

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 223  
5643239

BETWEEN                      RODNEY PEOPLES  
   Applicant  
  
AND                                AVENGER STEEL LIMITED  
   Respondent

Member of Authority:        Andrew Dallas  
  
Representatives:              Phillip de Wattignar, Advocate for the Applicant  
   Rachel Brazil, Counsel for the Respondent  
  
Investigation Meeting:        24 May 2017 at Dunedin  
  
Submissions                      2 June 2017 and 15 June 2017 for the Applicant and 9  
   June 2017 for the Respondent.  
  
Determination:                 21 December 2017

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**DETERMINATION OF THE AUTHORITY**

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- A.     Rodney Peoples was unjustifiably dismissed by Avenger Steel Limited**
- B.     Avenger must settle Mr Peoples' personal grievance by paying him the following amounts:**
- (i)     \$7,280 gross as reimbursement for lost wages;**
  - (ii)    \$12,000 as compensation for humiliation, loss of dignity and injury to feelings.**
- C.     Costs are reserved**

## **Employment relationship problem**

[1] Rodney Peoples was employed as a fabricator/welder by Avenger Steel Limited from 13 June 2016 until 30 August 2016 when he was dismissed for serious misconduct. He was dismissed on notice and paid an additional week's wages as a "gesture of good will". Mr Peoples said he was unjustifiably dismissed and claimed statutory compensatory remedies. Avenger denied Mr Peoples' claims and resisted his remedies.

## **The Authority's Investigation**

[2] During the investigation meeting, I heard evidence from Mr Peoples and former Avenger fabricator/welder, Brett Taggart and for Avenger, managing director Paul Hickey, director Susan Hickey, foreperson Kelvin Neve, welder/rigger Paramena Loffley and rigger Robert Magee.

[3] This determination, reserved at the conclusion of a one day investigation meeting, has been issued outside the statutory period of three months after receiving the last submissions of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s 174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s 174C(3)(b) of the Act.

[4] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

## **Issues**

[5] The following are the issues for investigation and determination:

- (i) Was Mr Peoples' dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?;

- (ii) If Avenger's actions were not justified what remedies should be awarded, considering:
  - (a) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act;
  - (b) compensation for lost wages under s 123(1)(b) of the Act?
- (iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Peoples that contributed to the situation giving rise to their grievances;
- (iv) Should either party contribute the cost of representation of the other?

### **Narrative**

[6] Mr Peoples commenced employment as a fabricator/welder with Pinnacle Steel in 2014. On 30 June 2016, Pinnacle went into liquidation. Mr Peoples was then offered employment on and from 13 June 2016 with a new company, Avenger Steel Limited which was set up by former directors and shareholders of Pinnacle and others including Susan Hickey, partner of former Pinnacle director, Paul Hickey.

[7] While Mr Peoples was employed under an individual employment agreement which required him to perform 40 hours per week. However, there was not always work available for him to perform in the initial stages of Avenger's start-up. During this period, Mr Peoples only came to work when there was work available. Avenger suggested he may have been absent at other times as well for what it described as "varying reasons".

[8] Mr Peoples reported to foreperson, Mr Neve and in his absence, Mr Hickey or Mrs Hickey. Mr Peoples said there were significant delays getting steel for a job and he left to find his own work for four weeks. Mr Neve disputed this.

[9] Mr Peoples said he had approached Avenger director, Andrew Aitchison and asked for work. Mr Aitchison said words to the effect of “it’s not my problem” and drove off in a truck with another employer. Mr Peoples account was confirmed by Mr Taggart, although he suggested that Mr Aitchison said to Mr Peoples, “it’s not my fucking problem” before driving off.

*Events on 5 August 2016.*

[10] Friday 5 August 2016 was a cold day. It had been snowing. While waiting for steel to arrive, Mr Aitchison organised a barbeque to warm everybody up. Mr Peoples and Mr Taggart said there was no work to do. Mr Taggart’s evidence was that in circumstances where there was no work available, he would enter “workshop” on his timesheet.

