

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 39
5416829

BETWEEN BARBARA TWENTYMAN
 Applicant

AND THE WAREHOUSE LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Megan McKee-Trail for Applicant
 Penny Swarbrick for Respondent

Investigation Meeting: 5, 6 & 7 November 2014 in Taupo

Submissions Received: 3 & 5 December 2014

Determination: 9 February 2015

DETERMINATION OF THE AUTHORITY

- A. TWL has not breached the implied and/or express terms of Ms Twentyman’s employment agreement.**
- B. Ms Twentyman did not raise a valid personal grievance within 90 days and TWL has not consented to the raising of a grievance outside that timeframe.**
- C. Ms Twentyman has breached the implied and/or express terms of her employment agreement.**
- D. Ms Twentyman is ordered to pay a penalty of \$1,500 to TWL within 28 days of the date of this determination.**

Employment relationship problem

[1] Ms Barbara Twentyman claims her employer The Warehouse Limited (TWL) has breached its implied terms of the employment agreement including:

- a) Failing to provide a healthy and safe workplace;
- b) Failing to maintain a relationship of trust, confidence and fair dealing;
- c) Failing to provide a work environment and management processes so that undue stress will not be caused to an employee.

[2] In the alternative Ms Twentyman claims one or more conditions of her employment was affected to her disadvantage by TWL's unjustifiable actions being the breaches of the implied terms of her employment.

[3] Ms Twentyman says the breaches related to two work injuries suffered on 3 February 2012 and on or about 12 February 2013.

[4] TWL denies the claims and says the personal grievance claim is outside the jurisdiction of the Authority because it was not raised within the requisite 90 day period required by the Employment Relations Act 2000 (the Act).

[5] TWL counter claims against Ms Twentyman alleging she has breached the implied terms of the employment agreement and her obligations of good faith and seeks penalties against Ms Twentyman.

[6] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Twentyman and TWL 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.

Credibility

[7] During the investigation of this matter I began to have serious concerns about Ms Twentyman's credibility. Credibility issues must be resolved on the balance of probabilities.

[8] Ms Twentyman provided evidence to the Authority that was exaggerated and misleading. For example Ms Twentyman says she suffered serious health

implications in February 2012 as a result of being exposed to concrete dust including swollen eyes, coughing, nausea and severe distress to the point where she felt she was having a heart attack. The Authority questioned Ms Twentyman's doctor, Dr Fraser about the symptoms reported by Ms Twentyman. Dr Fraser's evidence was that he did not observe the symptoms described by Ms Twentyman and denied the assertion that she was close to having a heart attack. Dr Fraser described Ms Twentyman's symptoms as being a bit of an allergy. In any event, Ms Twentyman did not attend her doctor in February 2012 when she says she experienced the symptoms. Rather she attended Dr Fraser's office in April some two months after she says the dust caused her health concerns.

[9] Further, Ms Twentyman denied being the subject photographed in photo's produced to the Authority by TWL to support its counter-claims against Ms Twentyman. The images in the photos are clearly Ms Twentyman and it was disingenuous of her to attempt to deny it was her.

[10] Ms Twentyman advised her doctor that she had been required to work with her arms above her head and that TWL was not interested in providing her with light duties. Dr Fraser relied on these statements when issuing medical certificates declaring Ms Twentyman unfit for work. Neither statement was correct. On the date Ms Twentyman told her doctor that she had to lift her arms above her head at work, she had not actually attended work. Ms Twentyman was also fully aware that TWL was attempting to work with her to return her to work on the basis of an agreed rehabilitation plan which included light duties.

[11] Lastly, in relation to the surveillance undertaken by TWL (which is discussed more fully later in this determination), Ms Twentyman told the Authority that she had surveillance men outside her house for 24 hours a day and for two years. Ms Twentyman claimed for the first time at the investigation meeting, that the private investigators had run her daughter off the road and nearly killed her. Further, that she stayed inside for six weeks so they could not take her photo. This evidence cannot be correct as Ms Twentyman was not made aware of the surveillance until after the surveillance had concluded.

[12] These matters, amongst others undermine the credibility of Ms Twentyman's evidence. Where the evidence between Ms Twentyman and TWL is in conflict, I have preferred the evidence of TWL.

Background

[13] Ms Twentyman commenced employment on 19 June 2009 working on a casual and fixed term basis. On 1 March 2010 Ms Twentyman began working as a permanent employee engaged to undertake duties in the role of a night filler in the clothing department of the Taupo store. Ms Twentyman's night filler role involved unpacking large plastic containers which are known as "stillages" of clothes, and then setting out the stock ready to be placed in the store.

[14] The terms and conditions of Ms Twentyman's employment were subject to the terms set out in a Collective Agreement (CA) between the Warehouse Ltd and first Union dated August 2012 to July 2013.

[15] TWL is an accredited employer and has contracted with the ACC to take responsibility for the management of work related injuries and rehabilitation. The responsibility for aspects of the management of work related injuries and rehabilitation has been sub-contracted by TWL to Gallagher Bassett Care Advantage (Care Advantage).

3 February 2012 incident

[16] On 3 February 2012 Ms Twentyman suffered an injury to her left shoulder. Ms Twentyman did not receive medical assistance at the time of the injury. Ms Twentyman continued to work normally from 5 – 21 February 2012 then proceeded on a period of paid annual leave which had been arranged prior to the injury. Ms Twentyman attended her doctor for the first time on 16 March 2012 and completed an ACC claim form on 22 March 2012.

[17] Ms Twentyman says she was lifting a stillage that had been stacked on top of another stillage when it slipped and she reached out to grab it and injured her shoulder when she did that.

