



employment relationship. To remedy these problems Ms Parish seeks compensation, damages and penalties, but not reinstatement.

[3] Telecom says that it did not unjustifiably dismiss Ms Parish or disadvantage her or breach good faith in its dealings with her.

[4] To resolve this problem I will set out in more detail the events that preceded Ms Parish's dismissal before reviewing the specific complaints made by her as to its justifiability and breach of good faith. Before starting that there are some points that should be made about the scope of the investigation and determination.

### **Limitations**

[5] An action for the recovery of a penalty must be commenced within 12 months after the earlier of the date when the cause of action became known to the plaintiff or it should reasonably have become known to them. These proceedings were lodged on 17 April 2008, so it is only events after mid April 2007 that might arguably give rise to a penalty. To some extent Ms Parish's complaint relates to another accident that happened in 2003 and events upon her return to work in 2004 but, for the reason just given, none of that can found a penalty claim in these proceedings.

[6] A grievance must be raised with an employer within the period of 90 days beginning with the date on which the action alleged to amount to a grievance occurred or came to the employee's notice (whichever is later). Ms Parish, through her solicitor, raised her grievance in a letter dated 22 November 2007. That opens up events from late August 2007 as potential grievances. There is no difficulty with the dismissal being the subject of a grievance since that happened in October 2007, but events prior to late August 2007 cannot separately constitute disadvantage grievances because they are out of time and there has been no application for leave to raise out of time grievances. This point only arises because the statement of problem claims the existence of unjustified disadvantage grievances without specifying them in any detail.

### **Ms Parish's initial absences from work**

[7] For context, I note that Ms Parish injured her back at a work social function in September 2003, reduced her work hours for a time, had five weeks off work in March and April 2004, returned to work part-time, then resumed full-time work from

the beginning of July 2004. Sometime after her return to work Ms Parish experienced difficulty with her then team leader, but that was resolved by her transferring to another team led by Keri Watson. Thereafter, Ms Parish had a good working relationship with manager.

[8] On 5 November 2006 Ms Parish injured her back dragging a woosack around her garden at home. Telecom's leave records show Ms Parish took one day's sick leave in the week starting 6 November 2006, half a day's sick leave in the week beginning 20 November 2006 and two days in the fortnight beginning 8 January 2007. No *accident absence* is recorded over this time. Presumably some or all the sick leave just mentioned related to the November 2006 accident. There is a work site assessment report dated 3 April 2007. It refers to Ms Parish's back pain settling down with physiotherapy over the six weeks following the November 2006 accident.

[9] The report explains that Ms Parish aggravated her back when she slipped getting out of the shower but no date is given. Ms Parish saw a doctor on 19 February 2007 who certified her as unfit for work for five days. Ms Parish must have returned to work and then saw her doctor again on 7 March 2007 who certified her as unfit for work for seven days starting 6 March 2007. Ms Parish's leave records indicate she took further time off work for the accident during the fortnight starting 19 March 2007.

[10] The report says that Ms Parish started back at work on full time hours and duties at the beginning of April 2007. Its purpose was to assess the physical environment to ensure Ms Parish's safe return to work. In general it concludes that the work station is well set up. The report also says that Ms Parish's *boss and her co-workers have been supportive towards Lyn with respect to the injury*. It was Ms Parish who said this to the report writer and it is an accurate description of Telecom's approach at the time. The report cautions that Ms Parish has suffered a major back injury that will take 6 to 12 months for full recovery but conveys an optimistic prognosis in the longer term. There are several recommendations and there is no evidence to suggest any lack of co-operation on the part of Telecom in implementing them.

**Events after Ms Parish finished work**

[11] Ms Parish ceased work at Telecom was 31 May 2007. In her evidence Ms Parish did not explain how this came about, except to say that she was now off work to undergo rehabilitation and pain relief following a course of steroid and spinal injections.

[12] There is a sequence of medical certificates covering Ms Parish's absence from work after 31 May 2007 for two days, seven days, two weeks (three certificates) and four weeks (four certificates). The last certificate is dated 10 September 2007.

