

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 367
3308620

BETWEEN	ONYX RAPANA Applicant
AND	UBP LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Dave Cain, advocate for the Applicant Roger Stewart for the Respondent
Investigation Meeting:	27 March 2025 in Hamilton
Submissions received:	Up to 3 June 2025 from Applicant Up to 4 June 2025 from Respondent
Determination:	25 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Onyx Rapana, worked for UBP Limited (UBP) as a Leading Hand in its beef processing plant. On 19 October 2023, Mr Rapana experienced a sudden crushing pain at the back of his neck when he was moving a large saw.

[2] He left work as a result. He says he initially believed it was a muscle sprain and returned to work for a couple of days following this incident. He says he was referred by his GP to a specialist who gave him an MRI scan. It was from this that Mr Rapana learned that he had problems with the vertebrae in his neck, and he was experiencing a pinched nerve. He was advised not to return to work as a result.

[3] Mr Rapana met with the Managing Director of UBP, Mr Roger Stewart, on 6 November 2023. Mr Stewart was in possession of a medical certificate via ACC, confirming that Mr Rapana was fit to work as of 5 November 2023. Mr Stewart asked Mr Rapana to return to work as of 7 November, and believed that Mr Rapana had agreed to this. Mr Rapana says he never went as far as making that commitment.

[4] Mr Rapana did not turn up for work on 7 November 2023. He remained at home until he was dismissed by way of letter on 8 January 2024. He says UBP should have contacted him in the interim to discuss.

[5] UBP says that its supervisor made multiple attempts to contact Mr Rapana by phone after he did not turn up for work on 7 November 2023, but Mr Rapana never answered any of the calls. Accordingly, it was entitled to terminate his employment.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Mr Rapana, his brother Mr Garnett Rapana, and his father Mr Myron Rapana. On behalf of UBP, written statements were provided by Mr Steve Allen, Production Manager; Ms Marion Nathan, Production Co-ordinator; Mr Martin Taupu, Slaughter Floor Supervisor; Mr Jacob Beetsma, Human Resources Manager; and Mr Stewart. Only Mr Beetsma and Mr Stewart gave in-person evidence. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination were:

- (a) Was Mr Rapana unjustifiably dismissed?
- (b) If UBP's actions were not justified, should Mr Rapana be awarded one weeks' wages at the rate of 90%, and any compensation under s123(1)(c)(i) of the Act?

- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Rapana that contributed to the situation giving rise to his grievance?
- (d) Should either party contribute to the costs of representation of the other party?

Background

[9] As stated above, Mr Rapana experienced a sudden crushing pain on 19 October 2023, leading him to leave work. Thinking it was a muscle sprain, he returned to work for a couple of days after this. UBP's records record that his last day at work was 24 October 2023.

[10] Mr Rapana's evidence was that on 25 October 2023, he had an MRI scan. As a result of an MRI scan, Mr Rapana was advised that he was suffering from damage to two of his cervical vertebrae, and that had led to a pinched nerve. He was advised by his doctor not to return to work as a result, so he did not return. He was further advised not to undertake strenuous exercise – he had been accustomed to diving and hunting. He has not yet, as of the date of the investigation meeting, been cleared to return to full duties.

[11] Mr Rapana did not advise UBP that he did not intend to return to work on the advice of his doctor. He said that he received several medical certificates, which he took to UBP in person, and handed to the first supervisor he saw. He was unable to recall who he had handed these certificates to, or on what dates. His in-person evidence was that he had retained hard copies of these certificates, however, these were not provided to the Authority.

[12] UBP said it was in possession of several medical certificates from ACC, but that these had been received from ACC later after Mr Rapana's dismissal rather than from Mr Rapana himself. It was explained that there was some confusion which took some weeks or months to sort out, as Mr Rapana's ACC claim for a work-related injury on 19 October 2023 was in the end declined by ACC. However, he had suffered a previous work-related injury to his neck on 5 December 2022, which it was accepted by ACC as being the underlying cause of his October 23 incident.

[13] UBP's evidence was that it was aware of a medical certificate dated 25 October 2023, which stated that Mr Rapana would be fit to work as of 5 November 2023, and it was this information which led Mr Stewart to meet with Mr Rapana on 6 November, and to ask him to return to work on 7 November. Mr Stewart believed this had been agreed, and was surprised that Mr Rapana did not attend work on 7 November. When the medical certificate showing a return to work date of 5 November 2023 was put to Mr Rapana, he could not recall seeing it or being aware of a return-to-work date of 5 November, and said that he did not read the certificates.

