IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 74
5515245

	BETWEEN	DAVID BRINE Applicant
	A N D	SOUTH PACIFIC MEATS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Karina Coulston, Counsel for the Applicant Rachel Webster, Counsel for the Respondent
Investigation Meeting:	5 and 6 May 2015 at Christchurch
Submissions Received:	13 and 26 May 2015 from the Applicant 20 May 2015 from the Respondent
Date of Determination:	08 June 2015

DETERMINATION OF THE AUTHORITY

A. The applicant was unjustifiably disadvantaged and is awarded compensation under s123(1)(c)(i) of the Employment Relations Act 2000.

B. Costs are reserved.

Prohibition from publication order

[1] During the Authority's investigation meeting, evidence of a number of details about Mr Brine's medical history was made available to both the respondent and the Authority in various documents, and during oral evidence. This evidence is of a private and sensitive nature and, save where it is referred to in this determination, I prohibit publication of this evidence.

Employment relationship problem

[2] Mr Brine claims that he suffered an unjustified disadvantage during his employment as a chiller hand in the meat processing plant in Malvern, Canterbury, when he was allegedly exposed to chemicals causing injury on Wednesday, 23 July 2014 and through subsequent alleged failures by the respondent to take reasonable steps to provide medical treatment and prevent further injury. Mr Brine claims compensation under s. 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), as well as the imposition of penalties against the respondent under ss. 4A and 134 of the Act, and damages for breach of contract and breach of statutory duty.

[3] The respondent denies that there were any such failures and that Mr Brine has suffered any unjustified disadvantage in his employment.

Brief account of the relevant events

[4] On the evening of Tuesday, 22 July 2014, the chillers at the respondent's premises in Malvern were subjected to a sanitisation process known as thermal chemical fogging by a company known as BioSsol. The contractor carrying out the fogging was Mr John Rickard.

[5] Thermal fogging is a process in which a hot mist or fog containing sanitising chemicals is expelled from a thermal applicator so that the chemical mix can be applied to all the surfaces of a work area. In this particular case, the chemical mix contained a sanitizer called Ster-Bac, together with an anti-microbial peracid sanitizer called Vortexx, delivered via a fogging solution called VK2.

[6] Mr Rickard's evidence is that he has been using this process and this chemical mix since 1997, although this was the first time that it had been applied at the Malvern plant since it was owned by the respondent. Some other witnesses were also familiar with the process and the chemical mixture, or at least some of the chemicals used.

[7] It is common ground that Mr Rickard placed a notice on the doors of the chillers that he sanitised stating that there should be no entry until either 7pm or 8pm that evening (the evidence was unclear on that point). It is also common ground that the beef chiller remained closed and unused until 06.15 the following morning, between 10 and 13 hours after the fogging took place.

[8] At around 6.15 am on Wednesday 23 July a compliance officer entered the chillers, placed five settle plates at various points in each room and retrieved them after a short set period of time. This process was to check that the fogging had been effective by detecting whether any pathogens remained in the rooms. The fans and evaporators in each room would have been switched off during this short period as the detection process required the air to be still. Otherwise, it is understood, they had been kept running between the start of the fogging and 6.15am the next day.

[9] At around 6.30 am, after the settle plates had been retrieved, the site engineer, Scott Goodsir, removed Mr Rickard's sign from the door to the beef chiller and entered the room, along with Mr Brine, and a colleague, Rob Andrews. Mr Brine and Mr Andrews had been instructed as part of their normal duties to wash out the beef chiller prior to it being stocked with beef carcasses. It is the evidence of both Mr Brine and Mr Goodsir that, on seeing the notice on the door, Mr Brine asked Mr Goodsir whether it was safe to enter and Mr Goodsir said that it was.

[10] It is Mr Goodsir's evidence that he had worked with the same chemical mixture in a previous employment and was familiar with the process and the after smell. Mr Goodsir says that the smell he detected upon entering the beef chiller that morning was no worse than he had smelled before.

[11] It is the evidence of Mr Brine that, within 15 minutes of starting work in the chiller, he developed a sore throat, watering eyes, a headache and a *"sticky horrible taste"* in his mouth. Mr Andrews' evidence to the Authority was that, upon entering the chiller, he noticed a very overpowering smell which he had smelt before in a previous employment (which he attributed to the Ster-Bac[1]) and that he suffered running eyes, a sore throat and difficulty in breathing for a while. He said that he recalled that Mr Brine was coughing and dry-retching.

