IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 266
3002934

	BETWEEN	TEOFILO VAILUA First Applicant
	AND	HUBBARD FOODS LIMITED Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Simativa Perese, Counsel for Applicant Erin Burke, Counsel for Respondent
Site Visit:	6 July 2017
Investigation Meeting:	19, 20, 21 and 28 July 2017 at Auckland
Submissions received:	28 July 2017 from Applicant and Respondent 31 July 2017 from Respondent
Determination:	1 September 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Mr Vailua suffered an unjustified disadvantage to his employment by Hubbard Foods Limited's failure to provide him with a safe workplace.

B. Mr Vailua was unjustifiably dismissed by Hubbard Foods Limited.

C. Hubbard Foods Limited is ordered to pay to Mr Vailua the following amounts within 14 days of the date of this determination:

a) **The sum of $11,076.00 gross for wages lost as a result of Mr Vailua's personal grievance;**

b) **The sum of $25,000.00 under s 123(1)(c)(i) of the Employment Relations Act 2000.**

Employment Relationship Problem

[1] Mr Vailua was dismissed from his employment with Hubbard Foods Limited (Hubbards) in September 2015. He says his dismissal was unjustified. In the alternative, he says Hubbards dismissed him because his position was redundant and he is therefore entitled to compensation in accordance with the provisions of the Collective Employment Agreement. He further says he was unjustifiably disadvantaged by Hubbards failure to provide him with a safe work environment. Lastly, he alleges Hubbards breached its obligations of good faith.

[2] Hubbards denies Mr Vailua's dismissal was unjustified or that his role was redundant. It denies it provided Mr Vailua with an unsafe work environment and denies that it breached its obligations of good faith. It says it terminated Mr Vailua's employment on the grounds of medical incapacity and that decision was justified.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from the applicant and respondent but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[4] The issues to be determined are:

(a) Did Mr Vailua suffer an unjustified disadvantage?

(b) Why was Mr Vailua dismissed?

(c) Was Mr Vailua's dismissal justified?

(d) If Mr Vailua was unjustifiably dismissed, or suffered an unjustified disadvantage, what remedies should be awarded?

(e) If any remedies are awarded, should they be reduced under s 124 of the Act, for blameworthy conduct by Mr Vailua that contributed to the situation giving rise to his grievance?

(f) Has there been a breach of good faith. If so, what penalty is payable by Hubbards to Mr Vailua?

(g) Has there been breach of the employment agreement. If so, what penalty is payable under s134?

(h) Should either party contribute to the costs of representation of the other party?

Background against which issues are to be determined

[5] Hubbards is in the business of food production, specifically the production of cereals.

[6] Mr Vailua was employed in 2000 by Hubbards as a process worker. This role involved the mixing and processing of ingredients to manufacture cereal. His role involved operating the rice cooker, operating the corn cooker and undertaking floor work. The rotation between these roles took place every fourth day. This varied where there was an absentee or where cover was required during lunch and rest breaks.

[7] On 29 August 2012 Mr Vailua suffered a workplace injury. Mr Vailua said he experienced stiffness and pain in his left shoulder during his shift that day. This pain persisted resulting in a claim being made to ACC and Mr Vailua being seen by a number of doctors and specialists.

[8] Mr Vailua's injury was initially accepted by ACC as a work place personal injury. On 5 August 2014 ACC revoked this cover and, at the same time, determined Mr Vailua had suffered a gradual process work related injury (gradual process injury). Hubbards did not challenge ACC's decision.

[9] ACC defines a gradual process injury as one:

> That is identified as a condition that is associated as being caused by repeated exposures over an extended period of time and takes on the nature of a diagnosable physical injury that occurs in that context. A gradual process injury may initially be thought to be that of a sprain but because it persists it becomes clear that the diagnosis is something else. A sprain injury is not a gradual process injury unless that gradual process injury itself is subsequently diagnosed.

[10] From 2012 until 10 September 2015 Mr Vailua undertook a variety of restricted duties for Hubbards with some periods off work on ACC.

[11] On 4 June 2015 a meeting took place between the parties and ACC. The parties agreed at that meeting that Mr Vailua would be assessed by ACC for functional capacity. This was to enable Hubbards to make decisions as to what duties Mr Vailua could and could not do.

[12] The functional capacity assessment report (FCA Report) was undertaken on 19 June 2015. It recorded the findings of various tests carried out on Mr Vailua. This included repetitive movement tests, strength tests, static strength tests, occasional material handling tests, grip strength, pinch grip strength, pain, fitness, rehabilitation and work ability. The FCA Report concluded:

> He [Mr Vailua] is safe to use his left arm in a medium capacity on a fulltime basis. Some discomfort may persist but this can be expected to eventually resolve.
>
> There is no danger of aggravation or re-injury with working to a medium level of physical demand. The exercise involved in manual work is in fact the best therapy that he could do.

[13] Based on the conclusions reached in the FCA Report Mr Vailua was capable of returning to his pre-injury role, taking into account the automation of the rice cooker machine which removed the requirement to lift 25 kg bags of rice.

[14] Following the release of the FCA Report, the parties met on 26 August 2015, 10 September 2015 and 15 September 2015.

26 August 2015 Meeting

[15] On 26 August 2015 the parties met to discuss a return to work plan. Mr Vailua's daughter, Laura Vailua (Ms Vailua), attended the meeting with Mr Vailua and spoke on his behalf. During this meeting a copy of the FCA Report was provided by Ms Vailua to Hubbards. Ms McGowan said during this meeting Mr Vailua requested his temporary light duty role be made permanent. Mr Vailua and Ms Vailua deny they requested a light duty role at this meeting. Ms Vailua explained she told Ms McGowan that Mr Vailua was willing to perform any role which he was medically capable of doing. At the time of the 26 August meeting she said this was a role which met the requirements set out in the FCA Report.