[18] On 3 April 2012 Ms Twentyman wrote to TWL advising that she had been ill treated and would be raising a personal grievance. The letter sets out various concerns she had about her supervisor Ms Te Rangi Nicholson.

[19] Ms Nicholson set out her responses to each of the complaints against her in writing on 3 April 2012. On 12 April 2012 Ms Sally Rison, Store Manager, formally responded to Ms Twentyman's letter. A meeting took place on 3 May 2012 to discuss the 3 April 2012 letter and Ms Rison's response of 12 April 2012.

[20] The purpose of the meeting on 3 May 2012 was to investigate further the complaints Ms Twentyman had made about Ms Nicholson. Ms Rison and Ms Twentyman discussed each of her complaints. The notes from the meeting show that Ms Twentyman did not wish to have any of the complaints investigated further and was not forthcoming in providing details or the names of people Ms Twentyman alleged could support her complaints. On 8 May 2012 Ms Rison advised Ms Twentyman that as no further details were provided at the meeting and based on the information she had at hand, Ms Rison was unable to take the complaints about Ms Nicholson any further.

[21] Ms Twentyman was now absent from work as a result of the injury she sustained on 3 February 2012. On 10 July 2012 Ms Twentyman attended a meeting with Ms Jane Clare, a Care Manager employed by Care Advantage and Ms Rison to discuss and agree on a return to work rehabilitation program. It was agreed at this meeting that:

- a) Ms Twentyman would participate in a work place assessment and proposed graduated return to work program;
- b) Ms Twentyman would meet weekly with Ms Rison to complete a rehabilitation monitoring form to identify any issues or concerns;
- c) A follow up meeting with Care Advantage would take place on 7 August 2012; and

- d) Ms Twentyman would provide medical certificates to TWL and Care Advantage that reflected her capacity or incapacity for work until a full clearance was obtained.

[22] On 18 July 2012 a rehabilitation program was discussed with an emphasis on Ms Twentyman returning to work as soon as possible on light duties and during the day so that she could be supported. Further meetings took place on 26 July, 1 August and 7 August 2012.

[23] A medical certificate dated 31 July 2012 confirmed Ms Twentyman was unfit for work for 30 days from 6 August 2012. As this was in conflict with other information received by TWL from Ms Twentyman's specialist, Ms Rison wrote to Ms Twentyman on 12 August 2012 confirming that both Ms Twentyman's specialist and general practitioner had confirmed that Ms Twentyman could return to work on the basis that she was cleared to work 3 hours each day for a maximum of 4 days each week for eight weeks.

[24] Ms Twentyman returned to work on 13 August 2012 and continued to work to the agreed rehabilitation plan until her shoulder was operated on, on 6 November 2012.

[25] In early November 2012 Mr Phil Vaughan replaced Ms Rison as the Store Manager. As part of the agreed rehabilitation program Ms Twentyman was required to attend weekly monitoring meetings. After her operation Ms Twentyman continued to have weekly monitoring meetings until early February 2013. Ms Twentyman did not turn up for more meetings and Mr Vaughan emailed Ms Twentyman reminding her that she was expected to attend weekly catch up meetings and set the next meeting for 4 March 2013.

[26] On 14 March 2013 Ms Twentyman raised a personal grievance claiming TWL:

- a) Had failed to protect her safety by not providing assistance for heavy lifting;

- b) Had breached its obligations of good faith in dealing with her injury; and
- c) Had failed to protect Ms Twentyman's health by subjecting the staff to concrete dust in February 2013.

[27] In response TWL denied Ms Twentyman had a valid personal grievance claim but agreed to attend mediation in an effort to resolve the matters raised as this was, and continues to be, an ongoing employment relationship.

[28] On 10 April 2013 Ms Twentyman was cleared for light duties for three hours per day for three days each week for eight weeks and an individual rehabilitation plan was finalised.

[29] Mr Vaughan wrote to Ms Twentyman on 15 April 2013 setting out the discussions they had had that day including welcoming Ms Twentyman back to work and setting out the physical restrictions on her work as well as the need for her to take regular breaks.

[30] Mr Vaughan met with Ms Twentyman on 16 April 2013. Mr Vaughan gave Ms Twentyman a copy of the 15 April 2013 letter. Ms Twentyman advised Mr Vaughan that she would not be starting work on the return to work plan and would be attending her doctor on 17 April 2013. Ms Twentyman handed Mr Vaughan a letter signed by herself, which states (verbatim):

I'm taking a personal grievance out on The Warehouse for the treatment I have received from Care Advantage and the Managers of The Warehouse, Taupo. I am requesting mediation with the Labour Department about my wages, The Warehouse safety practises and the treatment provider, Care Advantage. I would like an answer in seven days.

[31] After the meeting had concluded Ms Twentyman attended the store and was talking to other employees. After observing her for about 10 minutes Mr Vaughan approached her and asked Ms Twentyman to leave the store because if she was unable to work, then it was "*not a good look*" to be in the store shopping. Ms Twentyman reacted badly to the request that she leave the store and later that same day Ms Twentyman's lawyer wrote to TWL raising concerns about Mr Vaughan's conduct. Through her lawyer, Ms Twentyman also alleged that Mr Vaughan had advised

members of the Health and Safety committee that Ms Twentyman had cost the Warehouse \$50,000 so far.

[32] At the investigation meeting Mr Vaughan accepted that it might have been inappropriate to require Ms Twentyman to leave if all she was doing was shopping. TWL denies advising staff of Ms Twentyman's specific ACC costs. TWL does acknowledge that the Health and Safety committees do discuss long term injury rates but no specific names are discussed.

[33] On 17 April 2013 Ms Twentyman provided a medical certificate which stated that she was unfit to work for 30 days. Ms Twentyman refused to attend any further meetings with Mr Vaughan on the basis that she had been banned from the store. This was despite assurances from TWL that this was not the case.