[12] Mr Brine's evidence is that, around 8.30am, after two hours of cleaning the chiller, he and Mr Andrews went to see their supervisor, Wesley Cameron. Mr Brine's evidence is that he and Mr Andrews explained the effects that the chemicals were having on them and Mr Cameron went to see Mr Wayne Lindsay, the HR and health and safety coordinator for the respondent at that time. Mr Brine says that

[1] Although the safety data sheet for Ster-Bac states that it is odourless in dilution, it seems that the smell that was widely reported is likely to have been that of the residual VK2, which contains coconut oil fatty acids, amongst other things.

Mr Cameron came back and told them that there was nothing wrong with the chemicals being used and that the smell was safe. Mr Brine also says that one of the other chillers (the lamb chiller) did not have the same smell as the beef chiller.

[13] Mr Brine says that he and Mr Andrews went to see Mr Lindsay in his office at about 10am that day, and explained that he was suffering a sore throat, difficulty in breathing, watering eyes, headache and a sticky horrible taste in his mouth. He says that Mr Lindsay said that the chemicals were fine, the smell would disperse and that they should go back to work and keep cleaning the chillers out.

[14] Mr Lindsay denies that that conversation took place on that day, saying that he had been carrying out inductions during the morning and drug testing in the afternoon. Mr Lindsay states in evidence that the first time he became aware that Mr Brine was suffering from respiratory problems was over a week later, on 31 July 2014, when this was stated during a disciplinary hearing that he was running when he was investigating Mr Brine eating on duty. Mr Brine's evidence is that he had been sucking a throat lozenge because he had continued to have a sore throat.

[15] According to Mr Brine, after having seen Mr Lindsay on the morning of 23 July, he and Mr Andrews went back to work and continued to clean the chillers for a further two hours but decided between themselves that, as they were feeling sick, they would take short breaks every 30 minutes.

[16] Mr Brine says that, at around noon, he and Mr Andrews went into the smoko room and saw Dean Burgess, the plant manager, and explained to him that they were getting sicker and sicker, and experiencing difficulty in breathing, watering eyes, headache, sore throat and a horrible taste in their mouths. Their evidence is that Mr Burgess said that he would put something through the ventilation system but that there was nothing wrong with the chemicals that had been used to clean the chillers. Mr Brine says that, however, Mr Burgess did not put anything through the ventilation system.

[17] It was Mr Burgess' evidence that he did not recall any such discussion in the smoko room although he did recall a discussion about putting vanilla essence through the ventilation system but that he later realised it would not work as it was a closed system. He says that he does not recall telling Mr Brine and Mr Andrews to go back to work in the chillers and keep cleaning them. He said that it was up to their

supervisor to direct them in their day-to-day work. Mr Burgess' oral evidence was that he remembered Mr Brine mentioning the smell and a taste in his mouth on the 23 July, but no ongoing health effects.

[18] Mr Brine says that when he went home that night he felt worse and got sicker and sicker; he had a massive headache, sore eyes, heavy breathing and vomiting and diarrhoea. He said that his throat felt like sandpaper and he still had the horrible sticky taste in his mouth.

[19] Mr Brine says that he felt a bit better the following morning and so went to work, and spoke to the compliance officer and to meat inspectors who were onsite. The compliance manager was then called who said that the chillers were perfectly safe, although the smell was extremely strong. It was not possible to wash the chiller out again because product was about to be stored in it. Mr Brine's evidence is that another chiller hand then started to feel sick (Steve Benbow) and that he went to talk to Mr Burgess who again said that the chillers were safe.

[20] Mr Andrews and Mr Brine then went to speak to Mr Lindsay and they described their symptoms; Mr Brine says that Mr Lindsay said that he had spoken directly with the operator who had applied the chemicals and that it was perfectly safe to work in the chillers.