[13] Contrary to Ms Parish's evidence she was contacted several times by her manager (Keri Watson) after 31 May 2007. Ms Watson made notes which show calls on 25 June and 23 July 2007. These notes were put to Ms Parish, but she said she did not specifically recall the conversations. I have no reason to doubt that these and other notes accurately record what Ms Parish said to Ms Watson. During the first call Ms Parish said that there was possibly nerve damage. Ms Parish gave Ms Watson the name and phone number of her ACC case manager. They also had some discussion about facilitating Ms Parish's involvement in Telecom's performance review process. During the second phone call, Ms Parish told Ms Watson that there was no surgery to correct the problem, that pain management was the option being pursued and that there was a two year estimate to heal nerve damage. Ms Parish said that she had a further four week ACC certificate and that she was not able to manage any tasks other than visiting a doctor and her physiotherapist. She also said that her medication affected her memory and it was very disruptive.

[14] On 3 August 2007 Ms Parish sent an email to Ms Watson. It followed on from a visit from a work colleague and briefly set out what Ms Parish had been doing in terms of rehabilitation. It also says *Keri, my focus is to get back to work, I am doing all I can to make myself more fit, the medical team tells me this is possible however no one can commit to how long ....*

[15] Next, Ms Watson received a letter from a physiotherapist saying *your employee, Mrs Lyn Parish has presented to our Clinic with an injury influenced by work.* The letter offers a work site assessment. Ms Parish in evidence says *I understand no one from Telecom got back to my Physio.* However Ms Parish's understanding is wrong. Ms Watson rang and spoke to the physiotherapist to explain

that Ms Parish had not been at work since May 2007, had no date for a return to work and that a work site assessment report had already been compiled.

[16] Ms Watson then replied to Ms Parish's email on 16 August 2007 letting her know about the need to deal with Telecom's end of year review, her exchange with the physiotherapist and updating Ms Parish with general workplace news. The email also says *In the next couple of weeks (after the review stuff is all tidied) I need to call you into a meeting and get formalised what is happening with your injury, and recovery time etc as Telecom is wanting me to formalise records on where things are at.*

[17] As noted above Ms Parish gave Ms Watson contact details for her ACC case manager. At the time Ms Watson rang the case manager to seek information about Ms Parish's prognosis. The case manager was on leave but Ms Watson was told that ACC would not disclose any medical information and often did not know when a worker would be capable of returning to work. Ms Watson eventually had a discussion with Ms Parish's case manager on 20 August 2007. She was told that it looked like several more months before Ms Parish could return to work. Shortly before this conversation Ms Parish was certified fully unfit for work for a further four weeks.

[18] Against this background, sometime in August 2007, Ms Watson sought some HR advice about what to do regarding Ms Parish's continued absence. This resulted in Ms Watson sending Ms Parish a letter dated 20 August 2007. Ms Watson rang Ms Parish on 21 August 2007 and told her that she was sending the letter and briefly described its contents. Ms Parish in her evidence said *to my surprise without warning I received a letter dated 4 August 2007 ....* That evidence is wrong. Ms Parish knew from Ms Watson's phone call that a letter was on its way.

[19] The letter reads:

*Dear Lyn,*

*Possible termination due to medical incapacity*

*I write further to our discussions on the phone and via email during August 2007.*

*It has been six months since you first went off due to your back injury and for the last three months you have not been to work at all. The latest doctor's report you provided has not specified a date on which*

*you will be expected to return to full time duties and your ACC medical certificates are now issued for a month at a time (latest one due to expire 11 September 2007).*

*Unfortunately we are not able to keep your job open indefinitely. Given the importance of the role in our team it is a role we need to fill on a permanent basis. With the information you have provided us in relation to your present medical condition, including your pain levels and medication being taken, we have found that it would not be viable for you currently to initiate a gradual return to work or a change in work hours.*

*If you are unable to return to work and resume full, normal work duties by the 30th September 2007 then one option we will have to consider is ending your employment on the grounds of medical incapacity. Obviously this is not ideal.*