[16] I find Mr and Ms Vailua's account of what was said at this meeting regarding the type of role Mr Vailua was willing to undertake is more likely than what Ms McGowan said occurred. The purpose of the meeting was to discuss a return to work

taking into account the findings in the FCA Report. Ms Takurua's evidence was that Mr Vailua would have accepted any permanent role. Ms Takurua was Mr Vailua's ACC Case Officer.

[17] In reaching this view I have considered the typed notes which Hubbards produced and which Ms McGowan said were a transcript of the notes taken at the 26 August meeting. These notes recorded a request by Mr Vailua for light duties. I do not however accept these notes were made contemporaneously with the meeting. I find it more likely they were prepared after Mr Vailua raised his personal grievance. The last sentence of the notes records *"Outcome of our review is outlined in the letter of 10 September (Document 14)"*. The notes form part of a bundle of documents provided by Hubbards to Mr Vailua's solicitor, Mr Perese, in a letter to him dated 18 November 2015. It is likely the notes were prepared at or about this time.

[18] It was during the 26 August 2017 meeting that Ms McGowan told Mr Vailua that a potential outcome of the process may be termination on the grounds of medical incapacity.

10 September 2015 Meeting

[19] On 10 September 2015 a second meeting was held. At this meeting Ms McGowan provided Mr Vailua with a letter of that same date. This letter set out the findings of a review undertaken by Ms McGowan following the 26 August 2015 meeting. It also set out Ms McGowan's conclusion that Hubbards could not sustain Mr Vailua's employment in a light duties role. The letter stated:

> This then translates to your position at Hubbards being terminated on the basis of medical incapacity, a possibility we also discussed at our last meeting, and working with ACC to assist you with future employment possibilities.

[20] The letter stated Ms McGowan's conclusion was based on the following factors:

> 1. Review of both medical and occupational capacity assessments; *it is not expected that you will gain full use of your injured shoulder*
>
> 2. Review of your current tasks and the tasks required for a full capacity role working in your area of production; *there is a significant difference between what you do and what is required in a permanent role. This comparison is outlined in the attached document*
>
> 3. Any impact on your colleagues in the same area; *we spoke to other members of your shift who, while gracious about having picked up the*

> *tasks you can't do, feel it is unreasonable as a long term solution as it puts additional pressure on them to do their designated roles with the additional workload*
>
> 4. The existence of any similar roles across the shifts in production; *there are others who do similar tasks as you but are not restricted to these tasks being capable of filing in on other areas of Production as required*
>
> 5. Considering your 15 years of service; *we will work in collaboration with ACC to make sure your transition into future work is well supported*
>
> 6. Availability of ACC Vocational Re-training Program; *that this is available to you, and the transition will be supported by us, ensures you are not cast adrift in the job market without the possibility of future work but re-trained into a role that will not be impacted by your current injury*

[21] Ms Vailua said Mr Vailua was told he was terminated at this meeting. Ms McGowan denies this. She refers to the letter she provided to Mr Vailua on 10 September 2015 which states "*The next stage of the process is for us to meet up again once you have had a chance to digest these details and prepare any feedback you may have".*

[22] On balance I find Mr Vailua was terminated at the meeting on 10 September 2015. In reaching this finding I have taken into account that Ms McGowan's letter, and her evidence, conflict with the notes taken by Ms Takurua at the meeting. These notes summarise Ms McGowan's letter of 10 September 2015 and conclude *"Termination will commence straight away – As Viv cannot risk the client sabotaging product whilst working out his final days"*.

15 September 2015 Meeting

[23] On 15 September 2015 the parties attended a third meeting. There was no opportunity afforded to Mr Vailua to respond to the matters raised in Ms McGowan's letter of 10 September 2015. I find this was because the decision to terminate had already been made. As Ms McGowan said, the aim of this meeting was to discuss the payment of compensation by Hubbards to Mr Vailua.

[24] Ms McGowan gave Mr Vailua a draft letter of termination at this meeting. She said it was a draft because it contained an offer of compensation. When this offer was not accepted the letter was revised to exclude the compensation offer and was then reprinted on 17 September 2015.

[25] Hubbards paid Mr Vailua his ordinary wages until 24 September 2015. Mr Vailua has been without work since this time.

Issue 1: Unjustified Disadvantage Claim

[26] The Statement of Problem pleads Mr Vailua's employment was disadvantaged by Hubbard's failure to:

(a) Provide and maintain a safe working environment both before and after his injury;

(b) Ensure plant used by Mr Vailua was arranged, designed, made and maintained in a manner which was safe for him;

(c) To assess whether the manual lifting work carried out by Mr Vailua was a significant hazard and, in particular, to determine whether repeated heavy lifting above shoulder height of significant weight of food ingredients constituted a significant hazard.

[27] An employer owes an implied and statutory duty to provide a safe work environment. The Court of Appeal in *AG v Gilbert*[1] discussed the nature of the duty owed to provide a safe and healthy workplace as follows:

> The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of "all practicable steps". What is "reasonably practicable" requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it. These assessments must take account of the current state of knowledge and not be made with the benefit of hindsight. An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[1] [2002] 1 ERNZ 1

[28] The statutory provision applicable at times material to Mr Vailua's claim is Section 6 of the Health and Safety in Employment Act 1992 (the HSE Act). This section provides:

> Every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to—
>
> (a) provide and maintain for employees a safe working environment; and
>
> (b) provide and maintain for employees while they are at work facilities for their safety and health; and
>
> (c) ensure that plant used by any employee at work is so arranged, designed, made, and maintained that it is safe for the employee to use; and
>
> (d) ensure that while at work employees are not exposed to hazards arising out of the arrangement, disposal, manipulation, organisation, processing, storage, transport, working, or use of things—
>
> (i) in their place of work; or
> (ii) near their place of work and under the employer's control; and
>
> (e) develop procedures for dealing with emergencies that may arise while employees are at work.

[29] The requirement to take all practicable steps to ensure an employee's safety only arises where an employer knows, or ought reasonably to know, about the circumstances giving rise to the risk of harm (s 2A(2) HSE Act).

> While an employer cannot absolve itself of responsibility to take all practicable steps simply because its employees have not raised an issue, the alternative threshold of reasonable foreseeability must nevertheless be negotiated if a claim is to be successfully made out.[2]

[30] Relevant evidence to be considered in an unjustified action grievance is not necessarily confined to events in the 90 days preceding the raising of the grievance.[3] That is because disadvantageous acts or omissions in employment frequently do not occur in isolation but as part of a continuum of conduct which needs to be understood to determine whether an employee has suffered an unjustified disadvantage within the 90 day period.

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[2] *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99
[3] *Davis v Commissioner of Police* [2013] NZEmpC 226 at paragraph [47]

Did Hubbards know, or ought it reasonably to have known, about the circumstances giving rise to the risk of harm to Mr Vailua?

Relevant Terms in Collective Agreement

[31] Clause 20 of the Collective Agreement provides that the parties to the Collective Agreement *"are committed to the safe operation of all plant and equipment on site, to safe working practices, and to the good health of all employees"*. The importance of providing a safe workplace is also recognised in Schedule 2.

[32] The termination provision in the Collective Agreement does not specifically refer to termination for illness or incapacity but is general in nature.

Hazard Identification & Risk Control Manual

[33] Hubbards had a Hazard Identification & Risk Control Manual (Hazard Register) in place from in or about August 2001. The latest version of the Hazard Register, which was applicable at material times, was issued in June 2003.

[34] Hazard Numbers 10.1 and 10.2 in the 2003 Hazard Register identify medium risks of serious harm where a role involves pushing/pulling and moving material and equipment, moving objects weighing more than 10 kgs in weight and lifting/bending or twisting. Hazard 10.3 identifies a medium risk of harm of occupational overuse syndrome where a person's role involves repetitive tasks or work activities.

[35] Mr Fiori and Mr Wishnowsky gave evidence for Hubbards. Mr Fiori was Mr Vailua's Manager at material times. Mr Wishnowsky is Hubbards Operations Manager. They agreed parts of Mr Vailua's pre-injury role fell within Hazards 10.1, 10.2 and 10.3. In particular:

a) *The lifting of 25 kg bags of rice by Mr Vailua during the Rice Cooking process* - Mr Vailua was required to unload rice bags from a pallet and place these on the ground. The pallets each contained 40 bags of rice and were stacked eight bags high and five bags wide. The demonstration undertaken by Mr Fiori and Mr Vailua during the investigation meeting indicated the top of the rice bags on the pallet were approximately at Mr Vailua's head height. The width of the pallet was approximately 1.5 metres wide.

b) After stacking the rice bags on the ground, Mr Vailua then lifted 17 bags of rice from ground to mid chest height. The rice bags were then individually poured into the rice cooker. A number of components are then combined with hot water and stirred with a paddle before being added to the cooker. The mixture weighed 15 kg. An additional substance weighing 25 kg was added. The process of cooking then began. The cooking process was repeated 8 times per shift.

c) *The pushing and pulling of trays by Mr Vailua when undertaking his floor work duties* – The floor work undertaken by Mr Vailua involved the monitoring of rice and corn produced by the rice and corn cookers. The rice and corn would empty into a bin. After various records were completed the bin was then moved away from the collection point. This involved a pull/push motion. The Bins weighed 400-500 kg when full. This process would be completed on average 7 times each day.

d) *The repetitive aspects of Mr Vailua's role when working on the corn cooker*. Mr Fiori listed the following aspects of the corn cooker role as involving repetitive actions:

i. Loading of the corn – where corn is manually scooped into the corn cooker using buckets for approximately 5 minutes. I watched this process during my site visit, and also viewed the process on a video supplied by Hubbards.

ii. The stirring of the paddle - a number of components are combined with hot water using a paddle and are then poured into the corn cooker. I also watched this process during my site visit, and on a video supplied by Hubbards.

iii. The soaking of the corn - for a period of time Mr Vailua was required to manually scoop water into a tank to soak corn. He was then required to manually scoop the water out of the tank.

[36] The foregoing aspects of Mr Vailua's role support ACC's finding that there was a causal link between Mr Vailua's work activities and his gradual process injury: ACC concluded:

> This claim meets Section 30 criteria for the development of shoulder impingement syndrome. Mr Vailua's work tasks contain the combination of risk factors to establish a causal link for this injury, primarily forceful and sustained abduction above 60 degrees. There is also significant repetition in the actions that Mr Vailua is carrying out in the workplace which would factor into his causation.

[37] I am satisfied Hubbards knew, or ought reasonably to have known, from its Hazard Register and the knowledge of Mr Vailua's role, that there was a risk of Mr Vailua suffering a gradual process injury.

Were the steps taken by Hubbards to safeguard Mr Vailua's safety at work sufficient?

[38] The next issue is whether the steps taken by Hubbards to safeguard Mr Vailua's safety at work were sufficient.

[39] Hubbards' Hazard Register required staff to be trained in safe lifting, manual handling and carrying techniques. It required staff to be annually trained in the risk factors for Occupational Overuse Syndrome (OSS) and required staff to be provided with information on lifting. If Hubbards had been able to demonstrate that it had complied with these requirements then it might have been able to establish it had taken reasonable steps to avoid or minimise the risk to Mr Vailua. It could not.