[34] The parties attended mediation on 5 June 2013. No resolution to any of the issues raised by Ms Twentyman was reached.

[35] On 6 June 2013 Ms Kirsty Wooding, National Health and Safety Manager, wrote to Ms Twentyman advising Ms Twentyman that the claimant consent form she had signed in 2012 had expired. The letter was emailed to Ms Twentyman to ensure she received it. Ms Wooding advised Ms Twentyman that in the absence of a valid claimant consent form, Care Advantage would not be able to process any costs relating to her injury including doctor visits, physiotherapy treatments, or prescriptions. Ms Twentyman was requested to complete the form and return it by 12 June 2013. In her covering email Ms Wooding offered to look into Ms Twentyman's wages concerns and requested further information to assist her.

[36] On 14 June 2013 Ms Wooding acknowledged receipt of Ms Twentyman's completed claimant consent form via email. Ms Wooding advised Ms Twentyman that a further form would need to be completed and returned by 30 June 2013 as the current form expired on that date.

[37] Ms Twentyman lodged an application for an ACC Review regarding four decisions made about her ACC entitlements. The review covered decisions made on:

- a) 28 February 2013 to suspend Ms Twentyman's weekly compensation payments;
- b) 9 April 2013 to finalise a rehabilitation plan;
- c) 24 April 2013 choosing a rehabilitation; and
- d) 14 May 2013 to suspend weekly compensation payments for non-compliance.

[38] The written decision from the review hearing was issued on 17 October 2013. The Reviewer held that ACC was wrong in declining weekly compensation payments from 28 February 2013, the decision was quashed and TWL was directed to reinstate Ms Twentyman's weekly compensation payments from 4 March until 14 May 2013. The remaining three decisions were upheld as being correctly made.

[39] On 7 October 2013 a medical certificate signed by a locum General Practitioner advised that Ms Twentyman would be unable to return to the workforce for 1-2 years.

[40] By 11 December 2013 Ms Twentyman's entitlement to weekly compensation was reinstated. Ms Twentyman was asked to complete a new claimant consent form as her previous one had expired. Ms Twentyman was asked to attend her doctor and obtain a medical certificate that reflected the current state of Ms Twentyman's health and was in line with her specialists' assessment from her last review on 20 September 2013 when Ms Twentyman had been cleared to undertake light gardening work.

[41] As the rehabilitation plan from 9 April 2013 had expired Ms Twentyman was requested to meet to discuss her rehabilitation plan. Ms Twentyman was also asked to attend a meeting with an Occupational Medicine Specialist for an assessment and report to assist with determining any additional requirements for rehabilitation.

[42] Ms Twentyman responded by advising that she already had two medical certificates saying she was unfit to work and refused to attend a meeting with the Occupational Therapist in Auckland due to the time of year. Ms Twentyman reminded TWL that she had been banned from the Taupo store and therefore a new meeting place would have to be arranged.

[43] By letter dated 16 December 2013 TWL reiterated its requirements of Ms Twentyman and answered the concerns she had raised. The letter set out the travel arrangements in place for Ms Twentyman to attend the Occupational Therapist appointment in Auckland. TWL also addressed Ms Twentyman's continued assertion that she had been banned from the store and therefore any meetings could not take place at that location. In its letter to Ms Twentyman, TWL refers to a tape recording produced to the ACC Review which Ms Twentyman relied on to support her assertion. The recording was specifically considered during the ACC Review hearing and was found not to support her allegation.

[44] Ms Twentyman attended the Occupational Medical Specialist (Dr Dryson) appointment on 19 December 2013. It was Dr Dryson's opinion that Ms Twentyman could not return to her pre-injury employment and was not able to undertake activities involving gripping, lifting and carrying etc with the left hand.

[45] Mr Colin Hancock presented a report dated 31 March 2014. In his report Mr Hancock indicates that Ms Twentyman was making significant improvements in her recovery. Mr Hancock reports that on or about 17 February 2014 Ms Twentyman was to start using her left arm normally. By the time the meeting with Mr Hancock took place on 31 March 2014 Ms Twentyman had become aware of the surveillance of her activities and told Mr Hancock that the knowledge of the surveillance made her reluctant to use her left arm. During the appointment Ms Twentyman was able to lift a 1kg hand weight to 80% of her flexion range above head height. While Mr Hancock reports that she did this with pain, he also reports that she was able to do this sort of task if she needed to.

[46] Mr Hancock recommended Ms Twentyman should consider re-entering the work force in a work trial or graduated return to work program and reported that Ms Twentyman was unwilling to return to the job she had. Mr Hancock noted that Ms Twentyman could make more strength and range of movement gains, however, her refusal to use her arm in daily life prevented functional improvement. Mr Hancock recorded that Ms Twentyman was at 63% strength lifting weights to shoulder height and that if that was increased to 80% she would be safe to return to work.

[47] In December 2013 Ms Twentyman applied for a further ACC Review of the actions of TWL regarding her weekly compensation payments and requirement to undertake a rehabilitation plan. On 21 February 2014 all but one of the matters raised were withdrawn. The outstanding matter related to an allegation that Care Advantage had overridden the medical advice of her medical advisers.

[48] The ACC Reviewer held it had not have jurisdiction to investigate the allegation as Care Advantage had asked Ms Twentyman to clarify the inconsistencies between her GP's medical certificate and the specialists report which was dealing with a process and did not constitute a decision which could be subject to review.

[49] As at the date of the investigation meeting Ms Twentyman continues to be employed by TWL but also continues to be absent from work.

