

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 57
3062676

BETWEEN GANESH PARMAR
Applicant

AND PHARMA PAC LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: David Fleming, counsel for the Applicant
Stephen Langton, counsel the Respondent

Investigation Meeting: 11 and 12 December 2019

Submissions and further 16 December 2019 and 6 February 2020 from the
Information Received: Applicant
16 December 2019 from the Respondent

Date of Determination: 10 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Pharma Pac Limited is a rigid plastics manufacturing company supporting the New Zealand honey, food, supplement and pharmaceutical markets. Ganesh Parmar was employed by Pharma Pac as a Stores Assistant for approximately 11 years until he was summarily dismissed on 2 November 2018 on the grounds of incompatibility.

[2] Mr Parmar alleges that his dismissal was unjustified and claims lost wages and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). He also claims that he was unjustifiably disadvantaged when Pharma Pac forced him to remain away from work on unpaid sick leave.

[3] Pharma Pac denies Mr Parmar's claims. It maintains that Mr Parmar's dismissal was justified; it was a decision of last resort, where the employment

relationship had irreparably broken down substantially because of Mr Parmar's actions and inactions. It denies he was disadvantaged and maintains that his disadvantage claim was raised out of time.

[4] As permitted by s 174E of the 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 Issues

[5] The issues identified for investigation and determination are:

- a. Was Mr Parmar unjustifiably dismissed?
- b. Did Mr Parmar raise his claim for unjustified disadvantage within time?
- c. If so, did he suffer an unjustified disadvantage?
- d. If he was unjustifiably dismissed, and/or suffered an unjustified disadvantage, what remedies should be awarded?
- e. If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Parmar that contributed to the situation giving rise to his personal grievance?
- f. Should either party contribute to the costs of representation of the other party?

Background

The forklift incident

[6] On 10 September 2018 Mr Parmar was moving a tool using a forklift. He was not able to get the pallet holding the tool properly on to the forks and the tool was dropped. Pharma Pac viewed the incident as a health and safety issue and convened a meeting with Mr Parmar on 12 September to discuss it.

[7] During this meeting Mr Parmar explained what happened from his perspective. In summary he had been asked to move a tool by another staff member who I shall refer to as Person A. He asked Person A to remove obstacles around the

tool but he did not do this. Nevertheless, feeling under pressure, he agreed to move the tool with Person A's assistance. After dropping the tool, he secured the area and then left the scene to answer a call about an urgent delivery.

[8] Having heard his explanation, his Manager and Gillian Steele, Pharma Pac's HR Manager, reminded him that he should never use the forklift if he felt something was not safe, and that he should never leave the scene of an incident as he had when he answered his phone. They went on to advise him that they intended to speak with others involved with the incident and would then revert back to him.

[9] On 14 September 2018 Ms Steele wrote to Mr Parmar. Her email initially set out Mr Parmar's account of the events, going on to confirm the factual findings of the investigation. At the end of her email she stated "Please let us know if you do not feel you can perform these tasks of your role."

Mr Parmar requests information

[10] Mr Parmar was upset when he received this email. He felt he was being blamed for the incident and wanted to obtain information to enable him to respond and to prove this was not the case. This led him to write to Pharma Pac on 21 September asking for a copy of the following information "for me to respond":

- The health and safety process that outlines moving tools that [Person A] and myself should have followed
- The video footage from the incident on 10/09 from the various surveillance cameras in the area;
- The voice recording from the meeting on 12/09 between myself, Gillian and Nick
- The health and safety minutes that detailed the similar incident involving [Person A] and [another employee] moving tools and resulted in [Person A] injuring his finger i.e. were there existing procedures at that time or were new procedures put in place after the investigation.

[11] Over the next few days, emails were exchanged between the parties about the information sought by Mr Parmar. During this exchange Pharma Pac advised that the procedure for the movement of tools was covered by his forklift training, that it had limited CCTV footage and what that showed, that the meeting on 12 September was not a disciplinary meeting and was not recorded, and the health and safety minutes for the incident in 2013 were not available. Mr Parmar was not satisfied with Pharma Pac's response.

Pharma Pac requires Mr Parmar to attend a medical examination and requires him to stay off work until this occurs

[12] On 25 September Mr Parmar provided Pharma Pac with a medical certificate stating he would be unfit to work for 10 days. Ms Steele responded advising:

I would appreciate it if you could provide us with some more information about your illness. In particular, I would appreciate it if you could confirm the diagnosis and prognosis provided by your doctor?

[13] Mr Parmar responded repeating his request for documents “to clear the blame placed on me”. He went on to advise “the above has caused immense stress, unjustified, which has resulted in my doctor prescribing me 10 days stress leave.”

[14] On 2 October 2018 Ms Steele responded advising, amongst other things, that Pharmpac had provided Mr Parmar with adequate information and it was not treating the incident as disciplinary. She expressed concern that Mr Parmar wanted to challenge this decision rather than reflecting on the 10 September incident and taking responsibility for his involvement.

[15] The letter went on to address Mr Parmar’s health:

I also note that, while you have not responded to my request for information regarding your diagnosis or prognosis, you have claimed that your current absence is related to “stress”. Your claim in this regard is concerning, and we will need to understand more about your condition before you can return to work. We would therefore like you to attend a doctor, nominated by Pharma Pac, to confirm a diagnosis, prognosis, and any steps that we can take to assist you in returning to your role. Pharma Pac will pay for the costs of this appointment.