[40] Mr Fiori said Hubbards completes training records for all courses undertaken by staff. In preparing for this case he said he checked Mr Vailua's personnel file, information on Mr Fiori's own personal database and Hubbards' wages database. The only records he could locate which related to Health and Safety Training, as opposed to other training, was one Health and Safety Refresher course which was undertaken by Mr Vailua on 19 July 2010. Mr Fiori did not know if this course contained information on lifting or OOS.

[41] Mr Fiori explained the lack of training evidence on Mr Vailua's file as possibly being due to a change from manual recording to electronic recording in 2013. He said this resulted in training records being lost. He said he had not asked Hubbards' IT Manager, or anyone else, if it could retrieve lost data. Despite the lack of records, he said he believed Mr Vailua did attend other courses including health and safety refresher courses and lifting/handling courses. This belief was based on his own recollection of attending three lifting courses. He also recalls attending courses

where OOS training was covered. He was unable to produce any records showing when any health and safety, lifting or OOS courses took place or what was taught.

[42] Mr Fiori said it would be normal for Mr Vailua to have been shown how to offload rice bags during his initial on-job induction training. Mr Fiori was not however working for Hubbards when Mr Vailua was employed so was unable to dispute Mr Vailua's evidence that he had not received this training. Mr Vailua said he was never shown how to lift rice bags. He said his training simply involved watching a colleague perform the role. He then adjusted his technique to suit the job requirements.

[43] Mr Vailua said he only attended two workplace safety courses. He produced certificates evidencing his attendance. These "Introduction to Workplace safety" courses took place on 18 December 2001 and 4 June 2003. Mr Vailua's undisputed evidence was that these courses did not involve any information or training on lifting, OOS or how to prevent repetitive injuries.

[44] Having considered the evidence, I find that it is more likely than not that Mr Vailua only attended the three workplace safety courses for which documentation has been provided. I am supported in this view by the document produced by Hubbards titled "Training Record for Teofilo Vailua. Start date 29/10/2000". This document is 56 pages long and contains records of other courses attended by Mr Vailua. If a change to an electronic system had resulted in the loss of records as Mr Fiori contended, it is likely that all records would have been lost rather than only those evidencing attendance at health and safety courses.

[45] I find the 3 courses attended by Mr Vailua did not contain information on lifting techniques or OOS. Mr Fiori acknowledged the Health and Safety Refresher course did not contain any information on lifting techniques. He said these were a separate course. He could not recall if these courses included OOS training. Mr Vailua's evidence is that he never attended a course on lifting techniques or OOS.

[46] Hubbards is a large employer which at times had two human resource staff and a health and safety officer. It is reasonable in these circumstances to expect that it would have retained adequate records to show it provided training to prevent known workplace hazards if training was provided.

[47] It is pertinent to note that even after becoming aware of Mr Vailua's injury in August 2012 I am unaware of any steps Hubbards took, in the three years that followed prior to his termination, to provide Mr Vailua with the training identified in the Hazard Register or otherwise. This is despite Mr Vailua's restricted duties involving lifting/pulling/pushing and repetitive actions. For example:

a) Mr Vailua was required to work on the cornflakes machine. He said this involved stacking boxes of cornflakes weighing 10 Kg. He said the boxes were stacked in two rows. The front row was stacked 3 boxes high and 5 boxes long. The back row was sometimes only stacked 2 boxes high. He said when the boxes were stacked 3 high they were above his head.

b) Mr Vailua was required to work on the puffer machine which involved pushing/pulling bins weighing approximately 450 kg.

c) Mr Vailua was required to sweep cereal products off a roller/drum as they come off the end of a conveyor belt known as the Syrup Skid. This required constant repetitive overhead reaching movements of the right arm.

[48] I find no information was given to Mr Vailua on lifting techniques or OOS safety as required by the Hazard Register. Whilst Mr Fiori said posters were placed in common areas demonstrating lifting techniques, he was unable to provide me with a copy of these posters or to tell me when the posters were displayed. He could not say whether Mr Vailua had seen these posters or, if he had, whether he had understood them due to his language difficulties. Mr Vailua's evidence was that he had never seen any posters on lifting or OSS. I did not view any posters demonstrating lifting techniques or OSS during my site visit.

[49] I have considered, but do not accept, Ms Burke's submission that Mr Vailua's lack of injury for 12 years shows he received training on safe-lifting practices. ACC accepted cover for Mr Vailua's injury on the basis that his injury was a work-related gradual process injury caused by repetitive shoulder movements when lifting the 25kg bags of rice. Hubbards has not challenged ACC's decision.

[50] I have also considered Ms Burke's submission that Hubbards' focus on health and safety is evidenced by the letter to Mr Vailua dated 24 September 2012. This letter outlined the importance of reporting a workplace injury and provided a copy of the company's health and safety induction and house rules. However, this letter was

sent after Mr Vailua's injury. It does not therefore provide evidence that Hubbards was taking reasonable steps to provide a safe workplace at material times i.e. before Mr Vailua suffered his injury. I was not provided with copy of the health and safety induction or house rules booklets referred to in this letter. Whilst Hubbards said it told its employees to report incidents, there was no evidence that it then took reasonable steps to investigate or avoid the incident reoccurring.

[51] Mr Wishnowsky's evidence was that he had never seen an incident report following Mr Vailua's injury in August 2012. He said he did not know if an investigation had been undertaken. Other examples where Hubbards have been aware of hazards and not taken steps to remove the risk were raised during the investigation meeting. For example:

a) *Sieve Shaker* – Mr Vailua was required to work on the sieve shaker when undertaking the floor duties associated with his role. Both he and Mr Fiori acknowledged that if the bolts on this machine were not secured properly the lid could fall apart. This could result in injury due to the weight of the lid and its sharpness. Mr Fiori said he was aware the lid had become detached three times. He said on each occasion Hubbards had fixed the machine but had taken no steps to ensure it did not reoccur despite the possibility of injury occurring.

b) *Rice and Corn Cooker String* – The lid of the Cookers is attached to a string which runs through a pulley. The pulley enables the lid to be lifted on and off the cooker. The lid weighs between 50 and 60 kg. Mr Vailua said the string would break 2-3 times per year resulting in the metal lid falling down. He said he reported this to Mr Fiori. Mr Fiori acknowledged he knew of this issue. Mr Vailua and Mr Fiori said on each occasion Hubbards had fixed the string but had taken no steps to ensure it did not reoccur.

c) *Corn Cooker Hopper* – Mr Vailua's undisputed evidence was that a worker stuck his fingers inside the Corn Cooker Hopper Machine and these were cut off. He said Hubbards then installed a lid to prevent this reoccurring. He said there were also many missing screws on the Hopper. He was required to clean this machine. He said the screws were not sufficient to hold his weight and he worried that he would fall. He said Hubbards did not fix this issue.

d) *Pallet Height* – Mr Vailua said in about 2010 the fork lift drivers began loading full rice bag pallets on top of empty pallets. This increased the height he was required to lift from. He said he told Mr Fiori about this issue during change over meetings but no action was taken. He said he only told him twice due to his culture – he said it was disrespectful in his culture to challenge leaders. Mr Fiori denied Mr Vailua telling him this and said he never saw this happen. Mr Vailua said he eventually spoke to the forklift operators and told them it was not safe, they then stopped.

e) *Fan* – Mr Vailua said a fan disconnected from the roof and fell on top of the Rice Cooker due to lack of maintenance. He said this was replaced but no steps were taken to ensure it did not reoccur.

[52] I find Hubbards failed to provide Mr Vailua with a safe workplace. This unjustifiably affected his conditions of employment to his disadvantage and ultimately resulted in his dismissal. Had Mr Vailua been required to attend training on lifting, OOS or how to prevent repetitive injuries then, through the informed insights Mr Vailua would have acquired, he may have been able to avoid and later recover from the injury which caused him to be dismissed.

[53] What Hubbards did, and how it did it, was not what a fair and reasonable employer could have done in all the circumstances at the time. Mr Vailua is entitled to an assessment of remedies which I will turn to once I have considered his claim for unjustified dismissal.

Issue 2: Reason for Dismissal – Redundancy or Medical Incapacity?

[54] It is accepted that Mr Vailua was dismissed and his employment came to an end on 24 September 2015. The parties disagree over the reason for Mr Vailua's dismissal.

[55] Mr Vailua's amended statement of problem dated 30 May 2017 pleads he was terminated because his role was redundant rather than on the grounds of medical incapacity.

[56] In support of his client's position, Mr Perese refers to the change in Mr Vailua's role pre and post automation of the rice cooker. He submitted the differences between the roles were so significant there was a break in the continuity of Mr

Vailua's employment. He submitted Hubbards' decision not to offer Mr Vailua training to use the automated rice cooker meant that his role as part of the production line process disappeared. Mr Vailua could operate only one of the two cookers and therefore couldn't act as relief during breaks or absences or take part in the rotation of roles.

[57] Ms Burke submitted Mr Vailua's position was never superfluous to the needs of the business. She says it was the difficulties of not having Mr Vailua return to the rice cooker that was causing Hubbards difficulty. She referred to Mr Vailua's return to work on the rice cooker for a brief period, between October 2013 and December 2013, following the automation of the rice cooker. She submitted Mr Vailua's employment ended for reasons of medical incapacity and because he refused to accept any other existing role in the business that he could perform.

[58] Redundancy is defined under Clause 26(b)(ii) of the Collective Agreement as:

> Redundancy is a situation in which an employer has staff surplus to requirements because of the re-organisation or closing down of the whole or any part of the employer's operations due to a change in plant, methods, materials or products, economic circumstances, or like cause requiring a permanent reduction in the number of employees.

[59] I do not accept Mr Vailua's pre-injury role was redundant. The only change to his role was the automation of the rice cooker. The corn cooker and floor work remained unchanged. With training, Mr Vailua could have operated the new rice cooker machine and returned to his pre-injury role.

[60] I acknowledge email correspondence sent to ACC by Hubbards in late 2014 indicated Mr Vailua's role no longer existed but I do not accept that was true. Mr Fiori said that by the middle to the last quarter of 2014 the roles previously undertaken by Mr Vailua were being undertaken by two operators who had been trained to operate the automated rice cooker. He said these workers rotated between working on Cooker 1A and 1B (the automated rice cooker machines), the corn cooker, and doing the floor work.

Was Mr Vailua's dismissal justified?

[61] It is well established that an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work. An employer will be

justified in dismissing an employee for long term absence where it can be shown that the decision was substantively and procedurally justified.

[62] The test for assessing whether a dismissal was justifiable is set out at s 103A of the Employment Relations Act 2000 (the Act). It requires an objective assessment of whether the employer's actions and how the employer acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[63] In *Lal v The Warehouse Ltd*[4] Judge Inglis approached the issue of termination for medical incapacity within the following broad framework:

> [33] The employer must give the employee a reasonable opportunity to recover. The terms of the employment agreement, any relevant policy, the nature of the position held by the employee and the length of time they have been employed with the employer are factors which are likely to inform an assessment of what is reasonable in the particular circumstances.
>
> [34] The employer must undertake a fair and reasonable inquiry into the prognosis for a return to work, engaging appropriately with the employee. This will likely involve seeking and considering relevant medical information. It will also involve explaining the reasons for the inquiry, the possible outcome of it, and providing the employee with an opportunity for input and comment.
>
> [35] The employer must fairly consider what the employee has to say before terminating their employment. An employer is entitled to have regard to its business needs in deciding an appropriate response to the situation and any applicable time-frames. An employer is not obliged to keep a job open indefinitely, no matter how long an employee has been employed or how large the organisation is. For their part, an employee is obliged to be responsive and communicative.
>
> [36] In cases of medical incapacity, and a reduced ability to undertake certain tasks, a level of engagement with attempts to facilitate a return to work may reasonably be expected. Fairness cuts both ways, consistently with the mutual obligations which exist in employment relationships.4 This latter point has particular relevance in the circumstances of this case, having regard to the level of engagement Ms Lal was prepared to commit to a supported, gradual, return to work.

