a harness
> Ability to work upstairs, including to top of [part of the] plant at 17 metres
> Ability to carry out repetitive movements.

[13] The subsequent report, from an orthopaedics registrar at Waikato Hospital, said Mr Nelson was "cleared to return to his full time duties with no restrictions from a medical point of view". However it also said his ability to perform the listed tasks "depends hugely on his personal recovery journey". It stated there was "no set time frame" for "when exactly [Mr Nelson] will be able to perform certain tasks such as working full hours at work or lifting heavy objects". While it said he had "recovered fully enough" so there were "no concerns for him to perform these tasks", the report also stated it would "take him a long time to fully recover and he may not fully recover and may have residual symptoms". The registrar concluded with the comment that, while the prognosis for Mr Nelson's return to work in his role was good, he could not answer the question of the duration that would take.

[14] OCD found the registrar's 27 January report contradictory and unsatisfactory. It required Mr Nelson to attend a further specialist assessment to establish "if and when" he would be able to return to full duties. Although there was a dispute over whether the terms of Mr Nelson's employment agreement allowed for such a requirement in the way described by OCD, Mr Nelson agreed to attend an examination by consultant occupational physician David Prestage.

[15] After an assessment conducted on 2 March 2015 Dr Prestage reported the prognosis for Mr Nelson making a full return to his normal duties was "guarded at the

present time". Dr Prestage stated he could not be certain Mr Nelson would achieve a full return in the longer term but felt it was "too early to state that he will not be able to". He noted fatigue was an on-going issue that would become more prominent as Mr Nelson's hours were increased. He proposed a gradual increase to five hours on some days of the week and eventually all work days. Once full-time hours were reached, the physical demands of his duties could then be gradually increased. Dr Prestage said he was unable to provide a timeframe on when Mr Nelson was likely to "achieve maximum medical improvement" in his function and work capacity but suggested a further review if significant gains were not made within four to six months. He also suggested "a functional capacity evaluation" of Mr Nelson's capabilities along with a worksite assessment by an occupational therapist or physician.

[16] After receiving Dr Prestage's report OCD had its legal representatives advise Mr Nelson, through his lawyer, that it was beginning a process of consultation about "the potential termination of his employment by reason of medical incapacity". It said there was no prognosis for Mr Nelson's prompt return to full-time duties and he was far from being able to perform the hours or full range of duties needed for his full-time role. It identified three factors on which it invited Mr Nelson's submissions. Firstly, the terms of his employment agreement allowed for the termination of his employment after three months of medical incapacity. Secondly, OCD was concerned about its ability to have other employees cover Mr Nelson's duties and referred to the costs of a contractor engaged to cover the role. Thirdly, OCD said it would look closely at "the availability or otherwise of alternative duties".

[17] On 18 March Mr Nelson's lawyer provided OCD with a further report from Mr Nelson's physiotherapist, Chris La Pine. Mr La Pine's report was based on an assessment he carried out on 18 February 2015. He described Mr Nelson as having "gone backwards in terms of his stability and flexibility" which did "not bear well at this current stage for his ability to do physical work over longer hours". Mr La Pine proposed a strengthening programme in conjunction with a graduated return to work and which he considered should enable Mr Nelson to "return to full-time work in the future".

[18] Mr Nelson and his lawyer met with OCD representatives on 19 March 2015. The discussion canvassed both the prospect of termination of Mr Nelson's employment and of his redeployment to other roles.

[19] By letter on 31 March OCD's lawyers advised that OCD had decided to terminate Mr Nelson's employment after concluding he was "so incapacitated from performing his duties". The letter referred to taking account of reports from the doctors and the physiotherapist, Mr Nelson's ability to perform only a small part of his role since returning to work on part-time duties nine months earlier, the costs of paying a contractor to cover the balance of the role, and a lack of alternative roles to which Mr Nelson could be re-deployed.

[20] Mr Nelson's employment was terminated with one month's notice. His last date of employment by OCD was 30 April 2015.

[21] On 1 May 2015 Mr Nelson raised a personal grievance for unjustified disadvantage and unjustified dismissal. He also alleged OCD breached its contractual duties to him by failing to provide a safe workplace and breached his privacy rights by getting information from Dr Ruttenberg's report directly from ACC.

[22] In his statement of problem to the Authority Mr Nelson alleged he was unjustifiably discriminated against on the grounds of disability or, alternatively, unjustifiably disadvantaged by various arrangements made at his workplace after his return to work on the GRTWP. He alleged his dismissal was unjustified due to various factors including pre-determination, failure to accommodate his disability, taking into account irrelevant considerations but not relevant ones, not genuinely considering redeployment, and failing to provide him with outplacement support.

[23] OCD denied each allegation. It said it had been supportive and sympathetic to Mr Nelson and had made every endeavour to support his return to full time work. It said that by the time of its decision to dismiss Mr Nelson for medical incapacity, under a provision that allowed it to do so after three months, some 22 months had elapsed since the accident and 10 months since he had returned to work. No suitable, potentially available jobs were available for redeployment of Mr Nelson.

Issues

[24] From the statement of problem and the statement in reply the following issues were identified for investigation and determination:

(i) Was Mr Nelson unjustifiably disadvantaged and/or discriminated against on the grounds of disability in the specific instances of how he was treated by OCD after his return to work by being:

(a) denied flexibility to work more or fewer hours; and/or

(b) excluded from a lunchroom; and/or

(c) denied a new phone; and/or

(d) excluded from training; and/or

(e) effectively excluded from after-work drinks; and/or

(f) denied redeployment to alternative tasks or an alternative role?