Unfortunately, given the lack of clarity around your health issues, and the impact that those may have on your ability to operate safely in the workplace, we will need you to attend this appointment prior to returning to work. This is so that we can satisfy ourselves that you are fit to perform your role safely on your return. This is particularly important given that this is the second forklift incident that you have been involved in in recent months so we need to understand whether your health has impacted on this. Please confirm that you are willing to attend a doctor nominated by Pharma Pac for this purpose in accordance with the terms of your employment agreement.

Unfortunately, to ensure both your safety and the safety of others in the workplace, until such time as we are satisfied that you are fit for work, you will need to remain away from the workplace on sick leave.

[16] On 3 October Mr Parmar's paid sick leave entitlement ran out.

[17] On 7 October Mr Parmar sent Pharma Pac an email attaching two further medical certificates. One of those certificates was a replacement for the earlier medical certificate and confirmed that he was suffering work-related stress. The other stated that he would be fit to return to work from 8 October.

[18] In his covering email, Mr Parmar explained that the stress diagnosed by his doctor was due to the treatment he had received from Ms Steele and provided detail of this. He advised that he felt the way she had blamed him for the 10 September incident was a continuation of the way she had handled a complaint he had made about his Team Leader earlier that year and advised how this made him feel. He advised that he had “no objection to being examined by Pharma Pac’s nominated registered medical practitioner” but requested further evidence, namely the supporting evidence for Ms Steel’s allegation in her letter that he had been involved in another forklift incident, that he was not capable of performing his job, and the grounds for the medical examination.

[19] I pause here to note that the Team Leader complaint referred to by Mr Parmar related to a complaint that he was being bullied and intimidated by his Team Leader. He alleged at the time that he had raised this with his Operations Manager, Production Manager and Ms Steele. He was unhappy with Pharma Pac’s failure to respond, and Ms Steele’s manner of interacting with him, leading to him engaging a lawyer to assist him and him going on stress leave for 30 days. During this period, Pharma Pac appointed an investigator but, before the investigation could commence, the Team Leader resigned. Following consultation with Mr Parmar he agreed to return to work and agreed that it was not necessary for Pharma Pac to continue its investigation into the Team Leader’s behaviour.

[20] On 11 October Brett Hopwood, Pharma Pac’s Director, responded addressing Pharma Pac’s request for Mr Parmar to attend a medical examination. He advised that Pharma Pac was “concerned about his health, wellbeing and overall fitness to perform your role”. He pointed out that while Mr Pharma had provided medical certificates they had not been provided with any information:

from a medical professional about your condition; prognosis; or fitness to perform your role long term. As you note in your email, your current absence is the second extended absence you have had in recent times for medical reasons and we therefore need to make sure that any underlying medical issues are identified so that we can make informed decisions, particularly given the safety sensitive nature of your role.

Until we are satisfied that you can return to your role safely, it would not be responsible for Pharma Pac to allow you to return to work. Please therefore confirm that you are willing to attend a physician nominated by Pharmpac, and that you consent to a report being produced and provided to Pharma Pac regarding your fitness to work.

We can then take steps to arrange an appointment for you.

[21] Mr Hopwood also addressed Mr Parmar's comments regarding Ms Steele and his request for information, advising:

- a. He had not seen any evidence that Ms Steele had treated Mr Parmar unfairly and he was comfortable she had conducted herself appropriately and professionally. He advised that if Mr Parmar had specific examples of being targeted and belittled by Ms Steele then he should provide any evidence so that the matter could be reviewed.
- b. He was comfortable that all relevant information had been provided to Mr Parmar and that Pharma Pac had carried out a thorough investigation of the incident on 10 September.

[22] Lastly, the letter asked for Mr Parmar's confirmation that he was willing to attend a doctor nominated by Pharma Pac in accordance with the terms of his employment agreement. It also asked for his thoughts on attending mediation to "discuss matters in more detail to ensure you understand Pharma Pac's position" and to address "any outstanding issues you may have" and suggested that it might be helpful if he engaged his lawyer.

Mr Parmar responds to medical examination request

[23] On 15 October Mr Parmar responded repeating his request for documentation. He reiterated that he wanted the Company to answer his allegations about bullying in the workplace and responded to the Company's concern about medical incapacity noting:

You did not identify medical incapacity as a issue at the time of the 10/09 incident. Stress was caused from the bullying by Gillian as she blamed me, unjustifiably for the incident. Gillian's bullying is ongoing and systemic and part of the culture at Pharma Pac, i.e. making it an unsafe work environment. My registered medical practitioner has provided you with this medical diagnosis. Please refer to a medical expert to explain that stress is a medical condition like having the flu. i.e. the prognosis was to be away from the bullying from Gillian for 10 days. After which I was cleared as fit to return to work. Making the need for a medical examination null and void.

Bullying and negative culture evident in the recording and correspondences relating to [the Team Leader] case. Suggest you go and listen and read these.