[11] The steel arrived at about 12.30pm. Mr Neve advised Mr Peoples, Mr Taggart and another employee the steel had to be unloaded, checked and cut. Mr Taggart said Mr Neve said they would just have to “wait” until the steel was organised. Mr Neve said there was other work to be performed including making plate. However, Mr Peoples said he did not have any consumables to work with and only Mr Taggart had welding wire. Mr Taggart said he “scavenged” the wire from a number of sources in the workshop.

[12] Mr Peoples said he tidied up around the work area and stripped and cleaned his welder. At or about this time, Mr Loffley said he asked Mr Peoples to fix the forklift. He said Mr Peoples refused. In his evidence to the Authority, Mr Peoples described the forklift in very unflattering terms and said he had given up trying to keep it going because it needed a new battery, something Avenger was aware of. This matter appears to have emerged post-dismissal and was not directly, at least, relied upon as reason for dismissal.

[13] Mr Peoples said he made it clear to Mr Neve that once Mr Neve had sorted the steel, he would get on with the welding and fabrication and he would be in the staff room. Mr Peoples said Mr Neve did not respond. Mr Taggart, whose welder was in the vicinity of the band-saw Mr Neve was operating to cut the steel, said he heard Mr Peoples tell Mr Neve this.

[14] Mr Peoples said he was feeling a lot of pain in his hip – he had previously had a hip replacement – and took some painkillers during the afternoon “smoko” break. Mr Peoples said he then sat in the “lazy boy” chair to take the pressure off his hip. He said he pulled his hat over his eyes. Mr Peoples said he got the sense that someone came into the staff room but they did not say anything. Mr Peoples said he thought it might have been Mr Aitchison. For his part, Mr Taggart said he saw Mr Aitchison headed in the direction of the staff room at or about this time. The evidence would subsequently establish it was Mr Aitchison.

[15] Mr Peoples said he returned to his work area, cleaned up and finished at 4pm. He said he completed his timesheet for the week and deposited it in the dedicated box outside the staff room. Mr Peoples wrote the word “maintenance” on his timesheet. He said he did that if he had undertaken work about the workshop when there were no jobs to complete.

*Events on Monday 8 August 2016*

[16] Mr Peoples said he arrived at work at 7.30am on 8 August 2016. He said he spoke to Mr Neve and then commenced work. Mr Peoples said Mr Aitchison, after having a heated discussion with another employee, rushed passed him in an agitated state. Mr Peoples said he shouted, swore and waved a piece of paper and said words to the effect he was “not going to pay [Mr Peoples] for this”. Mr Peoples said Mr Aitchison stated words to the effect of “there would be legal consequences”. Mr Taggart in his evidence said Mr Aitchison “headed for [Mr Peoples] and was yelling something at him that I couldn’t hear. He was agitated and angry. [Mr Aitchison] waved a piece of paper and stormed off”.

[17] Mr Peoples eventually approached Mr Aitchison to ask him what was going on. He said Mr Aitchison was still “visibly agitated”. Mr Peoples said Mr Aitchison also said words to the effect of “he was not going to pay [Mr Peoples] for sleeping four hours” the previous Friday. Mr Peoples denied he was sleeping. Mr Aitchison said he had seen him.

*The employment investigation*

[18] Mr Peoples' employment agreement contained an appendix entitled "Behaviour & Performance Concerns: Disciplinary Action". This appendix set out the procedure to be followed by Avenger in undertaking an investigation into concerns about conduct or performance.

[19] Mrs Hickey said Mr Aitchison told her that he had seen Mr Peoples sleeping in the staff room on 5 August 2016 when everybody else was working. Mrs Hickey said after "checking out [Mr Aitchison's] concerns around this and [Mr Peoples'] timesheet" said she became "concerned" as well.

[20] Mr Peoples' time sheet for 5 August 2016 recorded four hours work with the corresponding description, which was required by the form, of "maintenance". However, Mr Peoples' timesheet had been annotated. A question mark had been placed after the word maintenance and underneath this was written the words: "On what - his Book?".

[21] Mrs Hickey said she spoke to Mr Hickey and they decided to commence a disciplinary process. Mrs Hickey said she sent a disciplinary letter to Mr Peoples on 16 August 2016. Mr Peoples said Mrs Hickey handed him the letter. The letter invited Mr Peoples to a disciplinary meeting on 23 August 2016 at the offices of the Otago Southland Chamber of Commerce. The letter also stated:

It has been brought to my attention that you were found sleeping on the job by [Mr] Aitchison on the 5<sup>th</sup> of August. He said he came back to the workshop, at approximately 3.30pm, he saw you were asleep in the staff room.