(ii) Was OCD's decision to terminate Mr Nelson's employment on 31 March 2015 what a fair and reasonable employer could have done in all the circumstances at the time, including whether:

(a) OCD relied on information that he should have had a prior and proper opportunity to comment on but did not; and

(b) OCD unfairly relied on irrelevant or improperly obtained information; and

(c) OCD should have extended or continued its measures to accommodate Mr Nelson's limited work capacity (in light of the medical information available to it and/or its general obligations); and

(d) OCD properly explored and consulted with Mr Nelson about redeployment or alternative work options before making its decision; and

(e) OCD failed to provide him with outplacement support?

(iii) If OCD's actions were not justified (in respect of disadvantage and/or discrimination and/or dismissal), what remedies should be awarded, considering:

(a) Lost wages and benefits (with interest); and

(b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the ER Act)?

(iv) If any remedies were awarded, should they be reduced (under s124 of the ER Act) for blameworthy conduct by Mr Nelson (in relation to the grievances investigated, not any allegations regarding cause of or contribution to the earlier accident) that contributed to the situation giving rise to his grievance?

(v) Should OCD be ordered to pay a penalty for a breach of good faith in its dealings with Mr Nelson?

(vi) Should either party contribute to the costs of representation of the other party?

[25] One element of Mr Nelson's claim was not fully investigated. Rather it has been considered solely as a legal issue about the Authority's jurisdiction to consider his claims about losses and distress related to the accident. Mr Nelson alleged the accident resulted from OCD breaching express and implied contractual duties to provide him with a safe workplace. If such a breach were established Mr Nelson sought orders compensating him for three consequences of the accident:

(i) Lost earnings from the date of the accident to his return to work in May 2014, including the 20 per cent difference between the weekly earnings compensation paid to him by ACC (that is 80 per cent of earnings) and his gross income if he had not been off work because of the accident; and

(ii) Costs of medical expenses, accommodation, travel and other associated costs resulting from the accident but not covered by ACC payments; and

(iii) Distress, suffering and loss of enjoyment of life.

[26] This claim appeared to challenge the statutory bar at s 317 of the Accident Compensation Act 2001 (the AC Act):

> **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
> …

> (2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from,—
> …
> (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).

[27] Rather than delay investigation of Mr Nelson's grievance claim until the jurisdictional issue over these other claims for breach of contract and damages was resolved, the parties were given the opportunity to make submissions on the legal issue. In that way all matters raised Mr Nelson's application were, in one way or another, dealt with in a single determination which could then open to challenge by one or both parties.

The Authority's investigation

[28] For the Authority's investigation written witness statements were lodged by Mr Nelson, his wife Sara Pickin, Mr Stone, OCD's Waharoa site maintenance manager Werner Claassen, and the site's maintenance planner Ryan Hollingsworth. Each witness attended the investigation meeting and, under oath or affirmation, answered questions from me and the parties' representatives. The representatives provided oral closing submissions supplemented by further written submissions on the facts and legal issues for determination.

[29] As permitted by 174E of 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 but has not recorded all evidence and submissions received. The evidence included more than 640 pages of background documents that included some of Mr Nelson's employment records, ACC records, reports and certificates from various health professionals, and the parties' correspondence. Only necessary references to that information are included in this determination but the documents, witness statements, answers to questions and the parties' detailed submissions have all been reviewed closely before the conclusions set out were reached.

The contractual and statutory framework

[30] Mr Nelson's individual employment agreement included a term that allowed for the prospect that OCD could dismiss him for medical incapacity:

> The Employee's employment may be terminated by the Employer giving such notice as is appropriate in the circumstances, in the event that the Employee is determined unable to continue the proper performance of his/her duties through:
>
> a) Medical incapacity for a period of three months with no medically apparent improvement, through sickness or injury conditions or should a medical practitioner (appointed by the Employer in consultation with the Employee) determine that the Employee is so disable or incapacitated …
>
> …
>
> Prior to the Employer taking any termination action in the case of incapacity for medical reasons, the Employer will take account of any resulting report or advice from its own and/or the Employee's medical practitioner. Therefore, the Employee may be required to undergo a medical examination (at the Employer's expense) by a registered medical practitioner nominated by the Employer, with a follow-up report on his/her fitness for duties. The Employee's consent will be obtained where this occurs.

[31] OCD's actions in the arrangements made for Mr Nelson's return to work and its use of this medical incapacity provision to terminate his employment had to considered in light of OCD's statutory obligations under both the ER Act and certain specified provisions in the Human Rights Act 1993 (the HR Act).[1] Those provisions in the HR Act allowed for certain exceptions, in employment matters, to the prohibition on discriminating against an employee on the grounds of disability.[2]

[32] Although OCD, in closing submissions, sought to distinguish between the concept of incapacity and disability, it also addressed Mr Nelson's argument that he was unlawfully discriminated against on the basis of disability. It relied on having met the requirements of s 29 of the HR Act to have reasonably accommodated Mr Nelson's disability as far as it reasonably could have been expected to do. For the purposes of this determination there appeared to be no sustainable argument that incapacity to carry out work duties was not a form of "disability" as the word is used in the ER Act and the HR Act.

[33] Section 29 of the HR Act allowed two grounds on which OCD could treat Mr Nelson differently, based on physical disabilities he had at the time. Firstly, OCD

[1] Employment Relations Act 2000, s 103(1)(c), s 104, s 105(1)(h) and s 106 (f).
[2] Human Rights Act 1993, s 29 and s 35.

could do so where it was "not reasonable" for OCD to continue to provide Mr Nelson with special aid and facilities to perform the duties of his position satisfactorily. Secondly, it was not required to make arrangements for his continued performance of those duties if to do so would unreasonably risk harm to him or others and it would be unreasonably disruptive to take measures to reduce that risk to a normal level.

[34] What Mr Nelson and OCD hoped would be temporary impairments to his ability to perform the full hours and duties of his position were nevertheless within the scope of disability as defined in the HR Act. Disability includes "physical impairment". There was no doubt that applied to Mr Nelson as a result of his accident or that, on his return to work, he was physically impaired in what he could do. Disability as a characteristic is not necessarily permanent or fixed. It that way it is unlike other grounds on which discrimination is prohibited such as race or national origin. Rather, like other grounds such as family status or religious belief, a person's disability may be capable of change over time. Similarly, an assessment of what is reasonable (discussed later in this determination) is also subject to change over time.