Surveillance of Ms Twentyman

[50] Ms Wooding was concerned that Ms Twentyman was not attending physiotherapy appointments recommended by her specialists and not meeting with TWL for her weekly face to face meetings. Ms Wooding had also received information that Ms Twentyman was working on her property undertaking tasks that were more strenuous than those she was expected to do at work.

[51] Ms Wooding passed her concerns onto ACC. ACC authorised TWL to undertake surveillance on Ms Twentyman. The purpose of the surveillance was to identify whether Ms Twentyman's capacity as stated in her medical certificates was accurate.

[52] TWL received three reports from Complete Protection Services Limited (CPS). Activities observed by the investigator suggest Ms Twentyman was able to carry out normal day to day activities. The activities being carried out during the period of surveillance suggests Ms Twentyman was misrepresenting her physical capabilities.

[53] By way of example when Ms Twentyman attended the ACC Review hearing in Rotorua on 11 September 2013 Ms Twentyman was observed limping and walking with a crutch and favouring her left arm while going into, during and leaving the

hearing. After leaving the review hearing Ms Twentyman was observed, and recorded walking without the need for the crutch and was able to freely use her left arm. In a video which was played during the investigation meeting, Ms Twentyman looks to be removing something from her shoe with her left hand. The implication being that she had put something in her shoe to make her limp.

[54] Further surveillance was undertaken on 19, 20 and 21 December which was during and after Ms Twentyman's appointment in Auckland with Dr Dryson. The report from that surveillance shows Ms Twentyman at Auckland Airport freely using both her left and right hands, in particular and in conflict with Dr Dryson's report, gripping papers in her left hand. After her appointment with Dr Dryson, Ms Twentyman was observed sitting at Auckland Airport using her mobile phone, using both her left and right hands to grip the mobile phone and to text. Ms Twentyman was also observed using her left arm/hand to open and close the passenger door of a vehicle, after she returned to Taupo following her visit with Dr Dryson.

[55] In January 2014 Ms Twentyman was observed driving her own manual vehicle on three separate occasions. TWL asked CPS to report on whether Ms Twentyman had been observed raising her left arm/hand forward or sideways from the body more than 25 degrees or undertaking any activities involving stretching, reaching, gripping, lifting and carrying. In its final report CPS stated :

Ms Twentyman used her left arm in the above/positions/activities (i.e. stretching, reaching, gripping, lifting) on a number of occasions this year and last i.e. to enter and exit vehicles, to clutch her wallet while shopping, carry her handbag, to open and shut her (farm) gate and to hold her phone to text/make phone calls. Prior to January 2014 she has been observed carrying her handbag in her left arm, pulling her boots off with left hand, steadying herself as she slipped, eating etc...

[56] On 7 March 2014 a copy of the surveillance reports and associated videos were provided to Ms Twentyman for her response. TWL outlined to Ms Twentyman its concerns with respect to Ms Twentyman's self reporting to Care Advantage as well as the medical health professionals she had been consulting.

[57] Ms Twentyman declined to meet with TWL to discuss the report and video footage. In response to the invitation to meet, Ms Twentyman advised TWL that her specialist had reported that she was able to drive her own car. The report from the

specialist, pre-dated the report from Dr Dryson who reported that Ms Twentyman was unable to drive her own car which had manual gears.

Issues

[58] The issues for determination are:

- a) Has there been a breach of the implied terms of Ms Twentyman's employment agreement?
- b) Was a personal grievance raised within 90 days?
- c) If a personal grievance was not raised within the 90 day period did TWL give implied consent for the grievance to be raised out of time?
- d) Has Ms Twentyman been disadvantaged in her employment?
- e) In the event that Ms Twentyman is successful in her claims against TWL what, if any, remedies should be awarded?
- f) Is TWL entitled to counter-claim against Ms Twentyman for a breach of the implied terms of the employment agreement and for breaches of good faith?
- g) If the counter-claim is successful, what, if any, penalties should be awarded?

Did TWL breach of the implied terms of Ms Twentyman's employment agreement?

[59] There are three limbs to this claim. They are the failures to provide a healthy and safe workplace; maintain a relationship of trust, confidence and fair dealing; and provide a work environment and management processes so that undue stress will not be caused to an employee.

Failure to provide a healthy and safe workplace

[60] This claim relates to two incidents, the first resulted in Ms Twentyman being injured at work the second is in relation to a refit of the Taupo store and symptoms Ms Twentyman says she suffered as a result of concrete dust.

Failure to provide a healthy and safe workplace – 3 February 2012 incident

[61] Ms Twentyman claims she injured herself due to:

- a) Insufficient training in place relating to the lifting of stillages;
- b) Failure to provide staff with appropriate assistance when required to carry out lifting; and
- c) Instructions given to staff not to assist Ms Twentyman with lifting of stillages.

Insufficient training in place relating to the lifting of stillages;

[62] Ms Twentyman says the training provided to her in the lifting of stillages including safe lifting techniques and weights was insufficient. At the investigation meeting Ms Twentyman told the Authority that while the induction forms indicate she had extensive training in these areas, the reality is that no information was given to her and that she was simply told what to write and to tick each box on each induction sheet and sign it off as if she had received the training.

[63] Ms Rison's undisputed evidence is that when a new employee starts they are taken through the first four modules and they watch DVD's specifically related to health and safety. The employees are required to watch a section of the video and then answer questions to demonstrate their understanding of what they have viewed.

[64] Ms Wooding told me that the DVD's Ms Twentyman would have viewed shows correct lifting techniques throughout. There are also move safe posters showing proper squatting and lifting poses in the store.