[The Team Leader's] departure was evident bullying took place. It is also evident that senior management and Gillian knew it was taking place and refused to rectify it (August 2017- present). Under your watch, a review did not take place and the bullying has been allowed to continue. i.e. contravenes the Health and Safety legislation. [The Team Leader's] departure does not let Pharma Pac off the hook. Pharma Pac is still answerable for the bullying that has taken place, and that continues to take place. This requires an external independent investigation which I'm sure you have no objection to.

... I suggest you seek legal counsel re your responsibilities and legal obligations under the Health and Safety Act. [The Team Leader] issue exposed Pharma Pac's failure to action Health and Safety procedures and policies. An external independent investigation is required. I am more than happy to assist you with this review.

Pharma Pac begins communicating with Mr Parmar through its lawyers

[24] On 16 October Mr Hopwood wrote to Mr Parmar advising that he had already responded to the points he had raised and provided him with all relevant information. He confirmed he was comfortable with Pharma Pac's health and safety record and compliance with prevailing legislation. He expressed concern that Mr Parmar was continuing to raise allegations against Ms Steele that were not supported by the correspondence he had viewed or the information provided. He concluded by advising:

I am concerned about the impact that your actions are having on the employment relationship at this point and have instructed our lawyers to write to you directly to respond to your email in more detail.

[25] On 18 October Pharma Pac's lawyers wrote to Mr Parmar responding to his email of 15 October and outlining a number of concerns that it had regarding his employment. The key points were these:

- a. All relevant information that was available had been provided. Pharma Pac was not in a position to provide any further information in respect of the 10 September 2018 incident or the earlier 2013 incident that Mr Parmar had referred to.
- b. Mr Parmar had not confirmed his consent to attend a doctor nominated by Pharma Pac. In the event he didn't consent the Company would make an assessment on his medical capacity based on the information available to it. While Pharma Pac would take into account his view, such an

assessment could have adverse implications on the continuation of his employment.

- c. It had addressed Mr Parmar's complaints about his former Team Leader at the time of his complaint.
- d. It considered Mr Parmar's complaints against Ms Steele may have been raised with an ulterior purpose, namely to undermine Ms Steele's role at Pharma Pac and to distract from his involvement in the forklift incident. It indicated this may give rise to disciplinary consequences.
- e. It was concerned his actions in "raising unsubstantiated allegations, failing to consent to a medical examination and failing to accept responsibility in relation to recent health and safety incidents" may be undermining the employment relationship. Mr Parmar was asked to confirm he would attend a mediation to resolve its concerns prior to considering more formal action.

[26] Mr Parmar responded on 23 October advising Pharma Pac had misunderstood the facts from his previous correspondence and advising "you are not giving me fair ground for mediation without the supporting documents". He went on to state:

Wasting time going around in circles so I have no option but to take this as a personal grievance claim i.e. you are illegally stopping me from working without my agreement, and without pay, despite being cleared fit by a medical registered practitioner since 08/10... This is unfair ... This is bullying.

[27] Pharma Pac's lawyers responded advising there was nothing unfair in seeking his agreement to mediate. The email advised it would prefer to attend a mediation to resolve matters rather than taking formal action regarding its concerns that his actions were undermining the employment relationship. They sent a subsequent email on 29 October asking for his response by the following day.

[28] On 29 October Mr Parmar responded asking why he was being given a deadline when he had been waiting on documentation since 21 September. He advised that the documentation he had been requesting since 21 September was "crucial for mediation" and repeating what that documentation was. He advised that once he received the documentation he would "initiate the mediation process".

Pharma Pac invites Mr Parmar to attend a disciplinary meeting

[29] On 31 October Pharma Pac's lawyers responded in a comprehensive 3-page letter confirming its view that there were a number of issues between the parties that required resolution. It maintained that despite trying to organise mediation, Mr Parmar had:

continued to exhibit hostility and have been largely uncooperative in addressing the issues at hand. As a result, Pharma Pac is becoming increasingly concerned by your ongoing behaviour/attitude, and the effect this is having on the employment relationship.

[30] The letter went on to address the information requested and Pharma Pac's health and safety concerns. It reiterated that Mr Parmar's actions and stance may be undermining the employment relationship "to the extent that an ongoing relationship may be becoming untenable." The letter concluded by asking Mr Parmar to attend a meeting on 2 November to discuss the issues in more detail. He was advised that a possible outcome of the meeting:

is the termination of your employment. By this we mean that, in the event that we consider that your relationship with Pharma Pac has irreparably broken down due to your actions/attitude, or we otherwise reach a view that your ongoing employment is unsustainable in the current circumstances, a decision may be made to terminate your employment by reason of incompatibility.

[31] Mr Parmar responded to this letter by email on 31 October advising "Pharma Pac has already terminated my employment by stopping wages on 08/10/2018, severing the relationship, without verbal or written discussion". He sent another email on the morning of 2 November asking Pharma Pac to confirm receipt of his earlier email. Neither email was replied to.

[32] Just after midday on 2 November 2018, Mr Hopwood sent Mr Parmar an email summarily dismissing him on the grounds that the employment relationship had become "untenable due to your attitude/actions".

Issue one: Unjustified dismissal

[33] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of

Pharma Pac, 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.