[14] UBP's evidence is that it is now in possession of 4 other medical certificates provided by ACC all with different dates, all of which provided different return-to-work dates for Mr Rapana, as follows:

- a. A certificate dated 6 November 2023, with a return to work date of 27 November.
- b. A certificate dated 16 November 2023, with a return to work date of 7 January 2024;
- c. A certificate dated 23 November 2023, with a return to work date of 29 January; and
- d. A certificate dated 23 January 2024, with a return to work date of 29 February 2024.

[15] Mr Stewart and Mr Beetma's evidence was that UBP was not in receipt of these other 4 certificates at the time the decision was made to dismiss Mr Rapana on 8 January 2024.

[16] Mr Stewart says that when he became aware shortly after 7 November 2023 that Mr Rapana had not come to work, he asked Mr Allen to follow up. He says Mr Allen told him that he had called Mr Rapana on several occasions, and Mr Rapana had not answered any of the calls. Mr Stewart did not believe that any other steps had been taken to contact Mr Rapana e.g. texts, or in-person visits. Mr Rapana did not have an email address.

[17] Mr Stewart was critical of Mr Rapana, saying that Mr Rapana could have easily contacted him to let UBP know he wanted to come back to work and/or retain his job.

He says that Mr Rapana knew what to do by virtue of his long service with the company and his service as a union delegate.

[18] Mr Rapana was equally critical of Mr Stewart, saying that Mr Stewart could have come to speak with him prior to dismissal, as he and Mr Stewart knew where he lived, and could also have spoken with him when he came in to drop off medical certificates.

[19] Mr Rapana was dismissed by way of letter dated 8 January 2024. Mr Stewart's in person evidence was that this was because he had reached the conclusion that this was the "end of the road" and that Mr Rapana did not intend to come back to work. He referred to the fact that Mr Rapana had been off work for more than two months at that point, had said he would come to work on 7 November but had not, and had not communicated with UBP since the meeting on 6 November. Mr Stewart described this, both in person and his written correspondence to the Authority, as abandonment. He said that UBP was not obliged to keep Mr Rapana's job open indefinitely, particularly in the absence of any communication from Mr Rapana.

[20] The termination letter was written and signed by UBP's then human resources advisor, although Mr Stewart's evidence was that it was written on his instruction and he had approved it to be sent. The letter stated:

We have received no specialist reports regarding your injury... There has been no indication from you when or if you would be able to return to work to full duties.

We have considered a number of factors, which have led us to this position:

- How long you have already been absent from work due to this injury.
- The prospects of your return to work and recovering from it
- Your role within the company and your continued absence from work has a significant detrimental effect on the business.
- Providing you with reduced or alternative duties

We have unfortunately concluded, in light of all of the above factors, decided to let you go.

[21] Mr Stewart's in-person evidence did not align with the reasons for dismissal given in the 8 January letter. Mr Stewart's in-person evidence was very clear that he considered Mr Rapana had abandoned his employment, and that Mr Rapana had made

a decision that he was not going to return to work. This aligns with the first bullet point in the 8 January letter, but not the others. Mr Stewart's in-person evidence contradicted the third bullet point referring to the significant detrimental effect of Mr Rapana's absence on the business, as Mr Stewart said that he and his managers were able to manage Mr Rapana's absence by using casual labour and also they had recently had to lay off a large number of night shift staff, who had the skills to be re-hired. Mr Stewart gave no evidence of how he or UBP considered the prospects of Mr Rapana returning to work or undertaking light duties. He maintained that Mr Rapana was not in contact with UBP, and the only medical certificate available to him at that time was the one dated 25 October 2023, stating Mr Rapana could return to work on 5 November 2023.

[22] Mr Stewart also said that when deciding to dismiss, he took into account that Mr Rapana had tested positive for marijuana in June 2022, although this was not mentioned in the 8 January letter.

[23] Both Mr Stewart and Mr Beetman rejected the idea that it might or could have made a difference if UBP had written to Mr Rapana prior to the final decision to dismiss, telling him that dismissal was likely to occur as he had not been at work and had not been in contact. This was rejected on the grounds that they believed Mr Allen had already attempted to contact Mr Rapana by phone, and Mr Rapana had been avoiding that contact, and because of the view that Mr Rapana could have contacted UBP if he wished to do so.