If this is accurate, it would concern me that you were sleeping given we were paying wages to you to be working. It is also concerning given your timesheet reflects that at this time you were completing maintenance work.

If this is the case, we would consider these actions constitute serious misconduct, especially if you are misrepresenting your hours of work on your timesheet in order to be paid.

[22] The letter also advised Mr Peoples of his right to be represented, Avenger would be represented by a solicitor from the chamber and that he could face disciplinary action, up to and including dismissal.

*Disciplinary meeting: 23 August 2016*

[23] A disciplinary meeting was held with Mr Peoples on 23 August 2016. There was some confusion in the evidence about whether Mr Aitchison attended the meeting. However, it would seem Mrs Hickey, Mr Hickey, Rachel Brazil, solicitor with the chamber, Mr Peoples and Mr de Wattignar, who was representing him, were in attendance.

[24] As an outcome of the meeting, Mr Peoples was asked to provide feedback and clearly explain his position in writing.

*Subsequent correspondence*

[25] Later that day, Mr de Wattignar provided a written response on behalf of Mr Peoples. In summary this letter stated:

- (i) Mr Peoples told Mr Neve that if he needed him, he would be in the staff room;
- (ii) Mr Peoples denied being asleep in the staff room when seen by Mr Aitchison on 5 August 2016. Mr Peoples said he then sat in the lazy boy chair to take the pressure off his hip and had pulled his hat over his eyes;
- (iii) At the disciplinary meeting it was accepted by Avenger, Mr Aitchison did not speak to Mr Peoples in the staff room;
- (iv) Mr Peoples did not admit to Mr Aitchison he had been asleep during their conversation on 8 August 2016;
- (v) During that discussion Mr Aitchison made the allegation about the timesheet, said there would be legal consequences and that Mr Peoples was not given the opportunity to respond;
- (vi) Mr Peoples said Avenger was aware he had a right hip replacement, suffered mobility problems in the cold and took "Tramadol" for pain relief; and
- (vii) Mr Peoples had raised issues about the hard concrete floors and requested fatigue mats and work boots but neither had been provided.

[26] On 23 August 2016, Mr Brazil responded to Mr de Wattignar's letter on behalf of Avenger. The letter stated in summary:

- (i) Mrs Hickey did not accept Mr Peoples explanation;
- (ii) However, Mr Peoples knows that he must report to Mr Neve if is feeling unwell;
- (iii) Mr Neve did not know Mr Peoples was not working on the afternoon of 5 August 2016 or that he was in the staffroom;
- (iv) Mr Neve said there was work to do on the afternoon of 5 August 2016 and that if staff were not sure what work to do they should check with Mr Neve or Mrs Hickey or Mr Hickey in his absence;
- (v) Mrs Hickey, Mr Hickey, Mr Aitchison and Mr Neve were not aware Mr Peoples was taking Tramadol nor was this reflected in company records;
- (vi) Avenger was prepared to give Mr Peoples the benefit of the doubt he was not sleeping but his explanation was "far from accurate, and from acceptable";
- (vii) Avenger had concluded Mr Peoples knew he should have spoken to Mr Neve and did not follow the "correct procedure" by "going and lying down for the rest of the afternoon without permission";
- (viii) Mr Peoples appears to have misrepresented himself in his explanation by alleging Mr Neve knew where he was, when he said he did not;
- (ix) It was concerning Mr Peoples had not previously disclosed the medication he was taking and that he was taking it at work;
- (x) Avenger sought an assurance by way of a medical certificate that Mr Peoples could safely perform his duties including operating machinery while on medication;
- (xi) Avenger did not accept there was a requirement to write "maintenance" on Mr Peoples' timesheet and all staff were aware of the expectations around timesheets;

- (xii) Mr Peoples should have recorded “sick leave”, “not working” or “hip pain” on his timesheet;
- (xiii) Avenger said it had concluded Mr Peoples had knowingly misrepresented his hours on 5 August 2016, had been less than honest in his responses during the disciplinary meeting, did not follow correct procedure by advising Mr Neve he intended to lie down, appears to have failed to notify he was taking medication, which “on the face of it presents as a possible breach of obligation to ensure his own safety and that of others at work”.
- (xiv) Falsifying timesheets constitutes serious misconduct and combined with dishonest responses during the disciplinary meeting and a possible breach of health and safety obligations, “tends towards [Avenger] having a complete loss of trust and confidence in the employment relationship.