[34] Where incompatibility is relied upon to dismiss, the Court has held that an employer has the onus of establishing that irreconcilable incompatibility existed, that the irreconcilable breakdown in the employment relationship was attributable wholly or substantially to the employee and the employer effected the dismissal in a procedurally fair manner.¹

[35] In terms of the latter, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[36] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.²

[37] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

Was there irreconcilable incompatibility?

[38] It is clear that at the point Pharma Pac terminated Mr Parmar's employment the relationship had begun to deteriorate due to unresolved issues between the parties. However, I am not satisfied that those issues had reached the point where the employment relationship had broken down or, if it had, that the issues between the parties were irreconcilable.

[39] While I acknowledge Mr Parmar stated, in his 29 October email, that the employment relationship had broken down, it is unlikely that either party understood this at the time to be an irreconcilable breakdown. This comment was made by Mr

¹ *Walker v Procare Health Limited* [2012] NZEmpC 90 at [80].

² Section 103A(5), Employment Relations Act 2000

Parmar in the context of a lengthy email where he also agreed to attend mediation. In Pharma Pac's response on 31 October, being its last communication before termination, it stated the relationship "maybe becoming untenable" and confirmed it was still open to attending mediation to discuss the relationship issues.

[40] On balance, there were a number of steps that could have been taken to salvage the 11-year employment relationship before Pharma Pac took the drastic step of terminating Mr Parmar.

[41] First, Pharma Pac could have addressed Mr Parmar's concerns about his responsibility for the 10 September incident by disclosing the information he sought. While Pharma Pac denied to Mr Parmar that some of the information existed, in response to questions from the Authority it became apparent:

- a. Pharma Pac had written health and safety procedures in place that were relevant to the incident. A copy of the procedure was provided quickly to the Authority upon request.
- b. Pharma Pac had video footage of the incident on 10 September from the various CCTV cameras that it could have provided. It also had notes of the meeting with Mr Parmar on 12 September.
- c. Although Pharma Pac denied recording the meeting with Mr Parmar on 12 September, Ms Steele acknowledged to the Authority that a combination of her actions and words at the commencement of this meeting may have led Mr Parmar to believe she was recording the meeting with her phone. She explained that at the start of the meeting she put her phone on silent and, at the same time, told Mr Parmar that she would be recording the meeting. She said she meant that she would be taking notes but on reflection understood how Mr Parmar may have misunderstood her actions to mean she was recording the meeting with her phone.

[42] Had Pharma Pac provided the foregoing information to Mr Parmar it is likely to have alleviated Mr Parmar's feelings that he was being ignored and may have led to a different outcome e.g. having reviewed the requested material Mr Parmar may have accepted responsibility for the incident being one of Pharma Pac's reasons for citing incompatibility. In addition, Ms Steel's explanation around the recording could have

gone a long way to dispelling Mr Parmar's perception of the way Ms Steele was treating him.

[43] Second, if Pharma Pac had reasonable grounds for concern that Mr Parmar's health was affecting his safety at work, then it was open to it to organise a medical examination. Clause 16.4 of Mr Parmar's IEA provides:

If Pharma Pac has reasonable grounds for concern that your health is affecting your safety at work or the safety of others in the work place or customers, Pharma Pac shall be entitled to require you to undergo a medical examination at Pharma Pac's cost, by a registered medical practitioner nominated by Pharma Pac.

[44] A referral for a medical examination could have been done quickly as Pharma Pac intended to refer Mr Parmar to its general practitioner. It is more likely than not, given Mr Parmar's notification that he did not object to attending a medical examination, and Pharma Pac's refusal to allow him to return to work until he did, that he would have attended.

[45] Third, Pharma Pac could have met with Mr Parmar in person to understand the basis for his concerns that he was being bullied by Ms Steele rather than dismissing his complaint, insisting that the parties attend mediation, and then directing all correspondence go through its lawyers.

[46] Pharma Pac's Harassment and Bullying Policy and Procedure provided that where an employee did not feel comfortable dealing with a bullying or harassment issue through "self-help" then an "informal intervention" process may be appropriate. It stated:

You can approach the dedicated HR Adviser, your manager, union or health and safety representative for help and have a confidential meeting to discuss the situation. You will need to provide full details of the alleged harassment, discrimination or bullying.

[47] While I acknowledge Mr Hopwood asked Mr Parmar to come back to him in writing with specific evidence of bullying, under questioning Mr Hopwood acknowledged he knew Mr Parmar was not able to communicate in writing without assistance and the best way to communicate with him, as English was his second language, was to speak in person.

Was Mr Parmar's dismissal effected in a procedurally fair manner?

[48] Even if I had found that Mr Parmar's dismissal was substantively justified, I would still have found it unjustified based on the flawed process Pharma Pac followed. There were a number of serious defects in the process followed by Pharma Pac that resulted in Mr Parmar being treated unfairly in terms of s 103A(5) of the Act.