[65] Having regard to the evidence I heard I am satisfied it is unlikely the training provided to employees including Ms Twentyman was as described by Ms Twentyman

and was more extensive and thorough than indicated by her evidence. I find on the balance of probabilities that Ms Twentyman was properly trained in lifting techniques to the extent that there has been no breach of the implied terms of the employment agreement.

Failure to provide staff with appropriate assistance when required to carry out lifting/ Instructions to staff not to assist Ms Twentyman with lifting of stillages

[66] Ms Twentyman told the Authority that employees she worked with had been told not to assist her when she was lifting stillages and that was why she was lifting the stillage on her on when the incident occurred on 3 February 2012.

[67] Ms Twentyman called two witnesses to give evidence supporting this claim. Mr Corey Assadullah in his written statement told the Authority that employees had been told by the nightfill supervisor not to assist Ms Twentyman. Mr Assadullah explained that this was an unusual request. Mr Assadullah explained that all employees were told to help as a team and that he did give Ms Twentyman assistance. He confirmed that all Ms Twentyman had to do was ask. Mr Assadullah confirmed that the instruction was given in the context of being urged by his supervisor to get on with his own work.

[68] In her written statement Ms Carol Hyland states that she was present when employees were given a specific instruction not to assist Ms Twentyman with the stillages. Ms Hyland confirmed Mr Assadullah's evidence and had witnessed Mr Assadullah assisting Ms Twentyman with the stillages. In a more contemporaneous statement given by Ms Hyland on 3 May 2012 Ms Hyland states that Ms Twentyman would usually ask "*Jimmy or Jacob*" to assist with the stillages.

[69] In a statement signed by Mr Jim Sakara and dated 3 May 2012, Mr Sakara states that he had suggested to Ms Twentyman not to lift the stillages on her own but to ask for help.

[70] It is more likely than not that employees were, as confirmed by Mr Assadullah, required to focus first on their job, but that employees were not instructed not to assist Ms Twentyman with lifting the stillages. I have

preferred the evidence produced through the contemporaneous statements made in May 2012 that Ms Twentyman would often seek assistance of others to assist with the lifting of stillages and that suggestions that she should do so were made to her.

[71] I find Ms Twentyman has failed to establish TWL has breached the implied terms of her employment agreement.

Failure to provide a healthy and safe workplace – concrete dust

[72] At the investigation meeting Ms Twentyman claimed this issue arose in February 2012, although the claim in the statement of problem puts the timing of the issue as being February 2013. During the course of the investigation meeting Ms Twentyman did not resile from her insistence that the issue arose in February 2012.

[73] Ms Twentyman also insisted during the investigation that she had worked on multiple dates when the refit was being undertaken and had reported her symptoms to Dr Fraser in March 2012, prior to her attending Dr Fraser for her shoulder injury.

[74] Mr Ryan Neville, Store Development Project Team Leader, and was responsible for organising the Taupo store refit. The refit involved taking out the old shelving, lifting the old carpet which then required the concrete floors to be grinded to remove the glue. The area in which the carpet was removed and floors grinded involved approximately 30-33% of the total floor area.

[75] Mr Neville told the Authority that the removal of the shelving, carpet and floor grinding occurred over a period of 4 nights on 26-29 March 2012. Mr Neville explained that the grinding machine used by the contractors was a big heavy machine with diamond encrusted grinding blades. He says this removes the glue and a minute amount of concrete.

[76] The grinding blades are about 1 metre in diameter and has a vacuum attached to the head which sucks any dust straight into it. The machine is fitted with bristles and rubber which acts as a seal to prevent dust flicking out around the

work area. Dust goes through a filter and into a plastic bag which is emptied every 15-20 minutes.

[77] Mr Neville told the Authority that he was present during the Taupo refit. He disputed Ms Twentyman's evidence that there were clouds of dust and that workers were throwing bags of dust and were completely covered in it. Mr Neville said he did not witness any clouds of dust and certainly did not see anyone throwing dust around.

[78] Mr Neville's evidence is that masks and goggles were made available to the nightfill supervisor and he himself also had stocks of masks and goggles. The instruction to the supervisor was that employees should wear the mask and/or goggles if they had any concerns.

[79] I find Ms Twentyman's evidence about the dates on which the refit took place, the number of days she was exposed to dust during the refit and the extent of symptoms suffered by not only herself, but others in the workplace to be unreliable. The removal of the carpet and old shelving took place between 26 and 29 March 2012. During that period Ms Twentyman was present at work for only one day, 27 March 2012. Dr Fraser's records show that Ms Twentyman complained to him about dust related symptoms on 5 April 2012 and not in March as asserted by Ms Twentyman.

[80] I find Ms Twentyman's claim that TWL breached the implied terms of her employment agreement have not been substantiated.

Failure to maintain a relationship of trust, confidence and fair dealing

[81] Ms Twentyman's claim under this heading is that between 3 February 2013 and 3 July 2012 TWL attempted to deny the injury suffered by her and/or denied it was a workplace injury. Further she claims TWL acted in an unsupportive and unconstructive manner towards her and in doing so breached the implied terms of the employment agreement relating to trust and confidence in the work environment.

[82] For the reasons that follow, I find this claim is not substantiated.