[35] Section 35 of the HR Act provides a general qualification to the permitted exceptions. Its wording is complicated but its effect is this: an employer cannot use the excuse that adjustment to work arrangements are unreasonable if, without unreasonable disruption to its activities, the employer could get another employee to carry out particular duties that the disabled worker would have needed special help to do or that would be too risky for the disabled worker to carry out. In short, if the disabled worker can't do particular duties cost effectively or efficiently, could another worker do them without a great deal of cost or disruption to the business?

[36] Two statutory standards appeared to apply to the necessary assessment of OCD's conduct as a result of Mr Nelson's application to the Authority. Firstly, his claim of discrimination on the grounds of disability was to be assessed on the standard of reasonableness and reasonable expectations set in the exceptions allowed under HR Act s 29 and s 35. Secondly, his alternative claim of unjustified disadvantage (if his claim of discrimination did not succeed) and his claim of unjustified dismissal both had to be considered under the statutory test of justification at s 103A of the ER Act.[3]

[3] Employment Relations Act 2001, s 103A(1) applies to s 103(1)(a) and (b).

[37] For practical purposes however the standard of reasonableness to be applied to assessment of the alleged discrimination appears no different than the standard to be applied to the alleged unjustified disadvantage and dismissal. What was reasonable for OCD to have done in seeking to accommodate Mr Nelson's disability during his return to work programme, and thereby not unlawfully discriminate against him, logically had to be measured on the same objective standard of reasonableness as applied to its other actions under s 103A of the ER Act.[4]

[38] The arrangements OCD made for Mr Nelson's work under the GRTWP, and its decision not to continue with those arrangements, had to be within the reasonable range of what a fair and reasonable employer could have done in all the circumstances at the time. It required an assessment of what was practical and proportionate in those circumstances, balancing both the interests and needs of the employer and the worker, because a fair and reasonable employer could not have acted without making such a balanced assessment.

[39] Such an approach appeared consistent with case law, both on the application of the HR Act provisions about disability discrimination and on the termination of employment due to incapacity.

[40] In *Smith v Air New Zealand Limited* the Court of Appeal considered discrimination provisions required an evaluative analysis of the proportionality or reasonableness of the response to the needs of a person with a disability. It accepted reasoning from Canadian cases that excessive costs, where established by sound evidence, could justify a refusal to undertake measures to accommodate the person with a disability. Ultimately the assessment required broad value judgements taking into account the overall benefits in comparison with the costs.[5]

[41] In *Barry v Wilson Parking New Zealand (1992) Limited* the Employment Court confirmed that a decision to terminate employment due to incapacity required the employer to consider fairness to the employee as well as "the reasonable dictates" of the employer's business needs:[6]

> … the employer had to act with justice in a way that was fair to the employee. What this amounts to, speaking generally, is that the employer has to wait a

[4] See, for example, *Nathan v C3 Limited* [2015] NZCA 350 at [35].
[5] [2011] NZCA 20 at [60]-[61].
[6] [1998] 1 ERNZ 545 at 549.

> reasonable time to give the injured employee an opportunity to recover (what is reasonable being a question of fact in each case) and after that it has to inquire in a fair and open-minded way whether the employee has any realistic prospects of returning to work within a further reasonable time. This necessarily has to include seeking information from the injured employee, making it known at the time that the information may be used for the purposes of a decision to discontinue the employment relationship. This is to ensure that the employee understands the seriousness of the issue and will have a motive to ensuring that the information is as full and accurate as he or she can make it be. It would not be reasonable to expect so diligent a response to a mere casual inquiry after the employee's health. Sometimes an employer can safely act on information volunteered by the employee such as periodic medical certificates but, in general, will need to inquire from the employee in case there have been any recent developments, especially if the information held is stale. Once armed with all the necessary information the employer has to consider whether (balancing fairness to the employee and the reasonable dictates of its practical business requirements) it is prepared to keep the employee's position open for the indicated period of time. Reconsideration of this question might need to be undertaken more than once from time to time.
>
> In the present case, the respondent was ungenerous in the times that it allowed … However, the Court's function is not to compel employers and employees to be generous or kind to each other but only to see to it that they treat each other justly.

[42] The Court's decision in *Barry*, and other such cases, establish that the period for which incapacity should reasonably be tolerated by an employer will vary significantly according to a range of factors to do with the employee, the nature of her or his position, length of previous service and likely length of future service, the nature of the illness and prospects for recovery, and the nature of the employer's business and its practical requirements. The required assessment is the same whether it is said to concern the reasonableness of ongoing 'toleration of incapacity' or 'accommodation of disability'. In each case what is reasonable in the particular circumstances of the employer and the worker is a question of fact.

[43] The point at which an employer "can fairly cry halt" will vary according to business size, complexity and its reliance on the specific skills or input of the particular worker.[7] This point may come sooner for what is called in the case law 'a small shop'. However a substantial and sophisticated business like OCD had considerably more room to move and resources to call upon in taking measures to accommodate Mr Nelson's disabilities on his return to work and to consider alternatives to his dismissal for incapacity. His disabilities at that time were

[7] *Hoskins v Coastal Fish Supplies Limited* [1985] ACJ 124 at 127 (AC).

manifested by limits on his ability to climb ladders and steps and to tolerate prolonged sitting, standing or walking. He was able to do all those things prior to his accident.

The discrimination and unjustified disadvantage claims

[44] The six specific instances or ways in which Mr Nelson said OCD had discriminated against him or acted unjustifiably needed to first be considered against the background of OCD's agreement to the GRTWP proposed by ACC in February 2014.