[49] Pharma Pac failed to sufficiently investigate its concerns and/or to raise these with Mr Parmar prior to his dismissal. For example:

- a. Mr Hopwood said one of the matters he took into account when deciding the relationship was incompatible was the complaint made by Mr Parmar that he was being bullied by Ms Steele. He felt this complaint was false and was made for ulterior reasons. Pharma Pac failed to investigate the veracity of this complaint and failed to provide Mr Parmar with an opportunity to respond.
- b. Mr Hopwood said another matter were the accusations that Mr Parmar made about Pharma Pac's health and safety. He felt the allegations were false and explained how he took pride in making sure his company was safe. He said he was very offended by the comments made by Mr Parmar. Mr Hopwood's concerns were not raised with Mr Parmar before he was dismissed.
- c. A third matter taken into account by Pharma Pac was Mr Parmar's failure to consent to attend a medical examination. Mr Hopwood said he felt it was unsafe for Mr Parmar to return to work without first having a medical examination because he thought he was not "in the right mental state". He said it was apparent to him that Mr Parmar had "lost some of his mojo", having gone through a traumatic time when he raised a bullying complaint against his Team Leader. He referred to Mr Parmar's conduct over the few months before his termination and a "gut feeling" that things were not right. He felt Mr Parmar had lost confidence, was not willing to do tasks related to his job, and his demeanour had changed. Mr Hopwood's concerns were not raised with Mr Parmar before he was dismissed.

[50] Pharma Pac failed to provide a reasonable opportunity to Mr Parmar to respond to its concerns before his dismissal. On 31 October, Pharma Pac sent a letter

inviting Mr Parmar to attend the disciplinary meeting on 2 November. He responded promptly, however recording that he had already been terminated due to Pharma Pac's refusal to allow him to return to work and to pay him. He sent a follow up email too. Neither email prompted a response from Pharma Pac to confirm he was still employed.

[51] Taking into account Pharma Pac's knowledge that Mr Parmar believed he had been terminated, and his failure to appear at the meeting, a fair and reasonable employer could have made enquiries to ascertain his intentions. Alternatively, it could have rescheduled the meeting so as to provide him with an opportunity to respond to its concerns before dismissing him. This is especially so in circumstances where this was the first meeting that Pharma Pac had convened and there was no identified urgency.

Finding on Issue 3

[52] It is a rare and unusual case where incompatibility will justify dismissal.³ For the reasons outlined, I am satisfied that Pharma Pac's decision to terminate Mr Parmar's employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. Pharma Pac did not have a sufficient and reliable basis for concluding that there was incompatibility in the workplace and the process that it followed was flawed.

[53] Mr Parmar was unjustifiably dismissed from his employment with Pharma Pac.

Issue two: Did Mr Parmar raise his claim for unjustified disadvantage within time?

[54] Section 114 (1) of the Act states:

Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[55] Section 114(2) of the Act provides that a personal grievance is raised with an employer as soon as:

³ *Walker v Procare Health Ltd* at n 1.

... the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[56] In *Creedy v Commissioner of Police* Chief Judge Colgan held:⁴

[36] ... it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ...

[37] ... an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[57] The Chief Judge noted that the personal grievance procedures in the Act are:⁵

...aimed not at preserving rights to litigate past or current injustices at some indefinite future time at which an employee may elect to revive them. Rather, the procedures exist to have alleged injustices identified and addressed quickly, and initially at least, informally, and directly between employer and employee ...

[58] In *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* the Court made the following comments about the level of detail required to raise a grievance:⁶

[58] The level of information required to raise a grievance is not an end in itself. The grievance process is designed to deal speedily and informally with the employment relationship problems. The merits of these, rather than technical compliance with a process, are to prevail. In getting to the merits, an employer must know sufficiently of the complaint to be able to begin to address it promptly and informally and with a view to resolving it. Such a resolution mechanism almost invariably includes a discussion or discussions and not simply a formal exchange of correspondence. Details or uncertainties can be raised and dealt with during the course of such discussions. It is unnecessary for every "i" to be dotted and "t" to be crossed by an employee raising a grievance. What the cases say is that written or oral advice alone, such as "I have a personal grievance" or "I have been unjustifiably disadvantaged and want compensation and an apology" will usually be insufficient...

[59] In cases where the employer may be less aware, or even unaware, of a grievance, the onus on an employee will be greater to inform the employer of the complaint. So, for example, where an employee alleges sexual harassment by a customer or a work colleague, an employer may be unaware of that problem or at least not well informed about it. Similarly, where a resignation is said to amount to an unjustified constructive dismissal, an employer may likewise be unaware of the background and the information raising the grievance may have necessarily to be more detailed.

⁴ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC).

⁵ At para [39].

⁶ [2008] ERNZ 139 (EmpC).

Analysis

[59] The email Mr Parmar wrote to Pharma Pac on 23 October 2018 advised:

Wasting time going around in circles so I have no option but to take this as a personal grievance claim i.e. you are illegally stopping me from working without my agreement, and without pay, despite being cleared fit by a medical registered practitioner since 08/10... This is unfair ... This is bullying.

[60] In his email of 29 October, as well as the matters I have addressed earlier in this determination, his email stated:

I have been waiting on you to provide the documentation since 21/09/18. You have been informed on 23/10/18 that I am taking this as a personal grievance...

The correspondence clearly shows that Pharma Pac could have had a one-on-one discussion of these issues at the onset, settled there and then and maintained the employment relationship but instead have continually overruled and ignored my rights which has led to the breakdown in the employment relationship.

[61] The email went on to repeat Mr Parmar's requests for information and asked Pharma Pac to:

provide the legislation allowing Pharma Pac to stop wages to me, a current employee.