- [83] The incident occurred on 3 February 2012. Ms Nicholson confirmed she had had discussions with both Ms Twentyman and the Nightfill supervisor about the incident the day after it occurred.
- [84] Ms Twentyman alleges that the incident was recorded either on a piece of paper which was placed into the Nightfill book or was recorded on a page in the Nightfill book and the page or paper was then removed by Ms Nicholson. In any event, Ms Twentyman continued to work for two weeks following 3 February 2012, before taking two days sick leave on 18 and 19 February 2012.
- [85] Ms Twentyman worked normally on 20 and 21 February 2012 before commencing a period of annual leave on 23 February 2012 returning to work on 2 March 2012. Ms Twentyman worked normally until and including 11 March 2012.
- [86] Ms Twentyman was absent on 12 and 13 March and was rostered off on 14 and 15 March 2012. She attended Dr Fraser on 16 March 2012 and was signed off work until 26 March 2012. This was the first medical certificate provided to TWL.
- [87] Care Advantage completed an Initial Action Plan dated 20 March 2012 which was signed by Ms Twentyman on 22 March 2012. This document was provided to TWL. This was the first notification to TWL that there had been an injury requiring medical assistance. Concerns were raised by Ms Rison that the details set out in the documentation did not add up. This was because Ms Twentyman had continued to work normally for more than a month after the recorded date of the injury.
- [88] When Ms Twentyman arrived at work on 26 March 2012 she signed an Accident and Hazard Initial Report form which was then completed by Ms Rison and Ms Nicholson on 28 March 2012. She then continued to work normally until 3 April when she was rostered off. Ms Twentyman was declared unfit for work for the period 5 – 23 April 2012 and then again from 23 April 2012 for a period of 30 days.

- [89] From 26 March 2012 to 3 May 2012 Ms Rison undertook an investigation into the injury suffered by Ms Twentyman and concluded that the incident had been recorded on a piece of paper which was loosely placed into the Nightfill book and was then lost.
- [90] Following the investigation and during a further period of being unfit for work Care Advantage commenced paying Ms Twentyman weekly compensation entitlements. TWL was unable to explain why Ms Twentyman did not receive ACC payments until early July 2012. Ms Rison told the Authority that when she was advised Ms Twentyman was not receiving weekly compensation she took immediate steps to rectify the situation.
- [91] TWL accepts there were delays in processing the documentation to initiate the payments of weekly compensation but says that once it was brought to TWL's attention immediate steps were taken to address the non-payment.
- [92] At a meeting with Ms Twentyman on 10 July 2012 Ms Jane Clare, from Care Advantage explained to Ms Twentyman that the delay had been caused by its office and not TWL. Ms Clare apologised for the delay. During that meeting Ms Twentyman argued that the delay was caused by Ms Rison ticking the wrong box on her form. Ms Clare explained that the incident claim form Care Advantage received had the comment "*I am unsure that this is a work injury/disease*".
- [93] The reason for this comment was Ms Rison's concern that the injury was reported to have occurred on 3 February 2012, that Ms Twentyman continued to work normally until April 2012 and that she did not see a doctor about the injury until more than a month after the injury occurred.
- [94] I find that TWL acted promptly once the non-payment issue had been raised by Ms Twentyman and that the delays in commencing payment rested with Care Advantage and not with TWL. TWL has not breached the implied terms of Ms Twentyman's employment agreement.

Failure to provide a work environment and management processes so that undue stress will not be caused to an employee

[95] It is not clear what the allegations are regarding this claim. I have therefore assumed the claim is based on Ms Twentyman's injury and the processes put in place to manage her return to work.

[96] For the reasons set out below I do not accept Ms Twentyman has established any breach by TWL in relation to this claim.

[97] The evidence supports a finding that TWL has at all times supported and been constructive in its manner towards Ms Twentyman. For example:

- a) Ms Rison took steps to address the non-payment issue as soon as it was brought to her attention;
- b) TWL investigated each of Ms Twentyman's complaints and criticisms as they were raised by her; and
- c) At all times TWL demonstrated its willingness to establish and implement a return to work program taking into account Ms Twentyman's physical limitations; and
- d) The tape recordings of the meetings produced by Ms Twentyman during the investigation meeting demonstrate Ms Rison and Ms Wooding treated Ms Twentyman with respect throughout the meetings. This conclusion is supported by the notes taken at the 10 July 2012 meeting where Ms Twentyman acknowledged she had been supported by Ms Wooding.

Conclusion

[98] I find the evidence does not establish that TWL has breached any of Ms Twentyman's implied or express terms of her employment agreement.

Did Ms Twentyman raise a personal grievance within the requisite 90 day period

[99] Section 114(1) of the Employment Relations Act 2000 (the Act) provides for employees who wish to raise a grievance with their employer to do so within 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 unless the employer consents to the personal grievance being raised after the expiration period. Consent can be either express or implied by conduct.

[100] The question of what is required to raise a personal grievance claim was addressed by the Employment Court in *Creedy v Commissioner of Police*¹. In that case, the Court held:²

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So 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 ... in this case. As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. ... That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

... It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond on its merits with a view to resolving it soon and informally, at least in the first instance.

[101] Ms Twentyman wrote to TWL on 3 April 2012 complaining about the actions of Ms Nicholson. The letter of 3 April 2012 does not raise a personal grievance with respect to the incident of 3 February 2012 and which led to the shoulder injury but is a general complaint letter about how she is being treated by Ms Nicholson. The letter also states that Ms Twentyman “...will be lodging a personal grievance...”.

[102] This letter raises grievances Ms Twentyman has with her supervisor, but does not raise a personal grievance with respect to either of the matters raised in the statement of problem and which the Authority has been asked to investigate.

¹ [2006] ERNZ 517.

² Ibid at [36] – [37].