[27] The letter concluded by stating:

Before [Avenger] makes a decision on what disciplinary action to take, they wish to hear any further responses [Mr Peoples] wishes to make about [Avenger's] conclusions to date. [Avenger] would also appreciate [Mr Peoples'] responses to the further allegations of health and safety breaches and dishonest responses.

Please provide all feedback in writing to the writer by 4pm Thursday 25 August 2016. Given the possibility [Avenger] may decide to dismiss [Mr Peoples] without notice for serious misconduct, please also feel free to comment on alternatives to dismissal that might be practicable given the circumstances.

[28] In an email response to the letter, Mr de Wattignar advised Mr Peoples would respond in writing and had sought a medical certificate in respect of the Tramadol. Mr de Wattignar questioned the references to “safety” and “further allegations of health and safety breaches” in the letter and suggested without further information Mr Peoples would likely not be able to respond.

[29] Mr Peoples provided a response in writing to the letter of 23 August 2016 to Mrs Hickey. Mr Peoples reiterated his account of the events of 5 August 2016. He said that he did not believe Avenger did not know he had a hip replacement and that sometimes caused him pain. Mr Peoples said he made a mistake with the timesheet. He said he could have found out what was acceptable when the business changed [from Pinnacle to Avenger] but this could be corrected with training. Mr Peoples said the situation was not about time sheets but victimisation of someone with a disability.

Mr Peoples raised two further matters. He asked why if there was so much work available on 5 August 2016, did some employees go home and what did other employees put down on their timesheets when they were attending a barbeque. Mr Peoples also asked why writing “maintenance” on his timesheet was now unacceptable when it had previously been acceptable. Mr Peoples said he never received an explanation from Mrs Hickey about these matters.

[30] The medical certificate provided by the general practitioner confirmed that Mr Peoples had been prescribed Tramadol. The doctor also took issue with some of the “emotive” language used to describe the strength of the medication and its possible effects suggesting there was “no evidence or scientific bearing to suggest the medication has any adverse effects on Mr People[s]”. The certificate also stated: “I see no reason why it should have any serious consequences for Mr Peoples’ safety or health or those around him. I see no reason why he cannot safely take it and work in his current employment”.

#### *Decision to dismiss*

[31] Mr Hickey and Mrs Hickey, as joint decision-makers, said they considered Mr Peoples explanation but decided they had lost trust in Mr Peoples. Mr Hickey said his refusal to help on 5 August 2016, misrepresenting his hours on his timesheet, then denying any wrongdoing led to the decision to terminate Mr Peoples’ employment. In addition, Mrs Hickey claimed Mr Peoples’ explanation for his conduct on 5 August 2016 changed during the investigation: from being in the staffroom due to no work, to being in the staffroom due to being in pain and needing to take medication.

[32] This decision to dismiss Mr Peoples was recorded in a letter addressed to him dated 30 August 2016. The reason(s) for Mr Peoples’ dismissal was stated as:

In summary, we decided to terminate your employment for not instructing [Mr Neve] what you were doing, telling us you did when you didn’t, and then claiming wages while you were resting, unable to work due to pain.

[33] Mr Hickey said if Mr Peoples had shown any sign of remorse or acknowledgment that he should have been helping or working on the forklift, then Avenger would not have dismissed him. Mrs Hickey said on the day Mr Peoples was given his dismissal letter he came up to her and angrily asked her for an explanation as to why he had been dismissed.

## **Evaluation**

### *Procedure*

[34] Avenger submitted it carried out a fair process when investigating Mr Peoples including adherence to its contractual obligations. It said the process it followed was fair and reasonable and with the scope of what a reasonable employer could have done in all the circumstances. I do not accept this submission. There were several defects in Avenger's employment investigation into Mr Peoples' alleged serious misconduct.