[24] Mr Rapana received the 8 January 2024 letter and was shocked and surprised by it. He says he was never contacted by UBP prior to receiving this letter. He went immediately to speak to Mr Allen to ask why he was terminated, and Mr Allen told him it was because of his injuries. Mr Rapana said he suggested to Mr Allen that he would raise a personal grievance, and Mr Allen replied with words to the effect "this is war".

[25] In his in-person evidence, Mr Rapana stated that he never told UBP that he was returning to work. He says that his doctor told him that he just couldn't do it [work] like he had before, and that this extended to his active pursuits of hunting and fishing which he did with his brother. Mr Rapana's evidence is that when he was told this, he just stopped, and stayed home because he was shattered. He says that he told Mr Allen that he had a compressed nerve when he went to speak with him after receiving the 8

January letter, but that he can't remember speaking to anyone from UBP about his injury prior to this.

[26] He says he never had a return to work date, and still does not have one, and is still on pain medication.

[27] In essence, Mr Rapana's own evidence is that he never spoke with UBP about his injury, when he would be able to return to work, or a return to work date, as he did not have one. He says that even at the meeting with Mr Stewart on 6 November, he did not agree or commit to returning to work. He says that UBP had medical certificates showing that he was not fit for work, but cannot be specific about when he provided these or who he provided these too. Copies of these documents have not been provided to the Authority by either party.

Analysis

[28] I must consider if Mr Rapana was unjustifiably dismissed. The test of justification is set out in s 103A of the Act, and it requires that I assess whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[29] In doing so, I must consider whether UBP:

- a. Sufficiently investigated the circumstances before reaching the decision to dismiss; and
- b. Raised the concerns it had with Mr Rapana before dismissing him; and
- c. Gave Mr Rapana a reasonable opportunity to respond before dismissing him; and
- d. Genuinely considered any explanation Mr Rapana made before dismissing him.

[30] In making the decision to dismiss, UBP did investigate the circumstances. UBP and Mr Stewart knew that Mr Rapana had suffered an injury of some type. There was some discussion at the investigation meeting about the ACC claim for the incident of 19 October 2023 as in the end, that claim was not accepted by ACC. This is not directly relevant to the personal grievance claim, however. What is relevant is what UBP knew at the time of dismissal.

[31] UBP knew that Mr Rapana had suffered an accident or injury of some sort, was cleared to work as of 5 November, and had not returned to work even though UBP understood he had said he would do so. Beyond this, UBP says it had no further information, apart from the fact of Mr Rapana's non-attendance at work, and non-contact. This information is certainly sufficient for UBP to commence a process either investigating potential abandonment (what Mr Stewart said happened), or investigating the ending of employment for medical incapacity (what was set out in the 8 January dismissal letter).

[32] The difficulty faced by UBP is that having reached this initial point, it did not take any of the other steps it was required to take referred to in s 103A of the Act. No action was taken to raise with Mr Rapana the concern that either he had abandoned his employment, or that his employment needed to come to an end due to medical incapacity with no return to work date in sight. Mr Stewart relied entirely on what he said was advice to him from Mr Allen, that Mr Allen had called Mr Rapana and Mr Rapana had not answered the calls. Mr Allen gave no evidence in person, and his written statement does not mention any such actions.

[33] Mr Rapana did not know UBP was considering dismissing him due to his injuries and/or because he had not turned up to work. It follows that there was no opportunity for him to explain his position, or to discuss any alternatives that there may have been. It also follows that UBP did not genuinely consider any response or explanation by Mr Rapana, because no such opportunity for dialogue was created.

[34] This has led to the unsatisfactory situation where it is not clear why Mr Rapana was dismissed, as the letter of 8 January dismissing him says it was due to his injury, Mr Stewart's in-person evidence contradicts this by referring strongly and repeatedly to abandonment, and Mr Stewart also said in the investigation meeting that he took into account an adverse perception he had formed of Mr Rapana that he had tested positive for marijuana use some 18 months prior. In addition, Mr Rapana never knew that UBP was considering dismissing him, until he received a letter telling him the decision had already been made.

[35] Taking all these matters into account, Mr Rapana's dismissal was unjustified.

[36] Having said this, it is also clear that Mr Rapana contributed to his dismissal. His evidence was that he never discussed or informed anyone at UBP that he wanted to return to work, how or when. Even at his meeting with Mr Stewart on 6 November 2023, Mr Rapana said that he knew he wouldn't or couldn't return to work on 7 November, but he didn't make that clear to Mr Stewart at the time. Mr Rapana's evidence that he gave medical certificates to UBP is lacking as he can't say when this occurred, who he gave them to, or what they showed. Mr Rapana cannot explain why he felt UBP should keep his job open for him in these circumstances.