- [103] The letter raised grievances by providing sufficient information to allow TWL to address the concerns and investigate them. Following that investigation the parties met to discuss the letter and its contents in a meeting on 3 May 2012. Ms Rison and Ms Twentyman discussed each of her complaints about Ms Nicholson but Ms Twentyman did not want any of the complaints further investigated and was not forthcoming in providing further details including the names of people Ms Twentyman alleged could support her complaints. I am satisfied that on 3 May 2012 Ms Twentyman did not wish to take the matters raised in her letter of complaint any further and her concerns about Ms Nicholson had been addressed.
- [104] On 14 March 2013 Ms Twentyman, through Counsel raised a personal grievance in respect to two matters. The first was in relation to the injury suffered by Ms Twentyman on 3 February 2012. The second was the concrete dust issue which the letter says occurred in February 2013.
- [105] The raising of a personal grievance on 14 March 2013 for the incident which occurred on 3 February 2012 is well outside the requisite 90 day time period. No application for leave to raise a grievance outside that timeframe has been made to the Authority.
- [106] The evidence establishes that the refit of the Taupo store took place in March 2012 and not February 2013 as claimed in the letter dated 14 March 2013. At no time before 14 March 2013 did Ms Twentyman raise a personal grievance in respect of the concrete dust issue. The personal grievance relating to the concrete dust issue has not been raised within the requisite 90 day period. No application for leave to raise a grievance outside that timeframe has been made to the Authority.
- [107] On 16 April 2013 Ms Twentyman handed a typewritten letter to Mr Vaughan which purportedly raised a personal grievance for the treatment she had received from Care Advantage and the Managers of the Warehouse, Taupo. Ms Twentyman requested mediation with the Department of Labour about her wages and the Warehouse safety practices and the treatment provider, Care Advantage.

[108] The letter does no more than put TWL on notice that Ms Twentyman was raising a grievance but does not contain any further particulars. The information contained in Ms Twentyman's 16 April 2013 letter is insufficient to allow TWL to address it by responding on its merits with a view to resolving it quickly and informally. I find the letter of 16 April 2013 does not raise a personal grievance as contemplated by section 114 of the Act.

Was there implied consent to the raising of grievances outside the 90 day period?

[109] As this was an ongoing employment relationship, TWL was concerned to address Ms Twentyman's concerns. Despite TWL's view, (as expressed in its letter dated 28 March 2013) that Ms Twentyman did not have a valid personal grievance the parties attended mediation on 5 June 2013.

[110] Ms Twentyman says that by its actions TWL has impliedly consented to the personal grievance being raised out of time and so cannot rely on the upon the 90 day limitation.

[111] The test of whether there is implied consent is a matter of fact and degree. The question to be determined is whether the employer so conducted itself that it can reasonably be taken to have consented to an extension of time.³

[112] The Authority must examine the events which occurred between the receipt by TWL of Ms Twentyman's letter raising personal grievances and determine whether those events establish an implied consent.

[113] I have found the letter from Ms Twentyman dated 3 April 2012 did not raise a personal grievance related to the matters now before the Authority and the 16 April 2013 did not meet the test of raising a personal grievance. Therefore, I have focused on the letter dated 14 March 2013 and whether the out of time personal grievances set out in that letter were consented to by TWL.

³ *Vulcan Steel v Wonnocott* [2013] NZEmpC 15 at [22], quoting *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381.

[114] Ms Mary Marshall, Employment Relations Manager, responded to the 14 March letter on 28 March 2013. TWL sets out from the outset that it does not accept Ms Twentyman has raised a valid claim although it does not raise any question of non-compliance with the 90 day time limit. The letter also raises concerns that the matters raised by Ms Twentyman occurred 12 months earlier. Ms Marshall confirms TWL was prepared to attend mediation and the parties did so on 5 June 2013.

[115] Ms Marshall's uncontested evidence is that she had become aware that Ms Twentyman had a number of concerns with her treatment by TWL which extended beyond those outlined in the letter dated 14 March 2013. TWL had been trying to manage these issues and make progress on them and so she considered mediation would be an effective next step. TWL has previously attended mediation about out of time claims when the employee has an ongoing employment relationship as it sometimes assists in resolving matters.

[116] I find TWL did not either expressly or impliedly by its conduct, consent to the raising of Ms Twentyman's personal grievances outside the requisite 90 day time period.

Has Ms Twentyman been disadvantaged in her employment?

[117] As I have found the matters before the Authority relating to personal grievances were not raised within the 90 day period and TWL did not consent to the raising of grievances outside the 90 day period it is not necessary for me to make any findings under this heading.

Counter-claim

[118] TWL claims Ms Twentyman has breached the following express and implied terms of her employment agreement and that these breaches also give rise to a breach of good faith:

- a) Not raising issues relating to her health and safety in an appropriate and timely fashion;
- b) Obstructing TWL's management of her rehabilitation;

- c) Providing incomplete, inaccurate, untrue and/or misleading information to TWL and Care Advantage in relation to her condition.

[119] In resolution of its counter-claim TWL seeks penalties and asks that all or part of the penalties be paid to TWL.

Failure to raise issues relating to Ms Twentyman's health and safety in an appropriate and timely fashion

[120] TWL's house rules require all employees to report all workplace accidents, injuries, and illness as soon as they become aware of them.

[121] The evidence establishes that Ms Twentyman raised with her supervisor the fact that she had suffered an injury to her shoulder on the night it occurred. TWL took no further action as Ms Twentyman continued to work normally, undertook a period of annual leave, and returned to work following the completion of her annual leave without the need for any medical intervention.

[122] Ms Twentyman raised an issue about dust as a result of the refit with Ms Wooding on or about 4 April 2012. Ms Twentyman raised concerns about others but not about the effects on herself and the issues were promptly investigated. No further mention of this was made until the letter of 14 March 2013.

[123] Ms Twentyman then raised the dust issue with her doctor. The evidence establishes that Ms Twentyman advised Dr Fraser about her concerns with the dust on or about 5 April 2012. In his evidence, Dr Fraser confirmed he did not observe any of the symptoms Ms Twentyman now complains about, but described Ms Twentyman as suffering from "*a bit of an allergy*". Dr Fraser also advised that Ms Twentyman had experienced some chest changes "*...but nothing major going on*". Overall my impression is that Dr Fraser was unconcerned about the impacts, if any, the dust had had on Ms Twentyman's health.