*If you would like to discuss this matter please feel free to call me.*

*Yours sincerely,  
Signed  
Keri Watson  
Team Leader*

[20] Ms Parish did not respond to the invitation to contact Ms Watson. On 17 September 2007 Ms Watson phoned Ms Parish, having not heard from her since the expiry of the August 2007 medical certificate on 11 September 2007. When they spoke, Ms Parish said she had received a further medical certificate certifying her fully unfit for work for a further four weeks; that her doctor and physiotherapist thought that she was unlikely to be able to return to work by the end of September and they did not want to push her recovery; that Ms Watson should not feel bad about dismissing her and that she knew it was not personal.

[21] Ms Watson sent Ms Parish a final letter dated 25 September 2007 summarising their exchanges, explaining her decision to dismiss Ms Parish on the grounds of medical incapacity effective 12 October 2007, indicating a willingness to discuss future employment options when Ms Parish was fit to return to work and offering EAP support.

[22] Some time after receiving this letter, Ms Parish went into the workplace to collect her personal items. Later there was an email exchange between the two women. There was no indication to Ms Watson from these exchanges that Ms Parish had a grievance about her dismissal. As noted above, a grievance was first raised by correspondence dated 22 November 2007 from Ms Parish's solicitor.

### **Justification for dismissal**

[23] Whether Ms Parish's dismissal was justifiable must be determined on an objective basis by considering whether Telecom's actions and how it acted at the time, were what a fair and reasonable employer would have done in all the circumstances.

[24] In *Canterbury Clerical Workers IUW v. Andrews and Beaven Ltd* [1983] ACJ 875 the Arbitration Court held:

*... it is well established law that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period. This is particularly so when the business of the employer requires the presence of permanent staff.*

[25] The case makes the point that an employer must act in a procedurally fair manner when considering whether to dismiss an employee on the grounds of medical incapacity.

[26] There is a submission that a fair and reasonable employer would exercise greater tolerance or extended discretion in a situation when the employee is subject to a work related accident or gradual process injury. It is said that the 2003 accident which occurred during a staff social function outside work means that Ms Parish's incapacity after November 2006 should be treated as if the absence occurred due to a work related accident for which Telecom has some responsibility. I do not accept that Telecom was responsible for the 2003 accident, nor is it established that Ms Parish's incapacity in 2007 is materially connected to the 2003 accident. If there is a greater obligation on an employer arising from a workplace accident, that difference cannot assist Ms Parish in the present case.

[27] There is a complaint that Telecom did not put in place an agreed rehabilitation plan in consultation with medical advisers. Ms Parish in discussion with Ms Watson expressed a desire to embark on a graduated return to work. However, the medical information made available to Telecom in response to its inquiries was that Ms Parish was fully unfit for work, having been so since 1 June 2007. No one was saying that Ms Parish might be able to return to work in the near future. There was simply no basis for starting a dialogue much less concluding an agreement about a gradual return to work at the time of the dismissal.

[28] There is a complaint that Telecom did not adequately investigate Ms Parish's medical advice. I am referred to *Barry v. Wilson Parking New Zealand (1992) Ltd* [1998] 1 ERNZ 545 to support the contention that it is unwise for an employer to rely solely on an employee's representations. The Employment Court said in that case:

*Finally, even if genuinely relying on the incapacity, the employer had to act with justice in a way that was fair to the employee. What this amounts to, generally speaking, is that the employer has to wait a 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 for 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 has been any recent developments, especially if the information held is stale. Once armed with all the necessary information, the employer has to consider whether (in fairness to the employee and the reasonable dictates to its 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.*

[29] In the present case, Ms Watson alerted Ms Parish to the need to formalise things, then specifically advised her that she risked dismissal for incapacity if she was unable to resume normal duties by 30 September 2007. By that stage, Ms Watson had spoken to Ms Parish and her case manager about the prognosis. In this, Telecom met the requirements specified in *Barry* as to the need to make adequate inquiry.