Was the decision to dismiss procedurally fair?

[64] Hubbards provided Mr Vailua with a reasonable opportunity to recover before taking steps to terminate him. However, when it decided to take those steps, I find Hubbards failed to undertake a fair and reasonable inquiry which complied with its statutory obligations.

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[4] [2017] NZEmpC 66 at [32]-[36]

[65] Hubbards failed to raise all of its concerns with Mr Vailua before dismissing him and failed to provide Mr Vailua with a reasonable opportunity to respond to its concerns before dismissing him.

[66] Ms McGowan said, in addition to the matters set out in her letter of 10 September 2015, she also took into account that Mr Vailua was "demanding" his light duties be made permanent. As I found earlier, Ms Takurua's evidence was that Mr Vailua would have accepted any permanent role. Had Mr Vailua been afforded with an opportunity to respond to this issue then any misunderstandings could have been addressed.

[67] Ms McGowan said she also took into account that Mr Vailua was unwilling to accept any other role at Hubbards. It was Mr and Ms Vailua's evidence that Mr Vailua would have accepted any role which would have enabled him to continue working for Hubbards. This evidence is consistent with the contemporaneous notes taken by ACC, Ms Takurua's evidence and the email from Ms Neilson to ACC, following the meeting between the parties on 4 June 2015.

[68] Ms McGowan did not investigate whether or not Mr Vailua could carry out his normal duties taking into account the FCA report. The assessment was based on what he was doing rather than what he could do.

[69] Hubbards also failed to consider relevant medical information. Ms McGowan's conclusion that *"it is not expected that you will gain full use of your injured shoulder"* was not supported by the FCA Report which was the most recent assessment of Mr Vailua's ability. As Ms Burke submitted, this report was provided to Hubbards to enable it to make a decision on what Mr Vailua could or could not do. The FCA Report concluded that Mr Vailua was "*safe to use his left arm in a medium capacity on a fulltime basis. Some discomfort may persist but this can be expected to eventually resolve*". There was no dispute that the requirements of Mr Vailua's pre-injury role, taking into account the automation of the rice cooker, met the requirements of "medium work" defined in the FCA Report. Ms McGowan also had a report from Ms Sinclair, an Orthopaedic Surgeon who had undertaken a number of reviews of Mr Vailua. In Ms Sinclair's report of May 2014 she advised she expected that Mr Vailua should regain his range of movement.

[70] Hubbards also failed, at material times, to consider alternatives to dismissal. A focal point of Hubbards' argument was they repeatedly offered Mr Vailua an alternative role in the Packing Department. I have carefully considered the evidence that was provided by the parties on this point. I am not satisfied the evidence presented to me establishes, on a balance of probabilities, that Mr Vailua was offered an alternative role during the process leading to his termination. In particular:

a) The only evidence of an offer of a packing role, during the process leading to Mr Vailua's termination, comes in the form of unsigned typed notes. Ms McGowan's evidence is that these notes were taken by Belinda Burke, Hubbards Occupational Health and Safety Manager, at a meeting between the parties on 4 June 2015. The handwritten notes were unable to be located. The typed notes record:

> Asked if he would consider retraining to packing – he confirmed no as he is comfortable with work and wouldn't be with a move to packing

b) I am not satisfied these notes accurately record what was said at the 4 June 2015 meeting. Belinda Burke did not provide evidence. Ms McGowan said she attended the meeting and confirmed the notes were correct. I do not accept Ms McGowan's evidence that she attended this meeting. Her recollection is not supported by the evidence given by Ms Takurua, Mr and Ms Vailua or the contemporaneous notes of that meeting taken by Belinda Burke and ACC which do not record her attendance.

c) Mr Vailua and Ms Vailua say no offer was made for Mr Vailua to be transferred to a packing role. The Vailuas' recollection is supported by Ms Takurua. Ms Takurua was Mr Vailua's case officer at ACC. I found Ms Takurua's evidence to be very clear and concise. She had a good recollection of events and presented as a credible and impartial witness. Ms Takurua said Mr Vailua was happy working for Hubbards and wanted to stay working there. She said it was her goal to keep him employed with Hubbards. If an offer of an alternative role was made she said she would have known of it. She said to her knowledge no offer of a packing role was made by Hubbards. She said her recollection is supported by her notes taken on the day of the 4 June 2015 meeting which record:

> Belinda said it is not easy just to create a new position. This is not within her delegation, but she will present to her powers that be. She was not optimistic of the outcome.
>
> …Client adamant he wants to stay with employer and that the employer should be helping him find a suitable job in their workplace.

d) An email exchange between Belinda Burke and Ms Takurua on the day of the meeting makes no mention of an offer of a packing role.

e) Without Belinda Burke being present to verify the notes allegedly taken by her, and taking into account her email of the same date which makes no mention of a packing role, I prefer the evidence of Ms Takurua, Mr Vailua and Ms Vailua that no offer of a packing role was made during this meeting.

f) I also do not accept an offer of an alternative role in packing was made at either the 10 September or 15 September 2015 meetings. The notes taken by Hubbards at the 10 September 2015 record Ms McGowan advising that Hubbards *"can't sustain a role here"*. These same notes also record Ms McGowan advising *"you made it clear you don't want to move"*. I do not accept these notes show a refusal to move to a role in packing or another area within Hubbards. It is more likely they refer to the Vocational Retraining which ACC was organising to enable Mr Vailua to work elsewhere. Ms McGowan's notes of 15 September 2015 record her advising *"Option to go to another role (related to ACC vocational training offered"*). The notes also record Line Vailua commenting that Mr Vailua had been *"unfairly treated, extremely unfair, failed to give alternative role, failed to give him a chance"*.