[35] First, Mrs Hickey was primarily responsible for the investigation into Mr Peoples, and along with Mr Hickey was joint decision-maker. During the investigation meeting Mrs Hickey said she had limited experience in conducting employment investigations. She also said she had not reviewed the "Behaviour & Performance Concerns: Disciplinary Action" procedure contained in Mr Peoples' agreement. The starting point for any fair and reasonable employer carrying out an employment investigation must be observance of any formal arrangements it has made with or in relation to the employee. This is usually in the form of a disciplinary procedure contained in an employment agreement but may also take the form of a disciplinary policy. The likely failure to properly observe the procedure and the unfairness that accrues from it, compounds upon the fact that Avenger director, Mr Aitchison had already put the allegation about sleeping at work to Mr Peoples on 8 August 2016 – before Mrs Hickey became involved – and on the evidence without any regard to either the procedure or any discernible principles of procedural fairness. Mr Aitchison did not give evidence at the investigation meeting, so it was not possible to ask him questions about this.

[36] Second, it was clear from Mrs Hickey's own evidence that at the outset of her investigation, she shared Mr Aitchison's "concerns" about Mr Peoples allegedly sleeping in the staffroom. She arrived at this position without hearing from Mr Peoples and this is suggestive of predetermination. Further the references in the letter of 23 August 2016 of: (i) a tending towards Avenger having a complete loss of trust and confidence in the employment relationship and (ii) asking for submissions about alternatives to dismissal; are also suggestive of pre-determination and particularly so, given the letter also raises further allegations and seeks responses to these.

[37] Third, the allegations against Mr Peoples evolved over time and he was not sufficiently put on notice about them. Mr Peoples' representative was sufficiently concerned about this that he raised these in writing. Avenger did not respond to those concerns. The email sent by Mr de Wattignar stands on its own merits and the lack of response is telling. I also find Mr Peoples was not afforded a sufficient opportunity to respond to the evolving allegations, several of which were raised for the first time on 23 August 2016.

[38] Fourth, Avenger's approach to the presenting fact Mr Peoples was taking Tramadol in the workplace and using this as a basis for further allegations about breaches of health and safety obligations was unfair and unreasonable. It was also highly questionable based on an "on the face of it" assessment of Mr Peoples' general practitioner's comments in the medical certificate provided to Avenger. These allegations, which were ultimately not relied on by Avenger, achieved little other than an increasing array of allegations made against Mr Peoples and reinforcing the view Avenger had a pre-determined outcome – that is, his dismissal.

[39] These procedural deficiencies were not minor and they resulted in Mr Peoples being treated unfairly.<sup>1</sup> I find Avenger carried out an unfair employment investigation.<sup>2</sup>

#### *Substance*

[40] There is a significant nexus between the evolving nature of the allegations raised with, or put to, Mr Peoples during the investigation and the ultimate substantiation of some of these. The original allegation (or allegations) put to Mr Peoples on 16 August 2016 was:

It has been brought to my attention that you were found sleeping on the job by Mr Aitchison on the 5<sup>th</sup> of August. He said he came back to the workshop, at approximately 3.30pm, he saw you were asleep in the staff room.

If this is accurate, it would concern me that you were sleeping given we were paying wages to you to be working. It is also concerning given your timesheet reflects that at this time you were completing maintenance work.

If this is the case, we would consider these actions constitute serious misconduct, especially if you are misrepresenting your hours of work on your timesheet in order to be paid.

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<sup>1</sup> Employment Relations Act, s 103(A)(5)

<sup>2</sup> Employment Relations Act, s 103(A)(3)(a)

[41] The reason (or reasons) why Mr Peoples was dismissed on 30 August 2017 was stated by Avenger as:

In summary, we decided to terminate your employment for not instructing [Mr Neve] what you were doing, telling us you did when you didn't, and then claiming wages while you were resting, unable to work due to pain.

[42] It was clear Avenger would face some difficulty substantiating the allegation of sleeping in the lazy boy in the staff room because based on Mr Aitchison's reported account and on Mr Peoples' evidence, Mr Aitchison never sought to ascertain, principally by asking him, what Mr Peoples was doing sitting in the lazy boy, let alone in the staffroom when he apparently found him there during the afternoon of 5 August 2016.