[45] OCD had not filled Mr Nelson's role once it became apparent that he would face many months of rehabilitation after his May 2013 accident. Instead OCD chose to engage a contractor to carry out those duties while Mr Nelson was away. It continued with arrangements to use the contractor's services after Mr Nelson's return. It did so to cover those parts of his duties that Mr Nelson could not do, either for reasons of his limited physical capacity or his limited hours. The total cost for the contractor's services were more than what would have been spent on Mr Nelson's salary and associated employment costs if he had been able to work full-time and do his full duties. The arrangement indicated, as a matter of likelihood, OCD's long-term intention that Mr Nelson would return to work and retain his role, if he was able to do so.

[46] In his oral evidence Mr Nelson accepted OCD was supportive and considerate in the arrangements made for his return to work. For example, his work was arranged in single-level areas of the plant level as steps were difficult for him to get up and down and he was not assigned duties that required climbing ladders or clambering into confined spaces. The initially sympathetic approach changed, in Mr Nelson's view, because Mr Stone and Mr Claassen thought he was not improving as rapidly as they wanted. When increases in his hours and day "stalled" he considered that they then "looked for a reason to get rid of me".

[47] Mr Nelson also accepted that the goal of the GRTWP and his own intention was to return to full-time work and to carry out his full pre-injury duties, although he thought this could not be achieved as quickly as suggested in the plan. The plan contemplated Mr Nelson increasing his hours from six in his first week to 20 hours after five weeks, with the next steps to be reviewed in the sixth week. However it was

not until around mid-August 2014, some 12 weeks after his return to work, that Mr Nelson briefly attempted the 20-hour step (a 4:5 week) before reverting to the 4:4 week on which he remained for the following seven months.

[48] Against that background five of the six instances or circumstances of discrimination and disadvantage can be determined relatively concisely. The sixth instance, concerning the question of whether OCD did enough to properly consider the redeployment of Mr Nelson to other roles or duties, was best considered in relation to his dismissal and what OCD did before making that decision. In that respect OCD correctly submitted that redeployment, whether to alternative duties or a completely different role or position, only needed to be considered once it had decided Mr Nelson had been incapable for too long of carrying out the role for which he was employed.

(i) Denied flexibility of hours?

[49] Mr Nelson said his direct manager Mr Claassen had insisted he work at least the hours set in the GRTWP and had criticised him for working, on one specific occasion, more than those hours. On that occasion Mr Nelson had stayed later one day to help another technician with a faulty pump. The following day Mr Hollingsworth told Mr Nelson that he appreciated him staying later to help the other technician but it was important to stick to the hours set in the plan. Mr Nelson said that when he "argued the point" because the other technician did not know what to do, Mr Claassen joined in the discussion and told him that he must "stick to the hours". It was an instruction Mr Claassen could reasonably make in light of the graduated plan and the risk that exceeding his hours might pose for Mr Nelson's health and progress.

[50] Mr Stone's evidence confirmed that Mr Claassen was following his instructions in the approach he took over Mr Nelson's hours. Mr Stone said he had told Mr Claassen to ensure Mr Nelson did not do activities or hours that were not part of the ACC plan. He said he did not want Mr Nelson put under physical stress or his return to work plan put at risk. It was a reasonable approach for a responsible employer to take.

[51] Neither did Mr Claassen act unreasonably when he expected Mr Nelson to move to the higher 4:5 week and encouraged him to do so. It was consistent with the

plan. Mr Nelson resented having to provide a medical certificate to revert to the 4:4 week arrangement rather than Mr Claassen accepting his word. However it was not unreasonable for Mr Claassen to expect the limit on progress under the plan to be confirmed by a doctor rather than rely solely on Mr Nelson's say so.

[52] At no stage from August 2014 did Mr Nelson ask to work longer hours. It cannot fairly be said that OCD thereby denied him flexibility of hours. Rather it accommodated him remaining on the 4:4 week for several more months.

(ii) Excluded from lunch room?

[53] Mr Nelson complained that he was required to take his breaks in a different 'smoko room' than he had previously used because that room had a large step which was difficult for him to get up. He also said Mr Claassen criticised him for using a temporary portable step that another worker had found and put by the room so he could get into it.

[54] On his return to work Mr Claassen and an ACC consultant had arranged for Mr Nelson to use a different room around 150 metres away from his usual smoko room. Mr Nelson said that arrangement meant he could not "catch up" with his workmates in his breaks. However there was no reason that his workmates could not have joined him in the other smoko room, if they wished to do so. Mr Claassen's concern that Mr Nelson could fall down the temporary step was not unreasonable in light of Mr Nelson's mobility issues.

[55] Mr Nelson submitted OCD could have built a ramp or handrail to provide access to the smoko room. It was not a cost-effective or necessary adjustment given that an adequate alternative was available on site and its use would have been short term. As his hours increased Mr Nelson had been assigned to duties in a different part of the plant and used a smoko room in that area instead.

(iii) Denied a new phone?

[56] Mr Nelson also suggested he was discriminated against or unjustifiably disadvantaged because the three other maintenance technicians were provided with new smart phones and he was not. An OCD-supplied work phone used by Mr Nelson was stolen when he was in hospital. Mr Stone had arranged for and provided him with a replacement phone at the time. Mr Stone also confirmed other fitters were

provided with new phones over several months as part of a replacement policy. However Mr Nelson's evidence did not establish that he would not have received one if he had returned to full-time work and full-time duties, including being available for on-call work (which he was not while he was on limited hours and duties).

(iv) Excluded from training?

[57] Mr Nelson said he was discriminated against and disadvantaged by not being allowed to attend a fork hoist training course held in Tauranga in early 2015. Other maintenance employees attended the course, leaving the plant around 8am and returning by around 4 pm that day. OCD said attendance would have required Mr Nelson to attend work for more than eight hours that day, including around an-hour-and-a-half of travelling time. It was considerably longer than Mr Nelson's daily hours of work at the time. Other similar courses had been held on site both before and since. There was no suggestion Mr Nelson would have been excluded from other courses that were on site or within his working hours.