[30] It is submitted that Telecom had to adopt a reasonable stance regarding assisting vocational rehabilitation in accordance with s.71 of the Injury Prevention, Rehabilitation, and Compensation Act 2001. That section is completely irrelevant for present purposes. An employer who is given a notice by ACC under s.86(2) of ACC's decision that it is reasonably practicable to return a claimant to their pre-injury employment, must then take all practicable steps to assist the vocational rehabilitation under their individual rehabilitation plan. There is no evidence that ACC made any decision or notified Telecom of a decision, nor is there any evidence that ACC had even begun vocational rehabilitation.

[31] It is submitted that Telecom was not in possession of all relevant information, that dismissal was considered as the only option, and that it simply imposed an ultimatum. I am referred to *Innes-Smith v. Wood* [1998] 3 ERNZ 1298 as an analogous case. Reference to that case demonstrates that it is not truly analogous. In *Innes-Smith* the employer simply wrote to the employee about eight weeks after the incapacity commenced saying that unless she returned to normal duties in a little over two weeks, she would be deemed to have terminated her employment. In the present case the timeframe, the extent of communication between the parties and the text of the relevant letter are all very different so it is not analogous to Ms Parish's situation. I reach a similar conclusion about another case mentioned in submissions: *Schenker & Co (NZ) Ltd v. Elliot* unreported, Colgan J, 13 July 1999, AC 53/99. In that case the employee was dismissed shortly before her first appointment with a specialist. In the present case, Ms Parish had seen the specialist and had conveyed the diagnosis and her prognosis to Ms Watson.

[32] It is submitted that Telecom's failure to convene a formal meeting to discuss the intended dismissal was a significant procedural flaw. Cases such as *Barry* make it clear that the employer's obligation is to seek information from the employee making it known what the information may be used for. There is no specific obligation to convene a formal meeting where the employer has made appropriate inquiries and received responses which do not include a reasonable request for such a meeting.

[33] I am not persuaded by any of the points raised by counsel that Telecom's actions and how it acted fell below the expectations on a fair and reasonable employer. To the contrary, I find that the decision to dismiss Ms Parish was justified.

### **Breach of good faith**

[34] There is a complaint that Telecom was not active and constructive in maintaining a productive employment relationship and so breached s.4(1A)(b) of the Employment Relations Act 2000. In the statement of problem it is alleged that Telecom's acts and omissions were intended to undermine the employment relationship. Only certain breaches of good faith render a party liable to a penalty, including breaches where there is an intention to undermine the employment relationship (see s.4A Employment Relations Act 2000).

[35] There is simply no cogent evidence of any intention on Telecom's part to undermine its employment relationship with Ms Parish. Indeed, the evidence is that Ms Watson, who dealt with Ms Parish and who made Telecom's decision, acted in a considerate manner towards Ms Parish throughout the whole of the relevant period. This is apparent from their written communications at the time and the evidence about their personal interactions.

[36] A penalty should not have been claimed and the claim is dismissed.

[37] Although not clearly set out as such, it appears to be part of Ms Parish's grievance that Telecom was not active and constructive in maintaining a productive employment relationship because it failed to explore the possibility of her working reduced hours. I am referred to *Classique Giftware Ltd v. Porter*, unreported, Palmer J, 9 May 1995, CEC 20/95.

[38] There was discussion between Ms Watson and Ms Parish about her wish to return to work on a gradual basis. At the time, however, there was no indication of when that could commence. The discussion resulted in Telecom's decision that a gradual return to work was not feasible. That reflected what Ms Parish had told Ms Watson about her pain levels and the effect of her medication. Telecom's letter of 20 August 2007 makes it clear that a gradual return to work could not be accommodated and Telecom needed an employee permanently in the role. In all this the present case is quite different to *Porter* where there was a dismissal at the beginning of an agreed gradual return to work programme.

## **Summary**

[39] Telecom justifiably dismissed Ms Parish on the grounds of medical incapacity.

[40] Telecom did not unjustifiably disadvantage Ms Parish during the relevant period.

[41] Telecom did not breach its good faith obligations in its dealings with Ms Parish during the relevant period.

[42] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority