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Twentyman v The Warehouse Limited [2016] NZEmpC 172 (20 December 2016)

Last Updated: 22 December 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 172](#)

EMPC 55/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN BARBARA TWENTYMAN Plaintiff

AND THE WAREHOUSE LIMITED Defendant

Hearing: 27, 28, 29 and 30 June 2016 (heard in Rotorua)

Appearances: Plaintiff in person

P Swarbrick and M McGoldrick, counsel for the defendant

Judgment: 20 December 2016

JUDGMENT OF JUDGE K G SMITH

Introduction

[1] Ms Barbara Twentyman claims to have personal grievances against The Warehouse Limited (TWL), arising from two incidents she says occurred at work; a shoulder injury sustained while handling a heavy packing case and other health problems caused by inhaling concrete dust during the refitting of TWL's Taupo store where she worked.

[2] The Employment Relations Authority (the Authority) dismissed Ms Twentyman's proceeding because it held she did not raise her grievances within time.¹ A penalty was imposed on Ms Twentyman for a breach of good faith and for a

breach of her employment agreement. Ms Twentyman challenges those decisions.

¹ *Twentyman v The Warehouse Ltd* [2015] NZERA Auckland 39.

BARBARA TWENTYMAN v THE WAREHOUSE LIMITED NZEmpC AUCKLAND [\[2016\] NZEmpC 172](#) [20 December 2016]

TWL says Ms Twentyman's claims are not personal grievances, if they are they were not raised in time, and the penalty was justified.

Background

[3] Ms Twentyman began work as a casual employee in TWL's Taupo store on

19 June 2009. On 1 March 2010, she joined the permanent workforce.

[4] Her work included night-filling duties, in a department called "Head to Toe" or "H2T", referring to the clothing and shoe department. Her duties included unpacking clothing from large packing cases called stillages, followed by sorting that clothing for sale by size and colour (referred to as colour-blocking and sizing). When full the stillages are heavy requiring more than one person to lift them. Empty stillages are also reasonably heavy and they are awkward to handle because of their size.

Shoulder injury

[5] On 3 February 2012, Ms Twentyman injured her left shoulder while handling a stillage she had emptied. While the injury was reported to a supervisor that night, a formal report describing the incident was not completed until 3 May 2012. In that report she described her injury as having occurred when she pushed an empty stillage to the edge of the full stillage on which it was sitting and gripped the base of it to stop it from falling onto the floor. She leaned forward to stop the stillage tipping over, and succeeded in doing so before it hit the floor, but felt a pain in her shoulder.

[6] Despite sustaining this injury Ms Twentyman continued to work. Aside from rostered days off, leave days, and two days on sick leave she worked as normal. On

16 March 2012, she obtained a medical certificate from her doctor, Dr Fraser, who certified her as unfit to work for 10 days. Dr Fraser certified Ms Twentyman as unable to continue her normal hours of work or to do selected or alternative duties.

[7] A claim for accident compensation under the Accident Compensation Act

2001 for a work-related injury was made on 19 March 2012. The Accident

Compensation Corporation (ACC) advised Ms Twentyman that TWL, as an accredited employer under the ACC Partnership Programme, would manage all aspects of her claim. She was advised by ACC that this management would include deciding what help she may be eligible for such as treatment costs or weekly compensation. TWL contracted management of its obligations under that partnership programme to Care Advantage (later known as Gallagher Bassett Care Advantage).

[8] On 26 March 2012 Ms Twentyman resumed work.

3 April letter

[9] On 3 April 2012 Ms Twentyman gave a letter to the Taupo Store Manager, Ms Sally Rison, complaining about Ms Te Rangi Nicholson who at that time was the store's Assistant Manager. Ms Twentyman's letter stated she was raising a personal grievance. The relevant parts of this letter begin at para 2 where Ms Twentyman wrote: **[CBD pg 161]**

2. I injured my shoulder one night while working and informed Frank and Mari who filled out the [night-fill] book (neither knew where the H & S Accident/[Incident] forms were or how to fill them out). Because of my injury I took 2 sick days off and when I returned Te Rangi pulled me up into the [manager's] office and said that [I'm] lying about my shoulder because I wrote the letter about being left out of the loop with the training at Fraser Cove.

[10] That complaint was followed by four amplifying paragraphs. In the paragraph numbered 3 Ms Twentyman wrote:

3. I took 10 days annual leave because my shoulder was very sore hoping it would recover. I came back and started my shift as usual and came across some chair covers in the furniture aisle, Daicy was there so I asked her where they came from and that they were on clearance. She advised that she [wasn't] sure where they came from and that they were on clearance. I put them on hold so I could purchase them the next day. When I came in the next day I [couldn't] find them so I started asking the team members if they had seen them. I then went to Te Rangi and I asked her if she has seen the chair covers, she informed me that she will call me up to the office to discuss them. She said that I had stashed them, that it was suspicious that they turned up when I came back from leave and that she will be doing a full investigation on me. I was informed by our security officers that this matter had been taken too far which I agreed with.

[11] The letter continued:

4. I felt very belittled and abused when Te Rangi introduced me to "my replacement" and that I will no longer be doing [stillages]. To rub salt in [the] wound she also stated that my replacement does a better job as I [don't] colour block and size.

5. I was informed by my supervisor that Te Rangi had said that she [doesn't] see what I do at nights. This hurts my feelings as I [genuinely] enjoy my job and put 100% into everything I do in H2T.

6. When I called Te Rangi today to inform that her that my shoulder is actually broken her reply was "I [don't] care, as long as you turn up for work tonight", which again hurt my feelings.

[12] Ms Twentyman's letter ended:

This whole situation is causing me so much stress physically and mentally and it is now causing [financial] stress as my case manager at ACC has informed me that my paperwork has been lost by Te Rangi. My case manager also advised me that the reason Te Rangi [couldn't] fill in my paperwork is because I [couldn't] be contacted because I live out of town when [in fact] I was in town.