(v) Excluded from after-work drinks

[58] Mr Nelson said he was discriminated against and unjustifiably disadvantaged by being excluded from weekly after-work drinks held at a hotel in Matamata. He also submitted that OCD "refused" his proposal for an alternative at-work function, a 'smoko shout', and that was a discriminatory failure to reasonably accommodate his disability.

[59] Mr Claassen was the manager responsible for hosting the after-works drinks, to which OCD contributed a small amount.

[60] Mr Nelson said that after he returned to work in May 2014 he could not attend the drinks because he had finished work by around midday and driven home, a journey of around 45 minutes from the factory in Waharoa to his home in Cambridge. It was too long and tiring a journey for him to then drive back to the hotel in Matamata in the late afternoon.

[61] If Mr Nelson wanted to attend the occasional after-work drinks he could have arranged to work afternoon rather than morning hours on those days. He neither suggested nor sought such an arrangement.

[62] He did suggest an at-work morning tea shout could be held instead as it could then also include two other workers who did not go to the hotel because they did not drink alcohol. He made that suggestion to Mr Hollingsworth, not Mr Claassen. Mr Claassen had not failed to reasonably accommodate Mr Nelson's disability by not implementing an idea he was not asked about.

The unjustified dismissal claim

[63] In writing to tell Mr Nelson, through his representative, of its decision to terminate his employment OCD gave three reasons for its conclusion:

(a) He was "so incapacitated from performing his duties" and
(b) There were no roles to which he could be redeployed; and
(c) There was a "considerable cost" in engaging a contractor to perform the "substantial balance" of the full time role of which he had only been capable of performing a small part since his return to work.

[64] Mr Nelson submitted OCD's conclusion was tainted by a flawed process and substantively unjustified as, with its resources, the decision was not what a fair and reasonable employer could have done in all the circumstances at the time.

[65] On my review of the evidence Mr Nelson's submission was not correct. OCD's conclusion was one within the range of responses that a fair and reasonable employer could have reached at the time. It had made adequate inquiry of Mr Nelson's prognosis. It provided and extended a sufficiently long period for him to improve. It made sufficient adjustments in his hours and what was required of him to give him a reasonable chance of building up his physical capacity. It then reasonably concluded he stood no real prospect, any time soon, of being able to do the full-time role for which he was employed. It fairly considered whether it could then find other work for him to do. While there were aspects of the process Mr Stone and Mr Claassen followed that were less than ideal, defects in how they went about collecting some information did not result in Mr Nelson being treated unfairly.

[66] Mr Nelson submitted that no account should be taken of OCD not having sought to make earlier use of its contractual term on medical incapacity during the months immediately after his accident when he was in hospital and later could only move around in a wheelchair. To the contrary OCD should be given some credit for

not acting in haste, waiting a year, agreeing to attempt a graduated return to work, and persisting with the work for many more months than anticipated by the initial plan. Those factors weigh in favour of the reasonableness of its subsequent decision, not against it.

[67] Some specific criticisms Mr Nelson made of OCD's decision, and how Mr Stone and Mr Claassen had reached it, are addressed in light of that general conclusion.

(i) Reliance on information Mr Nelson did not have an opportunity to comment on?

[68] Mr Nelson submitted OCD relied on information about the cost of its contractor and an assessment of the percentage of the duties he was able to carry out that was not fully disclosed to him and, therefore, he was denied a proper opportunity to comment on that information.

[69] Mr Nelson was not provided at or before the 19 March meeting with a breakdown of the monthly costs, with supporting invoices, for the contractor. That information later formed part of the documentary evidence made available for the Authority investigation. However he did know or would have understood the basic equation of the different hourly rates and the ongoing relative expense of retaining a contractor to do the work he could not do.

[70] Mr Nelson submitted that a recalculation he did using information disclosed for the Authority investigation supported the notion that OCD could have employed a junior to assist him for less than the cost of paying a contractor. The argument was not compelling. It was within the range of reasonable responses for OCD to seek to keep its staff costs within the amount that was required for a full-time, physically able employee rather than bear on-going costs for additional roles, whether a junior assistant to Mr Nelson or a contractor to do the work that he could not.

[71] Mr Nelson also submitted OCD unfairly relied on the notion he could only do around 20 per cent of his duties but had provided no basis for the statement. OCD accepted in its submissions that Mr Stone and Mr Claassen had estimated Mr Nelson was doing around 20 to 25 per cent of the maintenance technician's role. However Mr Nelson knew from the discussions in the meetings held with him before the decision was made to terminate his employment that those two managers held that

view about how much of the role he could do and he had not contested it. No precise mathematical equation was required to give him a fair opportunity to comment on that view. The reality was that Mr Nelson also knew he could not do most of the role for which he was employed. An occupational therapist's report, prepared for ACC in October 2014, recorded comments from Mr Nelson (referred to later in this determination) that suggest he had also reached that conclusion himself by then. The medical evidence, in reports from Dr Ruttenberg and Dr Prestage, confirmed the degree of incapacity was substantial.

[72] There was also a suggestion in the cross-examination of Mr Stone at the Authority investigation meeting that Mr Nelson did not get a proper opportunity to comment before Mr Stone and Mr Claassen reached a firm view on the prospects for redeploying him to another role. This was said to have occurred in the discussions that Mr Stone and Mr Claassen had prior to meeting with Mr Nelson on 19 March. However it would be unrealistic to have expected the two managers to gather information about possible roles and discuss them, in preparation for the meeting, and to invite Mr Nelson's comment before the meeting which was, in part, being held for the purpose getting his comments. They may have reached firm views but the evidence, taken overall, did not support a conclusion that they had closed their minds to what Mr Nelson might, and did, say at the 19 March meeting. The meeting included a reasonably detailed discussion about what roles were or might be available and whether he could be successfully redeployed to any such roles.