[71] In addition to the foregoing substantial procedural failures I find by the time Hubbards met with Mr Vailua on 10 September 2015 it had already decided to terminate his employment. Mr Wishnowsky said he met with Ms McGowan in late August or early September 2015 at which time he approved the decision to terminate. Mr Wishnowsky said he took notes of this meeting but these were destroyed at the end of the year. His destruction of his notes after Mr Vailua had raised a personal grievance is concerning.

[72] The defects in the process followed by Hubbards were not minor and did result in Mr Vailua being treated unfairly (s 103A(5)). They resulted in Mr Vailua not

being able to put forward a response to the important matters which Hubbards relied upon when making its decision to terminate.

[73] A decision to dismiss in all the circumstances known at the time was not one that a fair and reasonable employer could have made. Mr Vailua was unjustifiably dismissed from his employment with Hubbards and is entitled to remedies.

Issue 4: Remedies

Section 123(1)(c)(i) Compensation

[74] Mr Vailua claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i).

[75] Section 317 Accident Compensation Act prevents an employee who has suffered a personal injury from receiving damages for the effects of that injury. This is because such consequences are exclusively compensatable under the accident compensation legislation.

[76] In *Kim v Thermosash Commercial Ltd*[5], it was observed:

> [21] The accident compensation legislation replaced the common law action for damages for personal injury with a statutory compensation scheme. As Blanchard J observed in *Wilding v Attorney-General* the philosophy of the personal injury compensation legislation is to substitute an entitlement to claim compensation, capped as to amount, on a no-fault basis, for a right to bring Court proceedings for damages for injury. Its purpose is to prevent persons who have suffered personal injuries being compensated twice over, not to prevent them from recovering compensation at all.
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> [22] A distinction must accordingly be drawn between injury which is covered and injury or loss which is not. In *Attorney-General v B*, the Court of Appeal held:
>
> > "We accept that in principle an employer may be liable for breach of duties to an ill or injured employee. There may, for example, be discriminatory conduct towards an injured employee; or in a case like *Bint* the method of dismissal of an injured employee may cause damage for which compensation is not available under the accident compensation legislation by reason of its cause being entirely disjunctive of the injury."

[5] [2011] NZEmpC 169 at [21]-[22]

[77] In *Robinson v Pacific Seals New Zealand Ltd*[6], Judge Inglis held that s 317(1) does not operate as a blanketed bar to compensation under s 123(1)(c)(i) of the Act. Compensation under that provision remains available where the cause of the hurt, humiliation and/or injury to feelings is entirely disjunctive of the personal injury. A compensatory award under s 123(1)(c)(i) must, however, be causally linked to the employer's breach.

[78] Mr Vailua gave compelling evidence of the effects that the dismissal had on him. Mr Vailua is 57. I was told Mr Vailua is a "paramount chief" in the Samoan Community. Prior to his dismissal he was actively involved with the Catholic Samoan Community. This involved him providing both physical and financial contributions. This changed when he was dismissed. He said his family could no longer rely on his financial contributions. His son, who was playing rugby in England, had to come home and his children had to start working to assist with supporting the household. Mr Vailua explained how humiliated and ashamed he felt. He said he felt he had no hope. He explained how he felt angry about what happened and how this had affected his marriage and his relationship with his children. He suffered from a lack of confidence, worrying what others thought of him. This fear prevented Mr Vailua going to community events and, according to Ms Vailua, him becoming largely housebound.

[79] I found Ms Vailua to be a credible witness. She portrayed as a compassionate and caring daughter. Ms Vailua supported her father throughout the disciplinary process and afterwards. She lives with her father and was therefore able to provide a detailed account of the humiliation, loss of dignity and injury to feelings that her father had endured. She explained her father was humiliated when he lost his job. She said he avoided his former colleagues and friends and was reluctant to leave the house, even for his once daily walks. She described his demeanour as "defeated". She explained how her father was once a happy man who laughed a lot. She said since the dismissal he has become sad and depressed. She explained how her father looked forward to going to work each day. She said it was important for her father, as the head of the household, to support his family.

[80] I am satisfied Mr Vailua has proven, on the balance of probabilities, that he has suffered humiliation, loss of dignity and injury to his feelings. I am also satisfied

[6] [2014] NZEmpC 99 at [46]

that Hubbards' unjustified actions, and it unjustifiably dismissing Mr Vailua, were material factors in the loss sustained by Mr Vailua. The loss suffered by Mr Vailua is entirely disjunctive of his personal injury.

[81] I consider the evidence warrants a significant award of compensation under s 123(1)(c)(i) of the Act. As I have found Mr Vailua suffered an unjustified disadvantage, and that he was unjustifiably dismissed, it is appropriate that a global award of compensation is made. When setting the sum payable I have been mindful of the need not to keep compensatory payments artificially low. Recent cases reflect a discernible upswing in the quantum of awards for compensation under s 123(1)(c)(i).[7]

[82] Hubbards is ordered to make payment to Mr Vailua in the sum of $25,000.00 under s 123(1)(c)(i) of the Act. Payment must be made within 14 days of the date of this determination.