[13] Ms Nicholson responded and in her reply rejected these complaints. Ms Nicholson acknowledged there had been a conversation between her and Ms Twentyman about chair covers, but it did not involve any allegation of impropriety. She

denied introducing Ms Twentyman to her replacement, because there was no replacement. Ms Nicholson said that she never said, or suggested, Ms Twentyman had lied about her injury. She denied making any statement to the effect that she did not care about what had happened as long as Ms Twentyman turned up for work. For completeness, Ms Nicholson also denied that she had lost or removed any paperwork relating to Ms Twentyman's ACC claim, adding that she did not have anything to do with administering that claim.

[14] Ms Rison investigated these complaints and invited Ms Twentyman to a meeting to discuss them. Throughout this inquiry Ms Rison treated Ms Twentyman's complaints as personal ones about Ms Nicholson. In any event, by agreement, the investigation into these complaints ended on 8 May 2012, because Ms Twentyman did not want matters to be taken any further.

Remaining unfit for work

[15] Ms Twentyman worked for several hours on 27 March 2012 and then worked normally from 30 March to 3 April 2012. However, on 5 April 2012 she was diagnosed as having a rotator cuff sprain and acute sub-acromial bursitis rendering her unfit for work. The medical certificate provided for Ms Twentyman said she would be able to return to work on 23 April 2012. However, on 19 April 2012 a further medical certificate was provided certifying Ms Twentyman as unable to work for 30 days. On 15 May 2012, another medical certificate was provided certifying her as unfit to work for 30 days and confirmed that she had been referred to a medical specialist. That medical certificate was renewed on 12 June 2012 when Ms Twentyman was again certified as unfit for work for 30 days. Throughout this period when Ms Twentyman was unfit for work, her claim for ACC compensation was being processed by Care Advantage. That claim was finally accepted on

3 July 2012 and weekly compensation started.

[16] On 10 July 2012, Ms Twentyman provided another medical certificate certifying her as unfit to work for 30 days. On 18 July 2012, and again on

26 July 2012, Ms Twentyman participated in a rehabilitation monitoring meeting with her manager, Ms Rison, that discussed her possible return to work performing light duties.

[17] On 31 July 2012, two conflicting medical certificates were received by TWL. The first one certified Ms Twentyman as unfit to work for 30 days from

6 August 2012. The second one declared her fit to work three hours per day, four days per week for eight weeks from 6 August 2012. That second medical certificate was followed by further discussions with Ms Twentyman about light duties. Ms Twentyman's doctor confirmed her suitability for light duties provided she did not work above head height, work with her damaged arm, or lift weights of more than one kilogram. By 10 April 2013, Dr Fraser was able to further certify Ms Twentyman as eligible for light duties provided the tasks assigned to her did not include heavy lifting, pulling, carrying, or repetitive movements.

[18] TWL considered colour blocking and sizing were light duties complying with

Dr Fraser's certificates. In anticipation of her return to work there were meetings

between TWL, Care Advantage and Ms Twentyman to discuss her rehabilitation and to write a rehabilitation plan including providing for light duties. The first rehabilitation plan was signed on 10 July 2012. As part of that plan she agreed to participate in a workplace assessment and in a proposed programme to gradually return to work. Its stated purpose was to have her return to work on or before

7 August 2012.

[19] Part of this plan was an agreement by Ms Twentyman to meet TWL's Taupo Manager weekly, to complete a rehabilitation monitoring form, and to identify any issues or concerns she might have. Ms Twentyman was also to provide medical certificates to TWL, and Care Advantage, reflecting her capacity or incapacity for work until a full clearance was obtained. She accepted responsibility for contacting TWL and/or Care Advantage if her circumstances changed. Subsequently Ms Twentyman did not complete rehabilitation plans despite requests to do so.

[20] Ms Twentyman resumed work on light duties on 13 August 2012 working first three then four hours each day, three days each week. She did not undertake any duties for TWL after 29 October 2012.

[21] Eventually, on 6 November 2012, Ms Twentyman had an operation on her shoulder. The following day her surgeon provided a medical certificate declaring her unfit for work for 14 days. That certificate was updated on 20 November 2012 when she was declared unfit to work for 50 days. A subsequent certificate declared her unfit to work for 60 days from 7 January 2013. That certificate was followed by Dr Fraser's certificate of 10 April 2013 previously mentioned. However, on

17 April 2013, Dr Fraser certified Ms Twentyman as unfit for all work from that date for 30 days. These certificates

culminated in one dated 7 October 2013 declaring her unfit for work, but stating that she was expected to return to the workforce within one to two years when her shoulder had completely recovered.

Le Pine & Co letter

[22] Matters reached a head on 14 March 2013 when Ms Twentyman's lawyers, Le Pine & Co, wrote to TWL to raise personal grievances on her behalf. That letter made the following allegations:

1. TWL failed to protect Ms Twentyman's safety by not providing assistance for heavy lifting;
2. There were breaches of good faith in dealing with her injury; and
3. TWL failed to protect her health by subjecting staff to breathing concrete dust.

[23] The first of these allegations was about Ms Twentyman's accident on

3 February 2012. The alleged breach was of TWL's health and safety obligations to her by failing to provide sufficient staff to assist with heavy lifting or instructing staff not to assist with heavy lifting.

[24] The breaches of good faith referred to included an allegation that Ms Twentyman's supervisor had completed an accident report in the night-fill book, but the relevant page from the book had been ripped out. Ms Nicholson was also said to have disputed there being any report about the incident, alleging Ms Twentyman had been lying about having claimed to have hurt herself 'on the job'. That allegation was coupled with a complaint that TWL had been actively resisting Ms Twentyman obtaining ACC weekly compensation.

[25] Finally, Le Pine & Co made allegations on Ms Twentyman's behalf that she had been exposed to concrete dust caused by grinding or sanding the floor of the Taupo store, claiming that she, and other staff, were subjected to breathing concrete dust each night during a refit. This letter claimed Ms Twentyman was "subjected to nightly breathing fine white concrete dust" during what was said to be a six-week refit and that no safety equipment had been provided. The working environment in the store was described as "like working in a white cloud". The extent of the injuries suffered by Ms Twentyman were described as:

Ms Twentyman was not provided with glasses or a facemask to protect her eyes and lungs. Ms Twentyman suffered swollen eyes, coughing, nausea and discomfort. Along with her injured shoulder her ailments from inhaling the dust resulted in her declining to continue to work.

[26] It was said that Ms Twentyman was not provided with safety glasses or a face mask to protect her eyes and lungs.

[27] This letter was the first occasion on which a claim had been made on Ms Twentyman's behalf that a page had been removed from the night-fill book or about an alleged health risk caused by inhaling concrete dust.

[28] Le Pine & Co's letter concluded with an assertion that TWL's way of dealing with Ms Twentyman's injury was eroding the employment relationship and needed to be addressed. An invitation to attend mediation was extended to TWL.

[29] TWL replied on 28 March 2013. It did not accept Ms Twentyman had a valid personal grievance.

[30] In due course Care Advantage made a decision to stop Ms Twentyman's weekly ACC compensation because of difficulties experienced in having her continue to participate in her rehabilitation planning and for refusing to attend meetings to address her rehabilitation. Weekly compensation payments ceased, although that decision was subsequently reversed by an ACC reviewer.

[31] By June 2013 TWL had become suspicious of Ms Twentyman, and organised surveillance of her by a licensed private investigator; Mr Gasser-Gray. The private investigator's reports were relied on to support the penalty that was imposed by the Authority and to cast doubt on her evidence.

[32] Ms Twentyman's employment was terminated for serious misconduct on

2 March 2015. There is no separate challenge of that dismissal before the Court.

The Authority's determination

[33] Ms Twentyman's proceeding in the Authority alleged breaches of express and implied terms of her employment agreement and personal grievances.

[34] The Authority dismissed all of Ms Twentyman's claims. In doing so it held that her alleged personal grievances had not

been raised within time and that TWL

had not consented to them being raised late. The Authority accepted TWL's claim that Ms Twentyman had breached her duty of good faith and an implied term of her employment agreement. A penalty of \$1,500 was imposed on her and made payable to TWL.

The Challenge

[35] Ms Twentyman's challenge was confined to her alleged personal grievance for unjustified disadvantage in her employment. Initially, the remedies claimed by Ms Twentyman were inadequately articulated in her pleadings. Following a direction by the Court, she filed a memorandum stating the monetary remedies being claimed as follows:

- a) For the period from 5 April 2012 to 13 July 2012 the difference between what she received of \$3,956.32 (net) and what she said she should have received of \$8,380 (gross).
- b) For the period 1 September 2013 to 30 November 2013 payment of wages based on a 40-hour week at a rate of \$15.46 (gross) per hour.
- c) Reimbursement for lost holiday pay. Ms Twentyman was seeking payment for 136 hours of leave of \$15.46 (gross) per hour.
- d) Payment for 10 days sick leave from 16 March 2012 to 23 March 2012, at a rate of \$15.46 (gross) per hour for eight hours per day.
- e) Reimbursement of physiotherapy and doctors' surcharges of \$345.
- f) The difference between the wages she would have received as a full-time employee of TWL, and the compensation she received as her ACC entitlement for the period starting on 21 April 2012 to the date of her memorandum, which was 26 February 2016.

[36] TWL denied any personal grievances had been raised within time and sought to preserve the penalty that was imposed. It also pleaded that there were no wages,

holiday pay or other sums to which Ms Twentyman was entitled that were unpaid. It also relied on [s 317\(1\)](#) of the [Accident Compensation Act 2001](#).

The issues

[37] The issues in this case are:

a) Did Ms Twentyman have personal grievances which she raised with TWL within the period of 90 days beginning with the date on which the actions alleged to amount to personal grievances occurred?

b) If her personal grievances were not raised within those 90 days has

TWL consented to them being raised after the expiration of that period?

c) If Ms Twentyman raised her personal grievances within those 90 days, or TWL consented to them being raised after the expiration of that period, has Ms Twentyman suffered any disadvantage within the meaning of [s 103\(1\)\(b\)](#) of the [Employment Relations Act 2000](#) (the Act)?

d) If Ms Twentyman has suffered a disadvantage, what remedies (if any)

should be awarded?

e) Should a penalty have been imposed on Ms Twentyman and, if so, in what amount?

Did Ms Twentyman have personal grievances which she raised with TWL within 90 days?

[38] In her amended statement of claim, Ms Twentyman pleaded that her personal grievances arose from breaches of her employment agreement with TWL by that company:

a) failing to provide a healthy and safe workplace; and

b) failing to maintain a relationship of trust, confidence and fair dealing.

[39] No issue was taken by TWL as to whether the alleged breach of failing to maintain a relationship of trust, confidence and fair dealing had been raised in the letters of 3 April 2012 or 14 March 2013. Ms Twentyman relied on those letters as having

raised her personal grievances. There was no evidence they had been raised in any other way.

Section 114

[40] A personal grievance must be raised 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. That period is contained in [ss 114\(1\)](#) and (2) of the Act which read:

114 Raising personal grievance

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

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

...

[41] If the employer does not consent to the personal grievance being raised after the expiration of that 90-day period an application may be made to the Authority for leave to do so.²

[42] No formality is required to raise a personal grievance. In *Creedy v Commissioner of Police*³ the Court considered whether a claim for unjustified disadvantage had, in that case, been raised within 90 days to comply with [s 114\(1\)](#) of the Act. In *Creedy* the employee's representative had written a letter to the

Commissioner of Police stating:⁴

² [Employment Relations Act 2000, s 114\(3\)](#).

³ *Creedy v Commissioner of Police* [\[2006\] NZEmpC 43](#); [\[2006\] ERNZ 517 \(EmpC\)](#).

... by this letter Sergeant Creedy serves notice that he commences a personal grievance with you pursuant to [s 103](#) of the [Employment Relations Act 2000](#)

...

[43] The letter to the Commissioner also said:⁵

It is claimed that one or more of Sergeant Creedy's conditions of employment is or are affected to his disadvantage by the unjustified way in which you, as his employer have applied the disciplinary process to him.

[44] The Commissioner's immediate response was to ask for details of the alleged unjustified actions. No answer was provided. The Court concluded that this letter was insufficient to raise a personal grievance.⁶ The Court held that raising a personal grievance is:⁷

... the notion of the employee wanting the employer to address the grievance that means 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, for example, unjustified disadvantage in employment ...

[45] Later in the decision the Court said:⁸

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 to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[46] In *Creedy* the Court was satisfied a personal grievance had not been raised within time. The best indication of the failure to do so was the response from the Commissioner, not accepting a grievance had been raised and asking for further information.⁹

[47] With that background, it is necessary to consider the letters of 3 April 2012 and 14 March 2013.

⁵ At [31].

⁶ At [35].

⁷ At [36].

⁸ At [37].

[48] Ms Swarbrick, counsel for TWL, submitted that Ms Twentyman's letter of

3 April 2012 did not raise personal grievances. This letter was intended to complain about Ms Nicholson and was understood in that way by Ms Twentyman and TWL. She submitted that the letter was not about TWL's failure in its duty to provide a healthy and safe workplace arising from either the shoulder injury, the dust complaint, or for not maintaining a relationship of trust, confidence and fair dealing.

[49] I agree with those submissions. Ms Rison treated this letter as a complaint by one staff member about another staff member and investigated it in that way. Ms Twentyman knew her letter was being treated as such and did not object, or otherwise indicate it contained personal grievances for TWL to address.

[50] Read as a whole, references in that letter to the shoulder injury were only provided as a backdrop for the complaint about Ms Nicholson. It is mentioned in paras 2, 3 and 6, but only to justify the other comments that were made. Furthermore, the letter does not mention concrete dust, or the allegation that Ms Twentyman was not supplied with safety equipment to protect her from that dust.

[51] Finally, even if personal grievances were raised in that letter, they were resolved on 8 May 2012 when Ms Rison and Ms Twentyman agreed the complaint would not be taken any further.

[52] The next matter is whether the letter from Le Pine & Co raised personal grievances. As has already been discussed, several alleged breaches by TWL were stated in that letter.

[53] That letter contained sufficient information to raise personal grievances within the meaning of [s 114\(1\)](#) of the Act. It described the alleged breaches, provided adequate background information about them, and invited TWL to address them at least to the extent of attending mediation "to see if these issues can be worked through". However, that letter was written more than a year after she sustained her shoulder injury and just short of a year after work on grinding the floor in the Taupo store had occurred. No application had been made to the Authority for leave to raise a grievance outside of the 90-day period.

[54] It follows that Ms Twentyman did not raise her personal grievances with

TWL within the 90-day period required by [s 114\(1\)](#) because her letter of

3 April 2012 was insufficient to do so and the Le Pine & Co letter was too late.

If her personal grievances were not raised within those 90 days has TWL consented to them being raised after the expiration of that period?

[55] Having not raised her grievances within time, or obtained leave from the Authority to raise them, the next issue is whether TWL nevertheless consented to them being raised after that period.

[56] TWL elected to respond comprehensively by addressing each allegation. Its reply was written by Ms Marshall, its Employment Relations Manager, and began by stating the company did not accept Ms Twentyman had a valid personal grievance. However, the way that remark was made indicated it was a commentary on the substance of the allegations making up Ms Twentyman's personal grievances and was not an attempt to take any point about the timeliness of Le Pine & Co's letter. TWL pointed out that the refit started in 2012 not 2013 as Le Pine & Co stated. It disputed the assertion that Ms Twentyman did not have assistance with lifting heavy objects. It said facemasks and safety glasses had been supplied as soon as the matter was brought to the manager's attention. Significantly, the company noted this letter was the first time it had been told that Ms Twentyman claimed to have suffered harm from inhaling dust. After that comprehensive response TWL agreed to attend mediation.

[57] Correspondence continued. On 16 April 2013, Ms Twentyman provided a brief letter to TWL. It contained a claim by Ms Twentyman that she was "taking a personal grievance out" for what was referred to as treatment she had received from Care Advantage and managers of TWL in Taupo and a complaint about wages. That letter was devoid of information to explain the grievance, but a request for mediation was made. Ms Marshall wrote to Le Pine & Co on 17 April 2013 providing time and wage records previously requested by that firm and took the opportunity to address Ms Twentyman's latest letter. Ms Marshall also addressed an allegation that Ms Twentyman had been ordered to leave the Taupo store when she was there shopping, having declined on the same day to have a rehabilitation meeting with the store's manager.

[58] In her letter Ms Marshall asked Le Pine & Co whether the personal grievance referred to by Ms Twentyman was one that had already been replied to in earlier correspondence or was a different matter. Ms Marshall said that if the grievance was a different matter she would reply directly to the law firm and that TWL would go to mediation on any new matter.

[59] Mediation took place on 5 June 2013 but was unsuccessful.

[60] Against that background, Ms Swarbrick submitted that TWL had not consented either expressly, or by implication, to personal grievances being raised after the 90-day period in [s 114\(1\)](#). Relying on *Commissioner of Police v Hawkins*, she submitted that the question of consent by conduct is a matter of fact and degree.¹⁰ The passage from that case relied on reads:¹¹

The real issue is not whether, in formal terms, the Commissioner “turned his mind” to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.

[61] Ms Swarbrick submitted that attending mediation was not material, relying on *Vulcan Steel Ltd v Wonnocott*, where Chief Judge Colgan stated:¹²

Although participation in the grievance resolution process by the employer has been a feature of a number of cases where implied consent has been found to have been given, that is not the test.

[62] Similarly, in *Ale v Kids at Home Ltd*, Judge Inglis commented:¹³

It was also submitted that the defendant’s apparently unconditional attendance at two mediations was reflective of implied consent. Ms Burke submitted that attendance at mediation must be viewed in context. I agree. While attendance at mediation may be taken as signifying consent to pursue a grievance out of time, much will depend on the circumstances. Mediation is effectively mandatory in this jurisdiction. This will often make it difficult for the Court to conclude that any confidence that consent has been given simply by the act of attending mediation without expressly stating that it is

¹⁰ *Commissioner of Police v Hawkins* [\[2009\] NZCA 209](#), [\[2009\] 3 NZLR 381](#).

¹¹ At [24].

¹² *Vulcan Steel v Wonnocott* [\[2013\] NZEmpC 15](#), [\(2013\) 10 NZELR 659](#) at [\[45\]](#).

¹³ *Ale v Kids at Home Ltd* [\[2015\] NZEmpC 209](#) at [\[34\]](#) (footnotes omitted).

not to be construed as a waiver. Where, as here, there are a number of alleged grievances, some but not all of which are said to be within time, it will be difficult to conclude that attendance at mediation signifies consent. I do not accept that the defendant’s attendance at mediation can reasonably be construed as implied consent to pursue a disadvantage grievance out of time having regard to the particular circumstances.

[63] I accept that attending mediation where there is an ongoing employment relationship may not, by itself, amount to express or implied consent to a grievance being raised outside the 90-day time period. As Judge Inglis noted in *Ale*, attending mediation must be viewed in context.

[64] In the context of this ongoing employment relationship TWL did more than attend mediation with an employee. It disputed the substance of the allegations and generally engaged in addressing them. TWL’s letter was written by its Employment Relations Manager, Ms Marshall, who was familiar with Ms Twentyman’s circumstances. She knew before replying that the personal grievances in Le Pine & Co’s letter were outside the 90-day time period. It was against that background she responded, addressed all of the matters raised, and stated TWL’s preparedness to attend mediation, which it did. In explaining why TWL agreed to attend mediation, Ms Marshall said that it had agreed to do so in the past where a personal grievance had been raised out of time by an existing employee. She explained that this step was taken because of the ongoing employment relationship but TWL did not accept a personal grievance being out of time. Ms Marshall said it would have been preferable for her to have qualified TWL’s reply by more clearly articulating the company’s concerns about the timeliness of that letter.

[65] I consider Ms Marshall made a deliberate decision to engage with Le Pine & Co, and to entertain the grievances even though they were out of time, because she was dealing with an existing employee and an on-going employment relationship. Everything points towards consent being given for those reasons.

[66] I find that TWL consented to Ms Twentyman’s personal grievances being raised outside of the 90-day period in [s 114](#).

Has Ms Twentyman suffered any disadvantage?

[67] Ms Twentyman’s case relies on [s 103\(1\)\(b\)](#) of the Act which reads:

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; ...

[68] To establish a personal grievance under [s 103\(1\)\(b\)](#) of the Act, Ms Twentyman needed to show that her employment had been adversely affected to her disadvantage by some unjustifiable action by TWL. She did not need to establish a breach of contract. It would have been sufficient if she had shown that

her 'on the job' situation had been unjustifiably altered to her disadvantage.¹⁴ Had

Ms Twentyman demonstrated an impact like that on her employment, the burden would have passed to TWL to show that its actions were justified. Ms Twentyman has failed to get over this first hurdle.

[69] Ms Twentyman's first alleged personal grievance was a breach arising from a failure by TWL to provide a healthy and safe workplace, relating to her shoulder injury and harm to her health allegedly caused by inhaling concrete dust because of the absence of safety equipment.

[70] As to her shoulder injury, she claimed she was not given adequate training in lifting stillages and that TWL instructed other staff not to assist her in lifting them. This instruction was said to have been given in reprisal for what had happened when a fire occurred at the store in December 2011.

[71] I do not accept either contention and there is some doubt that the injury she suffered could be attributed to lifting anyway. Ms Twentyman said no training was

¹⁴ See *Victoria University of Wellington v Haddon* [\[1996\] NZCA 706](#); [\[1996\] 2 NZLR 409 \(CA\)](#); *Air Nelson Ltd v Neill* [\[2008\] ERNZ 483](#).

provided to her other than when she expressed an interest in operating the checkout. Instead, she said that what passed for training was a box-ticking exercise where, under instructions from a supervisor, she and other staff members were required to complete TWL's training record as if the training had been provided and to immediately return to work. In other words, TWL's training record, signed by Ms Twentyman, was a false statement of what had been done. There was no corroboration for what Ms Twentyman said about either her training, or the training record, and what she said was unconvincing. The Store Manager, Ms Rison, Assistant Store Manager, Ms Nicholson, and National Health and Safety Manager, Ms Wooding all disagreed with what Ms Twentyman said about her training and training generally. They maintained training in all aspects of the job was provided and the record was only completed once a supervisor was satisfied the training had been undertaken satisfactorily.

[72] TWL's record of Ms Twentyman's training was comprehensive. Part of this training was in techniques for lifting. While that record does not list stillages, I accept that instructions in lifting them were given. Other employees at the Taupo store received instructions on how to lift safely, and there were posters in prominent places in the store showing correct lifting techniques.

[73] Furthermore, there is considerable merit in Ms Swarbrick's submission that Ms Twentyman was not hurt while lifting a stillage, but in attempting to stop one falling to the floor. That action by Ms Twentyman may have been instinctive, but I doubt her resulting injury could properly be described as being the result of a lack of training about lifting.

[74] I also do not accept Ms Twentyman's claim that an instruction was given to other staff not to assist her in lifting heavy items. As has already been mentioned, she has attempted to link such an instruction to TWL's reaction to the role she claimed to have played one evening in December 2011, when a fire was lit by an unknown person against one wall of the store. At the time, TWL's night-fill employees were working and Ms Twentyman was on duty. Smoke entered the store. Everyone was evacuated in an orderly way without any injuries being sustained but the store was damaged. Ms Twentyman claimed she played a significant role in the

evacuation, contacting emergency services, and generally taking charge because the managers on duty were either indecisive or inactive in response to the emergency. Not surprisingly, none of TWL's witnesses shared Ms Twentyman's view of what had happened, or her role in the evacuation.

[75] According to Ms Twentyman, a degree of resentment emerged about the role which she had taken. She attributed the resulting instruction not to assist her to Ms Dudley, the Night-fill Supervisor. When Ms Dudley gave evidence she did not recall giving such an instruction and said that it would not be in her nature to do so. Ms Dudley said she would help anyone

who needed it. She also said that as well as the possibility of using a forklift to move a stillage, which Ms Twentyman was qualified to drive, the night-fill routinely used a “team lift”; that is two or more staff members working together to lift a heavy object. She had never heard the sort of instruction Ms Twentyman had attributed to her being given by anyone else.

[76] I reject Ms Twentyman’s evidence as unreliable and I find she did receive training in lifting. I also find no instruction was given to other staff not to help her.

[77] The next aspect of this grievance is what Ms Twentyman said about impacts on her health caused by inhaling concrete dust generated by grinding the store’s floor. This matter was not before the Authority but has been considered for completeness.

[78] Ms Twentyman said that in February 2012 she was exposed to breathing concrete dust created when the store underwent refitting. According to Ms Twentyman, the Duty or Night-fill Manager, who at the relevant time was Mr Frank Murphy, did not know where to locate safety equipment to deal with dust. She said, eventually, another staff member took safety glasses and masks from the store’s shelves where they were displayed for sale.

[79] Ms Twentyman said she had not previously experienced breathing difficulties but as a result of this exposure she visited her doctor who prescribed Ventolin and Flixotide inhalers. She said:

Doctor Fraser’s report states that he ordered blood tests, as the exposure to the dust had caused me severe distress to the point where I felt I was having a heart attack.

[80] The tone of this evidence was of a substantial health problem created by TWL, implying disdain for the health and safety of its employees. As an example of this tone, in response to questions, Ms Twentyman said a staff member was hospitalised as a result of inhaling concrete dust. In fact no one was hospitalised because of dust inhalation and no one other than Ms Twentyman complained about the dust.

[81] It was put to Ms Twentyman in cross-examination that the grinding machine did not create dust as she described and that her evidence was exaggerated. Ms Twentyman strongly disagreed. In her answer she referred to the employees of the contractor undertaking the work and said:

... I saw those men covered in dust from head to foot and all you could see was their lips when they licked them, so no I don’t agree that it doesn’t make dust.

[82] She also claimed that the contractor’s employees were covered in dust when emptying the grinding machine into a skip and, at the time, they were not wearing protective equipment. Ms Twentyman described those employees as: “... they were grey, from head to foot they were covered.”

[83] TWL had contracted Project Floors (NZ) Limited to remove and replace the flooring at the Taupo store. Mr Dipak Patel from that company gave evidence. He explained that his company used two subcontractors and the work was performed in two stages. The first stage was on 26 and 27 March 2012. The second stage was on

28 and 29 March 2012.

[84] Mr Ryan Neville, as TWL’s Store Development Project Team Leader, was responsible for overseeing refitting TWL stores throughout New Zealand including the Taupo store. His experience involved at least 15 similar projects. The Taupo store was the third one where the floors needed grinding. Mr Neville estimated that the floor area of the clothing and footwear department being replaced was

25 per cent to 33 per cent of the total floor area of the store. He was present

throughout the work and described what was done. Work was carried out after

8.00 pm each evening when the store was closed to the public. A space was cleared and roped off, and the racking and shelving was moved aside and stacked close together. The floor was cleaned of debris. Any existing dust was swept up, bagged and taken away.

[85] The existing carpet was lifted. Grinding then took place to remove glue that had held down the old carpet, using a machine with an attached vacuum system. A thin layer of glue was skimmed from the floor and in that process a minute amount of concrete was taken off. To suppress any dust generated by this process the grinding machine sprayed a fine mist as it operated. The machine’s vacuum system collected the material ground from the floor in a filter bag which was disposed of into a skip outside the store. When full, the bag was removed from the machine and secured with a cable-tie for disposal. It was not emptied and reused.

[86] Mr Neville said there was no visible layer of dust left on the concrete floor by this grinding and no dust plume in the air. After the work was done the floor was vacuumed. He said the contractor’s employees were not covered in dust as Ms Twentyman claimed they were. He was confident of the dust management system but, nevertheless, before the work started

he ensured there were masks, goggles and earmuffs available for anyone who wanted them. Mr Neville's evidence is in marked contrast to what Ms Twentyman said and he was not challenged about it.

[87] Furthermore, Ms Twentyman did not work on the days when grinding took place other than for one brief period on 27 March 2012. Consequently she could not have been exposed to inhaling dust for the length of time claimed in Le Pine & Co's letter. She also claimed to have been working on colour blocking and sizing in or very near to the area where the grinding was taking place, and to have therefore been exposed to dust. I doubt that was possible given the shelves and racking had been moved and placed close together to allow the floor area to be worked on to be exposed; there would not have been enough space available in which she could work.