[124] I find Ms Twentyman did raise issues with TWL in respect of the dust issues and her concerns about the impact the dust was having on other employees. The matter was investigated by TWL and no further action was deemed necessary to be taken at that time.

[125] Ms Twentyman has not breached the express or implied terms of her employment agreement by failing to raise issues relating to her health and safety in an appropriate and timely manner and is not in breach of her duties of good faith.

Obstructing TWL's management of Ms Twentyman's rehabilitation

[126] TWL has contracted to ACC to provide aspects of ACC's statutory obligations with respect to employee injuries. This means that TWL was responsible for the management of Ms Twentyman's work related injury.

[127] TWL claims Ms Twentyman has failed to comply with the Rehabilitation Plan stipulated by Care Advantage, including failing to attend appointments with medical professionals and by failing to attend meetings with TWL. Further TWL claims Ms Twentyman breached her obligations when she contacted the media in relation to her treatment by TWL, providing a medical certificate certifying that she was medically unfit for work and not expected to return to the workforce for one to two years and engaging in inappropriate text message communications with Ms Wooding.

[128] TWL claims these actions have obstructed TWL's management of her rehabilitation. TWL says it and Care Advantage have been unable to assess the veracity of the information Ms Twentyman has been provided and whether and in what capacity Ms Twentyman can return to work.

[129] The evidence shows that Ms Twentyman failed to attend all the required weekly meetings with her manager. While the evidence shows Ms Twentyman did not complete the consent forms in a timely manner once Ms Twentyman received a warning letter the forms were completed and returned to Care Advantage.

[130] From the evidence I find on balance Ms Twentyman did not cooperate with TWL and obstructive with both TWL and Care Advantage which made managing her rehabilitation back to work extremely difficult.

[131] The evidence demonstrates that Ms Twentyman supplied Dr Fraser with inaccurate and misleading information on which Dr Fraser then relied in producing medical certificates to the effect that Ms Twentyman was unfit for work. These medical certificates from Dr Fraser were inconsistent with the information TWL was receiving from Ms Twentyman's specialist who was encouraging Ms Twentyman to return to work.

[132] Ms Twentyman's conduct of being obstructive in the management of her rehabilitation and in providing misleading information to Dr Fraser who then acted on that information to continue Ms Twentyman's access to weekly compensation is a breach of the implied terms of her employment agreement and is a breach of her duty to act in good faith.

Providing incomplete, inaccurate, untrue and/or misleading information to TWL and Care Advantage in relation to Ms Twentyman's condition.

[133] In support of its claims under this heading TWL relies on the surveillance reports, together with the inconsistent advices from the various medical professionals who relied on Ms Twentyman's self reporting, and Ms Twentyman's misleading reporting to Dr Fraser.

[134] It is apparent from the surveillance reports that Ms Twentyman had much greater use of her arm than she reported to TWL, Care Advantage or medical professionals. Dr Dryson assessed Ms Twentyman's shoulder in December 2013 and reported that she could only abduct her arm 25 degrees. This report is inconsistent with the activities Ms Twentyman was observed undertaking in December 2013 and January 2014 and the range of motion demonstrated during the surveillance period.

[135] Also inconsistent with Dr Dryson's report is Ms Twentyman's ability to drive her own manual car as a result of the injury. This aspect of Dr Dryson's report is based solely on reporting from Ms Twentyman and is inconsistent with the

observations made of Ms Twentyman driving her car during the surveillance period.

[136] I find on balance it is more likely than not that Ms Twentyman has provided medical professional's information which is misleading with respect to her physical capacities at times when decisions about her ability to undertake work duties were being made. As a consequence TWL has been unable to assist Ms Twentyman in returning to work in a considered way with the ultimate goal of having Ms Twentyman return to full normal duties.

[137] I find Ms Twentyman's obstructive and uncooperative conduct is a breach of the implied terms of her employment agreement and her duty to conduct herself in good faith.

Penalties

[138] I have found that Ms Twentyman has breached the express and implied terms of her employment agreement as well as her duties of good faith. I view Ms Twentyman's breaches seriously. It is important that medical professionals and employers are able to trust the veracity of the information employees provide to them when decisions about the capacity of employees to return to work are being made. Employers must be able to rely on the information provided by medical professionals when medical professionals assess employees as being unfit to work.

[139] The Employment Relations Act 2000 expressly provides for employees who are found to be in breach of their employment agreements and good faith to be subject to penalties.⁴

[140] The submissions made on behalf of Ms Twentyman does not address the counter-claims made by TWL or the claims for penalties. Ms Twentyman's evidence regarding the claim for penalties was to simply deny the breaches.

⁴ Employment Relations Act 2000, section 133(1)(a), 4A(a).

[141] Penalties are designed to punish and deter others from engaging in similar conduct.⁵ I find this case warrants the imposition of a penalty and I have taken a global approach to exercising my discretion in that regard. Ms Twentyman's conduct in providing misleading information and being obstructive was deliberate conduct, was serious and sustained over a long period of time.

[142] I consider a total penalty of \$1,500 to be justifiable. The Authority has the discretion to award the whole or any part of the penalty to TWL.⁶ I have determined that in this case it is appropriate for the penalty to be paid to TWL.

[143] Ms Twentyman is ordered to pay the penalty of \$1,500 to TWL within 28 days of the date of this determination.

Costs

[144] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so TWL shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms Twentyman shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority

⁵ *Tan v Yang & Zhang* [2014] NZEmpC 65.

⁶ Employment Relations Act 2000, section 136(2).