[43] Mr Peoples said he did inform Mr Neve that he would be in the staffroom. Mr Taggart supported this evidence. Significantly, during the investigation meeting Mr Neve was unable to say whether or not Mr Peoples had approached him on the afternoon of 5 August 2016 about taking a rest in the staffroom. A fair and reasonable employer could not have discounted such evidence and the possibility that Mr Neve was mistaken in his belief that Mr Peoples had not told him where he would be. If alternatively, this evidence did not feature as part of Mrs Hickey's investigation, then it goes to the issue of the sufficiency, and ultimately the deficiency, of the investigation conducted.

[44] A key part of the reason for Mr Peoples' dismissal was because he was claiming wages via timesheet while resting in the staffroom and unable to work due to hip pain. As stated above, Mr Peoples' timesheet for 5 August 2016 recorded four hours work with the next to the word "maintenance". During the investigation meeting, none of Avenger's witnesses could explain why a question mark had been placed after the word maintenance and why underneath this, the words: "On what - his Book?" were written. Mr Peoples clearly was not responsible for it.. There was no evidence before the Authority Mrs Hickey conducted any enquires into who may have had access to the timesheet and/or annotated it in the way described above. Unfortunately, the timesheet that was so foundational to Avenger's decision to dismiss Mr Peoples was also contaminated by the actions of (unknown) parties. The actions of a fair and reasonable employer would have been to set it aside.

[45] Mrs Hickey drew much from her belief that Mr Peoples' explanation for his conduct changed during her investigation. She asserted his explanation changed from being in the staffroom due to no work to one of being in the staffroom due to being in pain and needing to take medication. Mr Peoples' submitted his explanation did not change, what changed were the allegations put to him by Avenger. In my view, there is nothing necessarily incompatible between a situation where on one hand, on Mr Peoples' and Mr Taggart's evidence, there was no work to do until the steel was cut and on the other hand, Mr Peoples, with an existing hip problem feeling hip pain and needing to take pain medication. These matters could have easily evolved into one or occurred concurrently. Indeed, Mr Peoples said in his evidence to the Authority there was more than one reason for him being in the staffroom that day. Further, in my view, it would appear the allegations evolved to suit the presenting facts because Avenger had a pre-determined view that Mr Peoples ought to be dismissed regardless of his explanation. The reference in the letter of 23 August 2016 of a tending towards Avenger having a complete loss of trust and confidence in the employment relationship is very significant within this context. Indeed, buried within the body of that letter appears to be the first time formal notification of the allegation that Mr Peoples had been providing "dishonest responses" during Mrs Hickey's investigation was given to him.

[46] Avenger's suggestion Mr Peoples should have recorded "sick leave", "not working" or "hip pain" rather than "maintenance" on his timesheet does not sit comfortably with the evidence given during the investigation meeting by Mr Hickey and Mrs Hickey as to why timesheets with "maintenance" written on them had been acceptable previously and why they had not raised the matter with Mr Peoples on those occasions.

**Could a fair and reasonable employer have reached in all the circumstances the decision to dismiss Mr Peoples?**

[47] I have found Avenger carried out an unfair and inadequate employment investigation.<sup>3</sup> I further find, Avenger's investigation failed to yield a proper and substantive basis to justify Mr Peoples' dismissal. A fair and reasonable employer could not have concluded Mr Peoples actions in this matter amounted to misconduct

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<sup>3</sup> Employment Relations Act, s 103(A)(3)(a)

that was so serious so as to deeply impair or destroy trust and confidence and justify dismissal.

[48] I find that the decision to dismiss Mr Peoples was not one a fair and reasonable employer could have reached in all the circumstances at the time. Having found Avenger was not justified in dismissing Mr Peoples, he is entitled to an assessment of remedies to settle his personal grievance.

### **Residual causes of action**

[49] To the extent Mr Peoples pursued his claims for unjustified action causing disadvantage and a breach of good faith by Avenger before the Authority, I find these would, in the circumstances of the case, be effectively subsumed by the substantive employment relationship problem of unjustifiable dismissal.<sup>4</sup>

### **What remedies should Mr Peoples be awarded?**

#### *Reimbursement for lost wages*

[50] Having found Mr Peoples was subject to an unjustifiable dismissal by Avenger, the Authority must, even if it awards no other remedies, order payment of the lesser of a sum equal to lost wages or three months ordinary time wages.