(ii) Relying on irrelevant or improperly obtained information?

[73] Mr Nelson submitted OCD unfairly relied on the contents of Dr Ruttenberg's report which was "improperly obtained" from ACC without Mr Nelson's knowledge.

[74] In October 2014 Mr Stone and Mr Claassen arranged to meet with the ACC case manager responsible for Mr Nelson at the ACC Hamilton office. For more than two months previously they had, unsuccessfully, sought to meet the case manager to talk about progress on Mr Nelson's case. On arriving at the office they found the case manager was not there for their arranged appointment. Instead they spoke to another ACC officer who, in the course of that conversation, showed them some information onscreen from an occupational assessor who had prepared a report in August 2014 after talking with Mr Nelson about the range of jobs that he could do or would be

interested in doing. The following day the same ACC officer also spoke by telephone with Mr Stone and read him parts of Dr Ruttenberg's September 2014 assessment of Mr Nelson. The officer's notes recorded that she told Mr Stone that Dr Ruttenberg had agreed Mr Nelson would probably not manage his pre-injury role, there were significant safety concerns and referred to some other roles that were considered currently medically sustainable.

[75] Mr Stone and Mr Claassen did not tell Mr Nelson that they were going to an ACC meeting that day. He was not invited to be part of the meeting. Mr Stone did however then ask Mr Nelson for the reports from the occupational assessor and Dr Ruttenberg. In his oral evidence Mr Nelson said he was reluctant to provide those documents because they discussed other jobs and he did not want OCD to think that he wanted to leave his present job.

[76] The information Mr Stone got directly from ACC did raise questions about its protection of Mr Nelson's privacy because he was not consulted before information gathered for ACC's purposes was given to his employer without his prior knowledge that was happening. However, it did not result in Mr Nelson being treated unfairly by his employer. Mr Stone asked Mr Nelson for the two reports. They were, eventually, provided to OCD by Mr Nelson's lawyer in December 2014.

[77] The information was appropriately asked for as relevant, in a good faith context, to discussions between OCD and Mr Nelson about his work prospects. While OCD had not been open with Mr Nelson about its contact with ACC, neither was Mr Nelson entirely open with OCD about his position at the time. A fairly frank assessment by Mr Nelson was recorded in an ACC support needs assessment report prepared by an occupational therapist on 17 October 2014. It was disclosed in documents made available for the Authority investigation. The therapist recorded that Mr Nelson had been unable to transition from light duties to his previous role as the work was too physically demanding due to his physical impairments after the injury. He recorded that Mr Nelson was "beginning to think that his existing job may not be sustainable in the future and he is starting to think about his options for other forms of employment". The therapist recorded that Mr Nelson's ideal outcome would be to start a business where he was able to coach BMX riding. He recommended ACC fund vocational support to help Mr Nelson in exploring future work options due to his "dissatisfaction and difficulties with his existing work role".

[78] A further submission from Mr Nelson that medical information prepared for ACC could not be taken into account by OCD of the grounds that the term in his employment agreement about medical incapacity required the employer to take account of reports or "advice from its *own* and/or the *Employee's* medical practitioner" (italic emphasis added). It would be a highly artificial approach to require the employer to disregard other medical assessments that might be useful in tracking progress in rehabilitation. And, if a narrow and technical rather than wide and purposive approach was taken to interpretation of the contractual clause, the wording of the term does not exclude other reports because it does not say the employer must "take account *only*" of advice provided by its or the worker's doctors.

(iii) Failure to extend or continue measures to accommodate Mr Nelson's incapacity?

[79] Mr Nelson submitted OCD had unjustifiably "cut short" his return to work programme despite advice from Dr Prestage, the consultant occupational physician commissioned by OCD (dated 3 March 2015), and Chris La Pine, the physiotherapist who had worked with Mr Nelson over many months (dated 17 March 2015).

[80] The term on medical incapacity in the employment agreement referred to "no medically apparent improvement" after three months.

[81] Dr Prestage felt it was too early to state Mr Nelson would not be able to achieve a return to full duties in the longer term. He proposed a review in four to six months. Mr La Pine noted his testing of Mr Nelson showed he had "gone backwards" by February 2015 compared with his May 2014 rating. He proposed further physical strengthening training in conjunction with an ongoing graduated return to work.

[82] Significantly neither health practitioner identified any medical improvement in Mr Nelson. While they could propose further attempts to develop and then assess his progress, OCD was entitled to take account of what had already happened over the previous nine months and 'cry halt'.

[83] Dr Prestage conducted a further assessment of Mr Nelson for ACC in July 2015. It was done after OCD dismissed Mr Nelson so could not be taken into account, for the purposes of s 103A of the ER Act, as a circumstance at the time of its action. However the later report was a useful cross-check on the robustness of the

reason for the decision OCD made in March 2015. After a thorough reassessment of Mr Nelson's condition and circumstances, and with the benefit of medical and vocational information from mid-2013 to May 2015 provided by ACC, Dr Prestage concluded in July 2015 that Mr Nelson's ability to sustain employment for 30 or more hours a week was not proven. He found Mr Nelson was "potentially capable of full-time work in a sedentary to light role that involves a suitable mix of sitting, standing and walking" but "that does not require climbing of ladders or steps on a regular basis." In that light, if OCD had stayed its hand in March 2015 for a further three months, Mr Nelson would have likely been no less incapable of performing the role for which he was employed.

(iv) *Failure to explore and adequately consult on alternative work or redeployment?*

[84] As already noted earlier in this determination, discussion between Mr Stone and Mr Claassen about possible roles to which Mr Nelson could be redeployed before meeting with him on 19 March was not of itself a failure to explore or adequately consult him about those prospects.