Wages

[83] Mr Vailua claims lost wages for a period of 37 weeks or such other period as the Authority determines appropriate.

[84] Section 123(1)(b) of the Act provides for the reimbursement by Hubbards of the whole or any part of wages lost by Mr Vailua as a result of his grievance. Section 128(2) of the Act provides that I must order Hubbards to pay Mr Vailua the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration.

[85] In *Xtreme Dining v Dewar*[8] the full Court confirmed that where an employer puts mitigation in issue, an employee must provide relevant information as to the steps taken to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

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

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[7] *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [112]
[8] [2016]NZEmpC 136

> [101] But there is an "evidential burden" on the employee to provide relevant information. This is what the Court referred to in *Transpacific*. It is necessary for the employee to provide this information, if called on, because it is information of which he or she has knowledge. This obligation is a manifestation of the famous statement made by Lord Mansfield in 1774 in *Blatch v Archer* that "it is certainly a maxim that all evidence is to be weighed according to the proof of which it was in the power of one side to have produced, and in the power of the other to have contradicted."
>
> [102] That does not preclude the employer from leading its own evidence on the topic, for instance as to employment options which were reasonably available but not pursued; or to challenge the accuracy or adequacy of the evidence given by the employee.
>
> [103] But when considering all the evidence, this issue of fact must be assessed on the basis that the employee is the victim of a wrong. The Authority or Court cannot be too stringent in its expectations of a dismissed employee. Further, what has to be proved – by the employer – is that the employee acted unreasonably; the employee does not have to show that what he did was reasonable.
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> [104] In summary, where the employer puts mitigation in issue, the employee must provide relevant information as to the steps he took to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.

[86] Hubbards did not put mitigation at issue in either its statement in reply or amended statement in reply. This was raised for the first time in Ms Burke's closing submissions. Ms Burke submitted that Mr Vailua took no steps to mitigate his losses. She referred to Mr Vailua's witness statement in which he states that, after drafting his CV, he *"…did not go any further as I decided to wait until the claim was resolved, but I had no idea it was going to take this long…"*. She submitted a failure to mitigate losses for the period claimed cannot be considered reasonable and prohibits Mr Vailua from an award of lost remuneration.

[87] I agree with Ms Burke that, in the circumstances presented to me, a claim for 37 weeks' lost wages is not reasonable. However, I find a period of 13 weeks' lost remuneration is reasonable and can be attributed to the personal grievance. I find Mr Vailua's failure to take steps to find a job during this period did not break the chain of causation. Mr Vailua said he *"wasn't thinking right at the time"*. He had lost confidence in himself. He could not leave the house. He felt ashamed. He also told me how the dismissal had resulted in increased blood pressure. He said he felt emotionally unwell.

[88] I am satisfied Mr Vailua has lost 13 weeks' remuneration as a result of his unjustified dismissal. He was not in receipt of an ACC benefit during this period. Mr

Perese submitted Mr Vailua's weekly wage at the time of his dismissal was $852.00 gross.

[89] Hubbards is ordered to make payment to Mr Vailua the sum of $11,076.00 gross for monies lost as a result of his personal grievance. Payment must be made within 14 days of the date of this determination.

Issue 5: Contribution

[90] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded (s 124 of the Act).

[91] Ms Burke submitted Mr Vailua contributed to the situation that gave rise to the personal grievance by refusing to accept an alternative role and by insisting that Hubbards provide him with a permanent restricted duties role.

[92] I have already addressed the issue of the alternative role. I have found, on a balance of probabilities that an alternative role was not offered to Mr Vailua during the termination process. I am also satisfied Mr Vailua did not insist that his restricted duties role be made permanent. The evidence from Mr Vailua, Ms Vailua, and Ms Takurua was that Mr Vailua was willing to accept any role which he was medically capable of undertaking.

[93] I am satisfied Mr Vailua did not contribute to the situation which gave rise to the personal grievance. Accordingly there should be no reduction in remedies for contribution.

Issue 6: Breach of Good Faith Claim

[94] Mr Perese submitted Hubbards breached its statutory obligations of good faith contained at s 4 of the Act. He submitted it did this by failing to consult Mr Vailua about the introduction of the automated rice cooker and the potential effect it had on his employment. Secondly, it breached its obligations not to mislead. Thirdly, it

failed to consider the FCA report. Hubbards denies this. It says, to the contrary, it is Mr Vailua who has breached the duty of good faith.

[95] I find Hubbards did not consult with Mr Vailua about the introduction of the automated rice cooker and the potential effect it had on his employment. However, I do not find that breach was deliberate, serious, and sustained. Nor do I find it was intended to undermine the employment relationship.

[96] The other breaches submitted by Mr Perese were not pleaded in the Statement of Problem. Hubbards was not on notice of these allegations and therefore I do not consider them. I also do not consider Hubbards' claim for breach as this was also not pleaded in the Statement in Reply.

[97] No penalty is payable by either party for these reasons.

Issue 7: Breach of the Employment Agreement Claim

[98] As I have found Mr Vailua's position was not redundant it follows there was no breach of the Collective Employment Agreement by Hubbards.

Issue 8: Costs

[99] The parties are encouraged to resolve costs by agreement. If that is not possible, then Mr Vailua has seven days to file a costs memorandum. Hubbards has a further seven days to file its costs memorandum. Mr Vailua then has three working days to file and serve a reply. This timetable will be strictly enforced and any departure from it requires prior leave of the Authority.

Additional Directions

[100] Due to my concerns regarding Hubbards' failure to comply with its implied and statutory duties to provide a safe work environment, and to adhere to its Hazard Identification & Risk Control Manual, I direct a copy of this determination be provided to Worksafe New Zealand.

Jenni-Maree Trotman
Member of the Employment Relations Authority