Once received, I will submit the documentation and initiate the mediation process. If I do not receive this documentation then I will escalate this directly to the ERA stipulating that you are deliberately withholding key information and refusing to communicate, making mediation futile.

[62] I am satisfied that these emails were sufficient to raise a personal grievance. Pharma Pac was made sufficiently aware of Mr Parmar's personal grievance to be able to respond as the legislative scheme mandates.

[63] The foregoing emails clearly informed Pharma Pac that Mr Parmar had a personal grievance and what this was for ("illegally stopping [him] from working without agreement and without pay"). Mr Parmar's email to Pharma Pac on 29 October reiterated that the email of 23 October was him "taking this as a personal grievance." The raising of a personal grievance on 23 October was also referred to in correspondence from Mr Parmar's representative to Pharma Pac on 24 January 2019 where he advised that he was claiming lost wages including for unpaid sick leave. Pharma Pac replied to this letter, denying an unjustified disadvantage and unjustified dismissal claim, on 14 February 2019.

[64] In reaching this finding I have considered, but disagree with, the submission made by Pharma Pac that it was necessary for Mr Parmar to state how he wanted Pharma Pac to address his grievance in order for a grievance to be raised. I agree with the Court in *Idea Services Ltd v Baker* where Judge Inglis (as she then was) said:

the informal, non-technical, nature of the personal grievance procedures relating to raising a grievance tells against an interpretation that requires an employee to specify the precise nature of the remedy or remedies they seek. The raising of a grievance is distinct from the more formal requirements attaching to the filing of a statement of problem, or a statement of claim. Both necessitate particularisation of the relief sought. That is not a requirement imposed under s 114(2).

[65] I find Mr Parmar raised his personal grievance within time.

[66] For completeness, I acknowledge that this personal grievance was not expressly pleaded in the statement of problem, and was not identified as an issue that the Authority was to investigate. However, the facts giving rise to the claim, and the remedies sought, were set out in the statement of problem, the statement in reply included pleadings on this issue, the issue was raised during the investigation meeting, and evidence was sought and obtained by the Authority at that time. I also sought the parties' agreement to the Authority investigating this issue as part of the current claim during the investigation meeting and both parties addressed the disadvantage in the submissions they filed.

[67] In the circumstances, it is appropriate that I address Mr Parmar's unjustified disadvantage grievance as part of the current investigation. This is consistent with the wider objectives stated in Part 10 of the Act, particularly the object of promoting interventions that are not inhibited by strict procedural requirements.⁷

Issue three: Unjustified disadvantage

[68] Under s 103(1)(b) an employee may commence a personal grievance claim if one or more of the conditions of the employee's employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[69] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what

⁷ Employment Relations Act, s 143(f).

a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

Analysis

[70] Although Pharma Pac did not say it was suspending Mr Parmar, in effect this is what it did. A suspension occurs when an employee is prevented from working and is sent away from the workplace, but his or her employment remains on foot.⁸

[71] There is no dispute that Mr Parmar was disadvantaged by this action. The issue is whether Pharma Pac's actions were justified. For the reasons that follow I find they were not.

[72] Pharma Pac failed to meet any of the mandatory considerations set out in s 103A(3), failed to meet the rules of natural justice, and failed to meet the provisions of Mr Parmar's individual employment agreement (IEA). Mr Parmar was not forewarned that Pharma Pac was contemplating suspension, nor provided with an opportunity to be heard before a decision was made. In effect the decision to suspend him was immediate and abrupt.

[73] Clause 35 of the IEA provided:

Pharma Pac may suspend you while conducting an investigation into alleged serious misconduct. Any suspension will generally be with pay but may be without pay in certain circumstances including (but not limited to) where:

- (a) An allegation against you gives rise both to a Police investigation and to an internal disciplinary enquiry by Pharma Pac into conduct which, if established, would amount to serious misconduct; and
- (b) Pharma Pac has either elected, or been required, to defer completion of its internal enquiry until the outcome of the Police investigation and any prosecution has been ascertained; or
- (c) In any other situation where you are unable to perform your work.

[74] At the time of his suspension there was no allegation that Mr Parmar had engaged in any serious misconduct nor was there any evidence that he was unable to perform his work. Even if Pharma Pac had valid grounds for concern that Mr

⁸ *Yoon Cheol Hong v Auckland Transport* [2019] NZEmpC 54 at [48] citing *Northern Butchers IUOW v Woolworths Supermarkets Ltd* (1986) 1 NZELC 95,148.

Parmar's stress would affect his safety at work, and/or the safety of others, it had sufficient time before he was due to return to work to meet with him and discuss its concerns.

[75] Pharma Pac's actions were not those of a fair and reasonable employer in all the circumstances. I know of no reason for Pharma Pac's haste or its failure to follow any resemblance of a fair procedure.

[76] I find Pharma Pac's actions constituted an unjustifiable disadvantage to Mr Parmar's employment.