[37] I find that this lack of communication directly contributed to Mr Rapana's dismissal, and will return to this when assessing remedies.

Remedies

[38] Having found that Mr Rapana's dismissal was unjustified, I must now consider remedies. As at the time of the investigation meeting, Mr Rapana was still continuing to receive ACC compensation. Accordingly, his advocate advised that he was not pursuing a claim for lost remuneration with the exception of a claim for the first week's compensation, which I understand UBP pays when required at the rate of 90%. The evidence was that ACC had accepted Mr Rapana's claim for a work-based injury dated 5 December 2022, and (after some investigation and correspondence) had eventually declined to recognise as a work-based injury a claim dated 19 October 2023. UBP had paid what was owing for the 5 December 2022 claim, but nothing was owing in respect of the 19 October 2023 claim as this had not been recognised as a work-based injury. In these circumstances, I decline to make any award in respect of the first weeks' compensation.

[39] Mr Rapana also claims compensation for hurt, humiliation, and injury to feelings. He gave evidence about the impact of both the dismissal and his injury on him, including that he found it very difficult to be required to suddenly stop working and to refrain from carrying out his active hobbies. He also gave evidence that the dismissal led to him experiencing financial hardship, which meant he had to borrow to pay rent from his father, and seek financial support from his brother and other family. His evidence and the evidence of his father and brother was that this had a long-lasting and negative impact on his physical and mental health.

[40] Overall, I accept Mr Rapana's evidence of the impacts on him. However, I do not accept that all of those impacts can be attributed to his dismissal alone. Mr Rapana's in-person evidence was that he was distressed about having to suddenly stop hunting and fishing as much as he was distressed about stopping work, and that he made no effort to return to work in any capacity. Even now, he remains on ACC and is not fit to work. His evidence as to the prescription of sleeping pills by his doctor was that this was to allow him to sleep through the pain rather than for any other reason. He accepts that he has received compensation from ACC, including I understand in a lump sum, which has resulted quite responsibly in the withdrawal of any claim for lost remuneration apart from one week's lost wages. Taking all this into consideration, my view is that compensation for hurt, humiliation, and injury to feelings in the sum of \$12,000 is appropriate to recognise the impacts on him stemming from his personal grievance.

[41] My view is that a reduction of 15%, or \$1,800 is appropriate to recognise Mr Rapana's contribution to the circumstances he finds himself, namely the lack of open and timely communication about his circumstances as set out above. Accordingly, this leads to an award of \$10,200 in favour of Mr Rapana.

Other matters

[42] I also note that the witness statements in particular from both parties discussed events that occurred around June 2022, when Mr Rapana had an earlier injury. I advised both parties that my view was that Mr Rapana was out of time to raise personal grievance claims for any events occurring in June 2022, and that they were not directly relevant to the matters at hand.

[43] The submissions for the applicant also raise a claim for a penalty, on the basis that the respondent failed to attend mediation on a voluntary basis, and then refused to attend mediation when directed by the Authority. The respondent resists this claim, and says that they initially refused to attend mediation on advice, but did attend "once jurisdiction was confirmed".

[44] I decline to award a penalty in all the circumstances. UBP is not obligated to attend mediation on a voluntary basis. Although there was some initial delay in attending mediation, this was in the end directed by myself following a case management call and UBP did attend. While it may be said that UBP initially resisted

attendance at mediation, it actively participated in the case management process, and once concerns about the Authority's jurisdiction and the raising of UBP's defences were clarified, mediation occurred. I do not find this was sufficient to amount to obstruction of the Authority's process in a way that would warrant a penalty, especially in circumstances where UBP was self-represented.

Orders

[45] Mr Onyx Rapana has a personal grievance in that he was unjustifiably dismissed.

[46] UBP Limited is ordered to pay to Mr Onyx Rapana within 28 days of the date of this determination the sum of \$10,200.00 without deduction as compensation for hurt and humiliation taking into account the reduction for contribution as set out above.

Costs

[47] Costs are reserved. The investigation meeting lasted for half a day, and the parties are encouraged to resolve any issue of costs between themselves bearing in mind the Authority's usual tariff, which for a half day hearing would amount to \$2,250.00.

[48] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondent will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[49] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.¹

Claire English
Member of the Employment Relations Authority

¹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1