[88] When questioned about her claim that grinding had taken place in February 2012, not in March as had actually happened, Ms Twentyman changed her story. She referred to earlier floor drilling, required for shelving, and said that activity caused the dust that led to her health problems. Eventually, she claimed to be uncertain about whether it was this drilling, or the floor grinding, that caused the dust responsible for her health problems. That evidence about drilling was not in her written brief of evidence, and it was not referred to in the Authority's determination. Even in the face of evidence from Mr Patel, and Mr Neville, about when the floor grinding took place, Ms Twentyman did not resile from her statement that it had occurred in February 2012.

[89] In an effort to bolster her evidence, Ms Twentyman also said she raised concerns about health-related effects from inhaling this dust with Dr Fraser in mid- March 2012. Dr Fraser's uncontested evidence was that the first occasion on which he made clinical notes of Ms Twentyman mentioning dust-related health problems to him was at a consultation on 5 April 2012. He did not observe any of the symptoms described by Ms Twentyman or as reported in the Le Pine & Co letter. Dr Fraser stated that on examination he concluded "... she had a slight chest issue but ... There was nothing major going on."

[90] That evidence is fundamentally different from the very severe symptoms

Ms Twentyman described. She did not explain that inconsistency.

[91] I reject Ms Twentyman's evidence about inhaling dust and the absence of safety equipment as exaggerated and unreliable.

[92] I have reached the conclusion that, as a matter of fact, Ms Twentyman was not exposed to any health hazard arising from floor grinding at the Taupo store in

2012. It follows that TWL could not have breached, and did not breach, its employment agreement with her, or otherwise adversely affect the terms and conditions of her employment or breach any duty to her. Consequently, she does not have personal grievances under [s 103\(1\)\(b\)](#) of the Act arising from TWL's actions in refitting the Taupo store.

[93] Ms Twentyman's second grievance is an alleged failure to maintain a relationship of trust, confidence and fair dealing. This is an assertion that she could not complete an accident form about her shoulder injury on the night she was injured and that a page in the night-fill book recording her injury had been torn out.

[94] Neither claim is sustainable. While Ms Twentyman did not complete a form on the night she was injured she did complete one subsequently. However she suffered no detriment in the delay in completing that form. TWL and ACC accepted she had sustained a work-related injury on 3 February 2012 and that she was entitled to cover under the [Accident Compensation Act 2001](#) as a result. The delay in completing the form did not adversely affect Ms Twentyman's ability to claim ACC, or the amount of compensation she was entitled to, nor did it lead to any disadvantage in her employment.

[95] Finally, for completeness, there was no evidence that a page had been removed from the night-fill book.

[96] My conclusion is that Ms Twentyman has failed to establish any of her personal grievances. TWL has not engaged in any activity that unjustifiably disadvantaged Ms Twentyman in her employment within the meaning of [s 103\(1\)\(b\)](#) of the Act.

[97] On that basis Ms Twentyman's claims fail. It is therefore not necessary to do more than make a brief comment about the remedies claimed by Ms Twentyman.

If Ms Twentyman was successful in her personal grievances what remedies (if any) should be awarded?

[98] Ms Twentyman made substantial claims for her alleged losses, but aside from making those claims she did not give evidence to explain them. In response to claims that she had been underpaid, TWL's comprehensive wage and time records were produced. They showed that she had been paid for all work until her ACC weekly compensation entitlements began, and thereafter she was fully compensated under the [Accident Compensation Act 2001](#). While Ms Twentyman distrusted the accuracy of those time and wage records, she could not explain why they showed she had been fully paid, or why they would

otherwise be wrong or inaccurate.

[99] Ms Twentyman has not proved any losses have been incurred. Had she succeeded in any of her personal grievances it would not have been possible to award a remedy for lost wages in the absence of that evidence. Furthermore, I accept Ms Swarbrick's submission that [s 317\(1\)](#) of the [Accident Compensation Act](#)

2001 is also a bar to Ms Twentyman's claim for top-up wage payments for the difference between compensation paid to her under that legislation and what would have been earned had she been in full-time work.

[100] Finally, Ms Twentyman claimed \$25,000 for compensation for alleged humiliation, loss of dignity and injury to her feelings under [s 123\(1\)\(c\)\(i\)](#) of the Act. Had she succeeded I would not have awarded that sum to her.

Should a penalty have been imposed on Ms Twentyman, and if so, in what amount?

[101] The Authority imposed a penalty on Ms Twentyman of \$1,500 and ordered it be paid to TWL. Ms Twentyman has challenged that penalty. TWL filed a counterclaim to Ms Twentyman's proceeding to defend the penalty that was imposed.

[102] The basis for TWL's claim for a penalty was an alleged breach of the duty of good faith by Ms Twentyman and a breach of the implied duty of trust, confidence and fair dealing in its employment agreement with her. Generally speaking, the same allegations support both of those claims. At the heart of this penalty action were allegations that Ms Twentyman misled TWL, provided inaccurate information, failed to comply with her rehabilitation plan and was obstructive.

[103] Ms Swarbrick made a number of submissions supporting TWL's counterclaim and the penalty imposed by the Authority. Ms Twentyman did not make submissions supporting that part of her challenge disputing the penalty being imposed. Nor did Ms Twentyman reply to the submissions made by Ms Swarbrick on this subject.

[104] Ms Swarbrick began by referring to Ms Twentyman's unreasonable approach to the light duties provided for her by TWL and an ongoing insistence that those duties were not being provided when they were. This conduct by Ms Twentyman manifested itself in meetings with TWL and Care Advantage between July and September 2012. For example, Ms Twentyman insisted that the colour blocking and sizing work made available by TWL could not qualify as light duties of the sort recommended for her by her medical advisors, because those tasks were part of the job she had undertaken before being injured in February 2012. While giving evidence, Ms Twentyman demonstrated, using a vigorous to and fro motion with her right arm, what she considered to be the repetitive nature of that work seemingly as a way of justifying why it did not qualify as light duties. Instead, she thought being engaged as a member of staff to greet customers when they first enter the store was more in keeping with the concept.