Issue four: Remedies

Lost wages for unjustified dismissal

[77] Section 123(1)(b) of the Act provides for the reimbursement by Pharma Pac of the whole or any part of wages lost by Mr Parmar as a result of his grievances. Section 128(2) provides that I must order it to pay Mr Parmar the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have a discretion to award greater compensation for remuneration lost than three months' equivalent.⁹

[78] In *Allen v Transpacific Industries Group Ltd*¹⁰, Chief Judge Colgan emphasised that those representing dismissed employees intending to take personal grievances should keep complete records of their attempts to mitigate losses. He said:

[D]ismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[79] In *Xtreme Dining Limited v Dewar*¹¹ the full Court confirmed that where the employer puts mitigation in issue, the employee must provide relevant information as to the steps taken to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

⁹ Employment Relations Act 2000, s 128(3).

¹⁰ [2009] 6 NZELR 530 (EmpC)

¹¹ [2016] NZEmpC 136

[100] It has long been the position in this jurisdiction that the common law tests as to onus are applicable to claims for statutory remedies. Given that onus, it is incumbent on the employer as the defaulting party to raise the issue, usually in the relevant pleading. Having raised the issue, the employer continues to carry the ultimate onus, or as it has sometimes been described, the “legal burden”.

[101] But there is an “evidential burden” on the employee to provide relevant information. This is what the Court referred to in *Transpacific*. It is necessary for the employee to provide this information, if called on, because it is information of which he or she has knowledge. This obligation is a manifestation of the famous statement made by Lord Mansfield in 1774 in *Blatch v Archer* that “it is certainly a maxim that all evidence is to be weighed according to the proof of which it was in the power of one side to have produced, and in the power of the other to have contradicted.”

[102] That does not preclude the employer from leading its own evidence on the topic, for instance as to employment options which were reasonably available but not pursued; or to challenge the accuracy or adequacy of the evidence given by the employee.

[103] But when considering all the evidence, this issue of fact must be assessed on the basis that the employee is the victim of a wrong. The Authority or Court cannot be too stringent in its expectations of a dismissed employee. Further, what has to be proved – by the employer – is that the employee acted unreasonably; the employee does not have to show that what he did was reasonable.

Analysis

[80] Mr Parmar requests the Authority to award him the sum of \$8,208.72 for wages lost during the period from his dismissal to the date he commenced part-time employment. In addition, he claims a sum of \$34,066.64 for wages lost during the period from when he started the part-time employment (9 January 2019) to 8 December 2019 being the difference between his earnings and those he would have received if he had remained working at Pharma Pac.

[81] Pharma Pac challenges any award on the grounds of a failure to mitigate loss. It submits that at most the remuneration that Mr Parmar could have lost during the three months following the ending of his employment was three months’ of his Pharma Pac income, minus the amount he earned at his new job. However, it submits this sum should not be awarded because the chain of causation between the grievance and the lost income was broken.

[82] Having considered the parties’ submissions, and the evidence provided, I find the chain of causation was not broken in the first three months following Mr Parmar’s

termination. I do not accept that he was unfit to work during this period. A medical certificate from his doctor certified him as fit to return to work from 8 October 2018.

[83] I find Mr Parmar acted reasonably during the three months following his termination in his attempts to mitigate his loss. Mr Parmar provided the Authority with specific dates between 8 November and 14 November where he applied by telephone for various jobs, he visited Work and income on 12 November to obtain assistance to find another job, signed up with Essential Workforce on 15 November and attended his first interview on 19 November. He applied for other jobs in December and accepted a part-time job that he commenced in January 2019 to mitigate his loss. However, I do not accept Mr Parmar has any claim for lost wages thereafter. There was no evidence of any attempts to find a new job until April 2019. I am satisfied that Mr Parmar's inaction over this period broke the chain of causation.

[84] 13 weeks multiplied by Mr Parmar's weekly earnings of \$1,052.82 equals \$13,686.66. From this sum must be deducted the earnings that Mr Parmar received in the period from 9 January 2019 to 3 February 2019 from his part-time role (\$1,497.50) leaving an amount of \$12,189.16.

[85] For the reasons that I address later in this determination, a further deduction of 15% from this sum is to be made for contribution (\$1,828.37).

[86] Pharma Pac is ordered to pay Mr Parmar an amount of \$10,360.78 gross for lost wages arising from his unjustified dismissal within 14 days of the date of this determination.

Lost wages for unjustified disadvantage

[87] Although Mr Parmar was stopped from attending work from 3 October 2018, he had provided Pharma Pac with a medical certificate that provided for him to be away on sick leave until 8 October. That being the case, I find the lost wages attributable to Mr Parmar's personal grievance are those wages he would have earned had he worked during the period from 8 October to 2 November 2018 (4 weeks) inclusive i.e. \$4,209.60 gross.

[88] Pharma Pac is ordered to pay Mr Parmar an amount of \$4,209.60 gross for lost wages arising from his unjustified disadvantage within 14 days of the date of this determination.

Hurt and humiliation

[89] Mr Parmar, his wife, and his daughter gave detailed and compelling evidence of the impact that his personal grievances had on him. It is unnecessary for me to repeat that evidence in full in this determination as to do so could cause Mr Parmar to suffer further unnecessary hurt and humiliation.

[90] It is sufficient for the purposes of this determination to confirm that Mr Parmar explained how heartbroken he was when he was ordered to remain away from work and was then dismissed. He said he had anticipated he would remain with the company until he retired and explained how his dismissal had destroyed his life. He had difficulty sleeping, contemplated suicide, avoided going out, and lost friendships. He explained how embarrassed he was, how he lost his confidence and became stressed over the family finances. He worried he was a financial burden and explained how he had to borrow money which made him very sad and depressed.