[85] Some of the roles Mr Nelson considered he could do were already filled by someone else. For example, he said he could do the maintenance manager's job. Mr Claassen held that position.

[86] Other roles were full-time and Mr Nelson was not capable of performing them. One example was a quality assurance job for which he would have required training and the ability to work full time. Another role of a fork lift hoist driver was also full-time and included 12 hour shifts, beyond Mr Nelson's capacity.

[87] He proposed the creation of a junior or 'journeyman' role so that an additional worker could be employed to assist him carry out tasks that he was not capable of doing. OCD's obligations in considering redeployment of Mr Nelson as an alternative to terminating his employment did not include creating new jobs for other people.

[88] Mr Nelson submitted a principle expressed in *Royal Bank of Scotland plc v McAdie,* a United Kingdom Employment Appeal Tribunal decision, should apply to the requirements on OCD in considering redeployment.[8] In part his submission was

[8] [2006] UKEAT 0268_06_2911.

based on the notion that OCD was at fault in causing the accident he suffered but even if it were not, OCD was required to do more to consider his redeployment.

[89] In *McAdie* Justice Underhill, as he then was, reviewed earlier and conflicting tribunal decisions about the implications of employer responsibility for a worker's incapacity and made the following statement of principle which was later endorsed by the England and Wales Court of Appeal:[9]

> … [T]here must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable.

[90] While OCD firmly rejected the notion that it was at fault for Mr Nelson's accident (as discussed later in this determination), Mr Nelson's submission that OCD had failed to "go the extra mile" failed to be persuasive on two counts. Firstly, as a matter of common sense and common fairness OCD had 'gone the distance' in the length of time that it held Mr Nelson's position open and then attempted to accommodate his incapacity. Those efforts were within the range of reasonable responses for an employer in those particular circumstances. Secondly, the passage relied on from *McAdie* in Mr Nelson's submissions omitted the important and relevant qualification Justice Underhill went on to make:

> However, … it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him forever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work.

[91] While considerable caution should be exercised in adopting principles developed in the context of different statutory regimes, New Zealand employment law shares the notion that an employer is not obliged to indefinitely retain a worker not able to do what is required for the role for which she or he was employed. As the passage from the *Barry* case cited earlier in this determination confirmed, an employer's obligation to an injured worker is to wait a reasonable period to allow for improvement and then, if the incapacity continues, to fairly gather and assess the

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[9] *McAdie*, above, at 4 and see *McAdie v Royal Bank of Scotland* [2007] EWCA Civ 806 at [40] per Lord Justice Wall.

relevant information on the worker's prospects for sufficient recovery before deciding whether or not to make a decision to dismiss. Redeployment options are part of that relevant information and assessment.

[92] In this case OCD made an assessment of those options that was reasonable in the circumstances of Mr Nelson's level of incapacity and was not unfair in its decision that there were no viable options for his continued employment. In the context of Mr Nelson's prognosis and OCD's business needs there was, as OCD submitted, no obligation to create a new part-time job for him of ongoing and indefinite duration.

(v) Failure to provide outplacement support during the notice period?

[93] Having made the decision to dismiss a worker in Mr Nelson's circumstances of incapacity, a fair and reasonable employer could not have failed to consider what support he might need during his notice period to prepare for the situation after his employment ended. OCD did not dismiss him for any deliberate or careless fault, such as misconduct. Rather Mr Nelson's situation, literally, occurred by accident and he was not 'at fault' for his ongoing incapacity to do his job. His dismissal for incapacity was more akin to the 'no fault' basis of a dismissal on the grounds of redundancy. In such 'no fault' dismissals, the courts have observed that fair treatment in carrying out the termination of employment "may call for counselling, career and financial advice and retraining and related financial support".[10]

[94] In his oral evidence at the Authority investigation Mr Stone accepted that offering outplacement assistance to Mr Nelson, such as help with preparing a curriculum vitae and with interview skills, was appropriate in his situation but was "overlooked". Mr Nelson was offered a farewell morning tea, which he declined, and provided with a reference but no other assistance on his exit from the employment. It was a disadvantage to him that was not justified in the circumstances.

[95] In closing submissions OCD accepted outplacement support should have been offered. It proposed now providing Mr Nelson with support up to the value of $2000 for CV preparation and similar activities, on receipt of invoices. It submitted any such payments should not form part of the Authority's determination but were something OCD wished to and would provide.

[10] *Aoraki Corporation Limited v McGavin* [1998] 1 ERNZ 601 (CA) at 619.

Remedies

[96] In light of the finding that the dismissal of Mr Nelson was not unjustified, his claims for lost wages and compensation on that ground failed. However he had established a personal grievance for unjustified disadvantage due to the failure of OCD to properly consider providing him with 'outplacement assistance' after its decision to dismiss him.[11]

[97] OCD proposed remedying the oversight on the basis of its offer to reimburse him for any invoices for such services, if presented by Mr Nelson, and without an order being made by the Authority. The limited and conditional nature of OCD's proposal was not an adequate remedy. Mr Nelson was entitled to an order for compensation for loss of a benefit that he might reasonably have expected to obtain if the particular disadvantage grievance had not arisen.[12] The appropriate amount was $2000 to be paid to him as money, not subject to the provision of invoices.

[98] He was also entitled to an award of compensation for the injury to his feelings resulting from what objectively, albeit unintentionally, appeared to an element of disregard by OCD in not offering him outplacement assistance after its decision to dismiss him on notice. The modest amount of $1000 was sufficient to compensate for that specific instance of injury to his feelings. It is set on the basis of excluding from consideration Mr Nelson's evidence about his sense of humiliation, loss of dignity and injury to his feelings arising from the consequences of his accident and his dismissal. While he experienced those feelings, compensation cannot be awarded for them in light of the findings in this determination.