[51] Mr Peoples obtained work on the same pay-rate approximately seven weeks after his dismissal on notice. Mr Peoples said if he remained employed by Avenger for period 5 September to 24 October 2016 he would have expected to earn \$7280 gross based on a 40 hour week. Consequently, he sought \$7,280 gross as reimbursement for lost wages. Avenger said the calculation should not be based on a 40 hour week but on an average of earnings over several previous months. However, Mr Peoples' employment agreement stipulated he work 40 hours and to engage in some alternative exercise to come up with an applicable reimbursement claim would, in effect, render an entirely artificial result.

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<sup>4</sup> Employment Relations Act, s 160(3).

[52] Mr Peoples said he took active steps to find alternative work, including distributing his curriculum vitae to various prospective employers and, indeed, was successful in doing so seven weeks after his dismissal. I accept that he made reasonable efforts to alleviate any loss he was required to mitigate.

[53] Subject to contribution, I find that an award of \$7,280 gross as reimbursement for lost wages under s 123(1)(b) of the Act is an appropriate award.

*Compensation for humiliation, loss of dignity and injury to feelings*

[54] Mr Peoples sought \$12,000 compensation for humiliation, loss of dignity and injury to feelings. This was a relatively modest amount when having regard to the recent upward trend of awards in the Authority and the Court.<sup>5</sup> It is, however, not possible to award an amount greater than claimed.<sup>6</sup> Mr Peoples said he was very upset and distressed by his dismissal. He believed he was being treated differently than other employees and did not understand it. Mr Peoples said he also lost weight in the immediate aftermath of his dismissal. The evidence of Mr Peoples' distress was supported by Mr Taggart who said he was so concerned about the effect of the dismissal on Mr Peoples he immediately raised the situation with Avenger. Mrs Hickey in her evidence, Mr Peoples was very upset about his dismissal when he came to her office to ask for an explanation about his dismissal letter. I accept that Mr Peoples suffered humiliation, loss of dignity and injury to feelings as a result of his dismissal.

[55] Subject to any consideration of contribution under s 124 of the Act, I find \$12,000 as compensation for that humiliation, loss of dignity and injury to feelings is an appropriate amount to award under s 123(1)(c)(i) of the Act.

*Contributory behaviour by Mr Peoples?*

[56] Having found that Mr Peoples is entitled to remedies for his personal grievances, I was required by s 124 of the Act to consider whether Mr Peoples' actions were causative and blameworthy of the situation he found himself in.

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<sup>5</sup> See, for example, *Stormont v Pebble Thorpaitken Limited* [2017] NZEmpC 71

<sup>6</sup> *McIver v Saad* [2015] NZEmpC 145 at [56]

[57] Advocate for Mr Peoples said there should be no deduction for contribution. Counsel for Avenger said Mr Peoples' actions and behaviour during the employment investigation lie at the heart of the matter and his explanations during the investigation added to his dismissal. The problem with this approach, of course, is Avenger are seeking to have Mr Peoples sanctioned and statutorily disentitled from compensation found awardable to him for articulating a defence of his actions during its investigation.

[58] Having found Mr Peoples had a valid person grievance for unjustified dismissal against Avenger in the circumstances that he does, I find, on the balance of probabilities, Mr Peoples' actions did not contribute to the situation that led to his personal grievance and I decline to reduce remedies as a consequence.

### **Summary**

[59] The orders made are for Avenger to settle Mr Peoples' personal grievance by paying him the following amounts:

- (i) \$7280 gross as reimbursement for lost wages; and
- (ii) \$12,000 as compensation for humiliation, loss of dignity and injury to feelings.

### **Costs**

[60] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, Mr Peoples has 28 days from the date of this determination in which to file and serve a memorandum on costs. Avenger has a further 14 days in which to file and serve a memorandum in reply. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, \$4500 for a matter such as this commenced after 1 August 2016, and adjusted upwards or downwards for relevant factors.<sup>7</sup>

Andrew Dallas  
Member of the Employment Relations Authority

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<sup>7</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.