[91] I am satisfied in all the circumstances that Mr Parmar has proven, on the balance of probabilities, that he has suffered significant humiliation, loss of dignity and injury to his feelings. I find that Pharma Pac's unjustified actions were material factors in the loss sustained by Mr Parmar.

[92] I consider the evidence warrants a global award of compensation under s 123(1)(c)(i) of the Act of \$25,000. For the reasons that I address later in this determination, a deduction of 10% from this sum is to be made for contribution (\$2,500).

[93] Pharma Pac is ordered to pay Mr Parmar the sum of \$22,500 for compensation under s 123(1)(c)(i) of the Act within 14 days of the date of this determination.

Issue five: Contribution

[94] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal

grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.¹²

[95] In *Xtreme Dining v Dewar*, the full Court discussed s 124 of the Act in some detail.¹³ For present purposes, the following observations are relevant:

[175] The subsection ... requires consideration of “the situation that gave rise to” that personal grievance. It is well-established that there must be more than simple cause and effect. The cases emphasis that the employee’s actions must be culpable or blameworthy or wrongful actions which have, when assessed in a commonsense way, contributed to the situation that gave rise to the personal grievance. So where the grievance is that the employee has been unjustifiably dismissed, the question will be whether the employee acted in a culpable or blameworthy way thus creating the situation that gave rise to that dismissal.

[176] The subsection also requires the Authority or Court to consider “the extent to which there was a relevant contribution”. That invokes the important requirement of proportionality, which is dependent on the circumstances. The analysis must reflect the fact that on occasion an employee may have been at fault but the circumstances did not justify his or her dismissal or disadvantage; and in other circumstances there is no element of contributory conduct, in which case neither the nature nor the extent of the remedies to be provided will need to be reduced.

[96] The Court also commented on the extent of any reduction with reference to recent cases. Those comments were summarised and affirmed in *Zhang v Telco Asset Management Limited* where the Court said¹⁴:

[139] The Court also made some brief remarks as to the extent of any reduction, as a matter of practice. It referred to the finding in *Paykel Ltd v Morton*, where Judge Colgan held that a reduction of 25 per cent was one of particular significance; then to the observations of Chief Judge Goddard in *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson*, that a contribution finding in the order of 50 per cent or even more should be very rare; and in *Nutter*, where the Court of Appeal touched briefly on this issue, expressing the view that a finding of contributory fault of 50 per cent is a significant one. (Citations omitted).

[97] In *Zhang*, the Court reduced Mr Zhang’s remedies for unjustified dismissal by 20%, finding that Mr Zhang’s language was “excessive and quite inappropriate, whatever he believed as to the merits of his concerns.”

Analysis

[98] Pharma Pac submits Mr Parmar contributed to his personal grievances in a number of ways. Having considered the submissions filed by the parties I find Mr

¹² Employment Relations Act 2000, s 124.

¹³ *Xtreme Dining Ltd v Dewar*, [2016] NZEmpC 136.

¹⁴ [2019] NZEmpC 151.

Parmar's conduct did contribute to the situation that gave rise to his personal grievance for unjustified dismissal but not to the extent claimed by Pharma Pac.

[99] Parties to an employment relationship have a mutual duty to be open and communicative. Mr Parmar contributed to the situation that gave rise to his dismissal by not providing evidence to support the allegations he made against Ms Steele when asked to do so, by not re-confirming he would attend a medical examination when Pharma Pac repeated its earlier requests, and by making the criticisms and accusations that he did regarding Pharma Pac's health and safety history. These comments went beyond that necessary to assert his legal rights and, based on the evidence I heard, were largely unsubstantiated. They contributed to Pharma Pac's concern that the relationship had or was breaking down and unnecessarily extended and/or inflamed an already difficult situation.

[100] I am satisfied that a reduction in the amount that I have awarded for Mr Parmar's unjustified dismissal is appropriate due to his contribution to the situation that gave rise to this personal grievance. However I find Mr Parmar did not contribute to his unjustified disadvantage and therefore no reduction is made to the figure that I have reached.

[101] I reduce the amount awarded for lost wages arising from Mr Parmar's unjustified dismissal at 15%. I reduce the amount awarded for compensation by 10% to recognise the figure awarded is a global amount that also takes into account his unjustified disadvantage grievance.

Costs

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

[103] If they are not able to do so and an Authority determination on costs is needed Mr Parmar may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Pharma Pac will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[104] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁵

Outcome

[105] The overall outcome that I have reached is:

- a. Ganesh Parmar was unjustifiably dismissed from his employment with Pharma Pac Limited.
- b. Ganesh Parmar was unjustifiably disadvantaged in his employment with Pharma Pac Limited.
- c. Pharma Pac Limited is ordered to pay the following amounts to Ganesh Parmar within 14 days of the date of this determination:
 - i. \$10,360.78 gross for lost wages arising from his unjustified dismissal;
 - ii. \$4,209.60 gross for lost wages arising from his unjustified disadvantage
 - iii. \$22,500 for compensation under s 123(1)(c)(i) of the Act
- d. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority

¹⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].