[99] No reduction of the remedies awarded was required under s 124 of the ER Act. Mr Nelson had not contributed to the situation giving rise to his grievance regarding OCD's oversight in considering outplacement assistance to him.

Penalty

[100] Mr Nelson sought the imposition of a penalty for alleged breaches of good faith by OCD in getting information from ACC without his consent or knowledge and not providing a more detailed breakdown of its costs for engaging a contractor to cover duties he could not do. For reasons already given in this determination I was

[11] Employment Relations Act 2000, s 122 applied.
[12] Employment Relations Act 2000, s 123(1)(c)(ii).

not satisfied OCD's conduct was as described by Mr Nelson or that a penalty was warranted. To the extent there was a failure in good faith behaviour regarding the open provision of information, Mr Nelson's approach was also less than ideal.

Breach of contract and damages claim – is it open to further investigation?

[101] Mr Nelson submitted he should be able to pursue claims for damages resulting from breaches by OCD of its express and implied duties to provide him with a safe workplace. The serious accident he suffered on 16 May 2013 was said to be evidence of the breach. By the time his application was lodged in the Authority Mr Nelson blamed OCD for his accident. OCD had not previously blamed Mr Nelson for the accident but in its reply to his application, OCD said that if responsibility for safety breaches that resulted in the accident were to become an issue relevant in the Authority's investigation, the responsibility lay with him.

[102] However during an interview with a Ministry of Business health and safety inspector soon after the accident in 2013 Mr Nelson said, according to a statement he signed at the time: "I don't see this as anybody's fault. It was one of those things". The inspector subsequently concluded, and informed both Mr Nelson and OCD in writing in July 2013, that the incident did "not appear to have been the result of poor work practices or systemic failure but simply an unforeseen event".

[103] Mr Nelson's later assertion about fault added nothing to the analysis required for determination of whether OCD had met its obligations to treat Mr Nelson fairly and reasonably on his return to work or in making its subsequent decision to dismiss him for incapacity. It was irrelevant. And the AC Act barred the Authority from investigating and determining his breach of contract claims seeking findings of fault and orders for damages resulting from effects of the accident. The reasons for that view are as follows.

[104] Section 317(2)(c) allows for Mr Nelson to have brought a personal grievance "arising out of" his employment agreement. Such a grievance could be raised for a breach by OCD of its duty to take practicable steps to eliminate, isolate or minimise potential hazards in his work.[13] The duty was expressly stated in OCD's Employee Handbook that was incorporated into Mr Nelson's terms of employment. However

[13] See, for example, *Robinson v Pacific Seals (NZ) Limited* [2103] NZERA Wellington 101.

Mr Nelson did not seek to raise a personal grievance on those grounds within the 90-day statutory period to do so after the accident that was said to be evidence of such a breach. Neither had he sought leave under s 114(3) and s 115 of the ER Act to raise a grievance outside that period. He had not done what was necessary to use the personal grievance exception to the ACC statutory bar.

[105] The other potential avenue, under s 317(2)(b) of the AC Act, to bring proceedings relating to, or arising from, any express term of an agreement was also a legal cul-de-sac. Even if a breach of a safety term were to be established, s 317(3) prohibits a "body", such as the Authority, awarding compensation for personal injury covered by the AC Act. There was no doubt that Mr Nelson's injury was covered by the AC Act as he had received weekly earnings compensation since his accident and, to the date of the Authority investigation meeting, was still being paid that entitlement.

[106] His three claims for damages in the Authority were also each squarely within the scope of the AC Act's prohibition on proceeding for damages arising "*directly* or *indirectly*" out of the personal injury covered by the AC Act: s 317(1).

[107] His claim for lost earnings (based on the 20 per cent difference between what he would have earned, but for the accident, and the 80 per cent ACC paid as weekly earnings compensation) arose directly out of the same personal injury for which ACC paid him that compensation.[14] Such a claim would not be barred if there was an express term in his employment agreement that allowed for payment of an ACC 'top up' and OCD had not paid it. The s 317(2)(b) exception permitted pursuit of such a payment to enforce the agreement but Mr Nelson had no such term.[15]

[108] His claim for medical and related costs not fully reimbursed by ACC was also barred because of the direct connection to his personal injury covered by the AC Act.

[109] Mr Nelson's statement of problem expressly identified his claim for damages for distress, suffering and loss of enjoyment of life as being for a "breach of contract as a result of the accident". It was not a claim for compensation that was "entirely

[14] *Mitchell v Blue Star Print Group (NZ) Limited* [2008] ERNZ 594 at [84].
[15] *McGrory & Ors v Ansett New Zealand Limited* [1999] 2 NZLR 328 (CA) at pages 6 and 10-11 and *Brittain v Telecom Corporation of New Zealand* [2001] ERNZ 647 (CA) at [20].

disjunctive of the personal injury" and it was therefore not compensable under s 123(1)(c)(i) of the ER Act.[16]

[110] Mr Nelson submitted that, at the very least, s 317 of the AC Act did not prevent an Authority investigation for the purpose of making a declaration as to whether or not there was breach of safety duties. He submitted such a declaration might have some use as deterrence or vindication. Even if that were so, the necessary expense of time and money by the parties and the state to achieve such a declaration would seldom warrant the exercise.

Costs

[111] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, and an Authority determination on costs is needed, either party may ask the Authority to set a timetable for the lodging of memorandum. If a determination is sought, the starting point for assessment would be the Authority's usual daily tariff adjusted upwards or downwards for particular circumstances and factors in this case.[17]

Robin Arthur
Member of the Employment Relations Authority

[16] *Robinson v Pacific Seals (NZ) Limited* [2014] NZEmpC 99 at [46]; *Kim v Thermosash Commercial Limited* [2011] NZEmpC 169 at [23]; and *Mitchell v Blue Star Print Group (NZ) Limited* [2008] ERNZ 594 at [77] .
[17] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].