[21] Mr Lindsay's evidence about this is that Mr Brine only mentioned the vomiting and diarrhoea but that he did not believe that that could have been caused by the chemical smells and so did not send Mr Brine home or to a doctor. During his oral evidence to the Authority, however, Mr Lindsay did agree that Appendix 14 of the company's health and safety policies and procedures required that anyone who had had vomiting or diarrhoea within the previous 24 hours prior to coming to work was to phone in sick and that the departmental supervisor was to notify the health and safety coordinator of the absence. Anyone developing vomiting and/or diarrhoea at work was to be sent home until they were symptom-free for 48 hours. During his evidence to the Authority Mr Lindsay also agreed that, in the light of this policy, he should have sent Mr Brine home, although he maintained that there was no evidence of any link between these symptoms and the strong smell in the chillers.

[22] Mr Brine reports another conversation with Mr Lindsay when he and Mr Andrews were called to Mr Lindsay's office and Mr Andrews was asked what

symptoms he was having. Mr Brine says that Mr Lindsay said there was nothing wrong with them and if they were feeling sick it must be some other illness. Mr Brine says that he was sent back to work in the beef chillers. The respondent submits that as Mr Brine and Mr Andrews carpooled, they probably had the flu.

[23] Mr Brine says that around 1 August 2014 he started to cough uncontrollably and brought up quite a lot of blood and, on the strength of that, he visited an after-hours medical centre on Saturday, 2 August 2014, when he was issued with an ACC 45 form which stated that Mr Brine would be fit to return to normal work on 7 August 2014, but that he was not to work in the chiller until then. It is Mr Brine's evidence (in his brief of evidence in reply) that he presented this ACC form to Mr Lindsay on Monday, 4 August 2014 and that Mr Lindsay told him to go to see Mr Cameron. Mr Brine says that Mr Cameron asked him what he had come to see him about and that Mr Brine said he did not know. Mr Brine's evidence then goes on to say:

> *I then went and worked in the chillers because this is my normal job and no one told me not to work in there.*

[24] This is quite different from Mr Brine's original evidence, which was that Mr Lindsay told him to work in the chillers despite knowing about the prohibition in the ACC45 form and that Mr Brine tried to protest but Mr Lindsay would not listen. In his oral evidence, Mr Brine said that his evidence in the brief of evidence in reply was correct.

[25] It is Mr Lindsay's evidence that he sent Mr Brine to see Mr Cameron in order to talk about alternative duties that Mr Brine could carry out but that he did not speak to Mr Cameron himself. He said that this was the normal process and that he would only have got involved directly if there had been difficulties in finding alternative work for Mr Brine. Mr Brine's evidence to the Authority is that he did not raise an objection to being made to work in the chillers, even though he had a doctor's certificate to say he should not do so, because he was scared of making a fuss in case he was dismissed.

[26] By this time, the New Zealand Meat Workers Union had reported to WorkSafe New Zealand its concerns about what it called *the accident and chemical inhalation*.

[27] On 14 August 2014, Mr Brine completed an accident form for the purposes of an ACC claim and on 16 August 2014 he had to go to the accident and emergency department of Christchurch Hospital because he was vomiting up blood, had an uncontrollable and painful cough, nausea and was sweating. On 20 August 2014, Mr Brine's GP notified WorkSafe that Mr Brine had suffered a notifiable occupational disease. Mr Brine was referred to the WorkAon occupational physician whose BMA file review notes stated the following:

> *It appears likely that the exposure to the fumigation agent has caused an acute irritant reaction. This has lead* [sic] *to aggravation of asthma, however is a distinct condition. Acute chemical induced pneumonitis/reactive airways disease (RADS) is the likely diagnosis. It is possible that the claimant has become sensitized to the agent.*

[28] On 16 September 2014, Mr Lindsay sent an email to Mr Tony Matterson of the New Zealand Meat Workers Union which contained the following text:

> *Your last health and safety "ISSUE" as you called it was a vinegar extract and your complainant was your "union organiser" who is a heavy smoker and his problem is related to that. The workplace event was harmless to a normal worker.*

[29] On or around 28 October 2014, Mr Brine was seen by a respiratory physician (Dr Michael Epton) who wrote a report for Aon Risk Services. The report contained the following passage:

> *The timeline and symptoms that Mr Brine describes are all entirely in keeping with an episode of reactive airways dysfunction syndrome (RADS). Some of the components of the cleaning agents that have been described as being used in his work place are recognised as causing RADS including chlorine, ammonia, acetic acid and some bleaching agents. The time line between exposure and the development of symptoms is consistent and in particular the presence of ocular symptoms is also consistent with this diagnosis.*

[30] On 13 November 2014, Aon New Zealand wrote to Mr Brine to tell him that his claim had been accepted under the Accident Compensation Act 2001 because the incident (*breathing in chemicals*) is classified as an accident and the diagnosed injury satisfies the requirements of a personal injury resulting from this accident.