[105] There is no support anywhere in the evidence for Ms Twentyman's point of view; none of her medical advisors ruled out colour blocking and sizing as light duties. However, I consider Ms Twentyman went out of her way to actively undermine performing colour blocking and sizing because she did not want to do that work. In fact, there was a degree of concern on the part of her medical advisors about her not attending to light duties and about her lack of progress in returning to work.

[106] Ms Twentyman did not attend physiotherapy sessions after January 2013. No adequate reason was provided by her for that failure although there was an attempt to say that she was unable to attend because she could not afford petrol to drive to the sessions (an explanation used also to explain why she did not attend meetings with TWL's Manager, Mr Vaughn).

[107] Ms Twentyman supplied misleading information to TWL, either directly or by misleading her medical advisers. One example illustrates the point. On

17 April 2013, she advised Dr Fraser that she was required by TWL to work above her head height. Such an instruction, if given, would have been contrary to Dr Fraser's medical advice and medical certificates authorising light duties. Such an instruction had never been given by TWL or even suggested by it. At the time when

Ms Twentyman said this instruction had occurred she had not been working. She gained an advantage from making this statement to Dr Fraser because his medical certificates declared her unfit for all duties.

[108] Despite having initially agreed to rehabilitation plans with TWL and Care Advantage, Ms Twentyman did not attend regular weekly meetings with TWL's manager and eventually refused to do so. More than once Ms Twentyman received a warning from Care Advantage that she was in breach of her obligations under the [Accident Compensation Act 2001](#), to assist with her rehabilitation.

[109] Considerable weight was also placed on surveillance reports from Mr Gasser-Gray to show Ms Twentyman was exaggerating her injury to avoid returning to work and, consequently, to mislead or deceive TWL. Ms Swarbrick submitted that Ms Twentyman's ability to use her left arm for some everyday tasks was illustrated in these reports and was apparent at times when she presented herself to her medical advisors, TWL, and Care Advantage as unfit for work including work on light duties. Photographs in those reports of Ms Twentyman showed her using her left arm to open or close car doors, carrying a handbag, and walking freely. She was seen driving her manual transmission car using both hands despite having

claimed she could not do so. Those activities were inconsistent with the information Ms Twentyman was supplying to her medical practitioners and, through them, to TWL.

[110] In her response to the surveillance reports, Ms Twentyman disputed being the subject of some of them but not convincingly. Those she acknowledged were said to show no more than her following the advice of her physiotherapist including, on occasions, to lift small weights.

[111] There is one surveillance report that created special concern about Ms Twentyman's activities. That was the report of her surveillance when she attended the ACC review hearing on 11 September 2013. TWL also attended that hearing and was represented by Ms Wooding. In the photographs taken of Ms Twentyman entering the building for the review hearing the image is of a person in considerable pain or discomfort. She is shown holding her left arm close to her

body and walking using a crutch. Dr Fraser had not prescribed the use of a crutch and she is not shown using it in any other surveillance photographs. Immediately after the ACC review hearing, and while she is getting into a car, she was seen removing her right boot from which something dropped to the ground and was retrieved. In the photographs taken in the days before and after that review hearing Ms Twentyman's demeanour was quite different; she was not using a crutch and she was not holding her arm close to her body.

[112] Ms Twentyman maintained that these photographs were equivocal and she denied any impropriety. While acknowledging Dr Fraser had not prescribed the use of a crutch, Ms Twentyman attempted to explain that she had done so because of a previous ankle injury which caused her trouble from time to time and which also explained why she was removing her boot. She denied having placed anything in her footwear. While some of these surveillance reports were equivocal, the report and photographs taken of Ms Twentyman at the ACC review hearing supported TWL's submission that it was being misled by Ms Twentyman about the seriousness of her injury and her inability to return to work on light duties.

[113] These surveillance reports were available in the Authority and were relied on by it to conclude there had been both a breach of the duty of good faith and Ms Twentyman's employment agreement. Ms Twentyman was on notice, from that investigation meeting and in TWL's counterclaim, that these surveillance reports would be relied on in Court. However, it was only when being cross-examined by Ms Swarbrick, and pressed for an explanation about inconsistencies in her demeanour apparent from the surveillance reports and photographs, that she offered as an explanation for using a crutch while attending the ACC review hearing, a pre-existing ankle injury that flared up from time to time. She also attempted to explain removing her right boot as also being necessary because of that previous injury.

[114] I reject Ms Twentyman's explanation as highly unlikely and implausible. Her behaviour at the ACC review hearing was an extension of the misleading behaviour exhibited by Ms Twentyman in her dealings with TWL and others when she avoided being assigned duties she did not want to do.

[115] I am satisfied that Ms Twentyman breached her duty of good faith and her employment agreement through this overall conduct. Her actions were misleading about her ability to work, she was not candid about her medical condition and she manipulated the situation to avoid doing work she did not want to do. The breaches of a duty of good faith and the implied duty of trust, confidence and fair dealing have been established and the penalty is appropriate.

Conclusion

[116] Ms Twentyman's challenge is unsuccessful. While I have reached the same conclusion as the Authority, that Ms Twentyman's case has failed, I have disagreed on one aspect; her grievance being consented to by TWL. Consequently, pursuant to [s 183\(2\)](#) of the Act this judgment stands in place of the Authority's determination. TWL's counterclaim seeking confirmation of the penalty imposed by the Authority is successful.

[117] Costs are reserved. As the successful party, TWL is entitled to an order of costs. In the absence of agreement between the parties, TWL may file and serve submissions no later than 31 January 2017. Ms Twentyman has a further 15 working days to respond.

K G Smith

Judge

Judgment signed at 1.45 pm on 20 December 2016