[31] Mr Lindsay prepared an incident analysis for WorkSafe New Zealand which stated, amongst other things, that Mr Brine was an asthmatic but that that had not been known by the company. Mr Lindsay agreed under cross-examination, however, that the company had been made aware that Mr Brine suffered from asthma and used an

inhaler. The Authority saw a copy of a company declaration dated 22 July 2013 in which Mr Brine had declared his asthma and the use of an inhaler.

[32] Mr Lindsay's incident analysis stated that Mr Brine reported his respiratory problems on 31 July 2014 and that *over the next few days he did appear to have respiratory problems*. The incident analysis also stated that the chemicals used *would have settled out of the atmosphere and would have been neutralised well within the no entry period* and that *there was no ongoing risk of chemical exposure*.

[33] The incident analysis stated that the three chemical products had a safe re-entry period of two to three hours after fogging and ventilation but that, *as the chillers are not externally vented, the re-entry was extended to 13 hours to allow the products to settle and break down*.

[34] Mr Lindsay's incident analysis concluded as follows:

> *All future fogging operations will be carried out at a time which would allow a longer ventilation period. … Consideration will be given to ensuring employees with known respiratory problems, are not put in the position of having to work in the chillers following fogging.*

The issues

[35] There are four main issues to determine, some of which overlap, as follows:

a. Whether the respondent acted in breach of its statutory and contractual obligations to Mr Brine by exposing him to chemicals that caused him injury; and

b. Whether the respondent acted in breach of its statutory and contractual obligations to Mr Brine by failing to take steps to avoid further injury to him, once it knew that he was suffering ill effects; and

c. Whether the respondent acted in breach of its statutory and contractual obligations to Mr Brine by requiring him to work in the chillers on 4 August 2014 despite medical advice that he was not to do so; and

d. Whether the respondent acted in breach of its statutory and contractual obligations to Mr Brine by failing to provide medical treatment and assistance.

The principal relevant legal principles

[36] Section 4 of the Act sets out the duty of good faith owed by parties to an employment relationship. Section 4(1A)(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[37] Section 103(1)(b) of the Act provides that a personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim that the employee's employment, or one 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.

[38] Section 103A of the Act sets out the test of justification which, at s.103A(2) provides that the test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[39] Clause 22 of the individual employment agreement between Mr Brine and the respondent provided as follows:

> *22. HEALTH AND SAFETY*
> *OBJECTIVES AND RESPONSIBILITIES*
>
> *22.1 South Pacific Meats Malvern Limited is committed to providing a safe and healthy working environment for all employees and to meetings it's* [sic] *obligations in terms of Health & Safety in Employment Act 1992 and all statutory requirements.*
>
> *22.2 The achievement of that objective requires all people employed in the company to ensure that their jobs are performed safely and without injury to themselves or other people.*

22.4 The parties to this agreement accept that management, supervision and workers share and accept a responsibility for creating a work atmosphere which is conducive to the prevention of risk that could result in personal injury.

22.5 The company shall;

(a) Provide appropriate training, safety equipment and facilities to enable each employee to perform their jobs safely; and

(b) Maintain appropriate first aid facilities located in a convenient place.

22.6 The employees bound by this agreement accept their responsibilities under the Health and Safety in Employment Act 1992 and its amendments to take all practicable steps in the course of employment to ensure their own safety and the safety of others and as such workers are required to:

(a) Observe all safety procedures and use protective clothing and equipment as specified by the company Health & Safety Manual.

(b) Report all accidents, incidents and risks promptly to the supervisor.

(c) Report all identified hazards to their Team Leader/Manager/Area H&S Representative as soon as possible so that remedial action can be taken.

(d) Observe the requirements as advised from time to time in accordance with the Meat Regulations 1969 and amendments.

22.7 The employee hereby irrevocably authorises a representative of the company to:

(a) View all personal or health information concerning the employee held by any medical practitioner, specialist, Accident Rehabilitation and Compensation Insurance Corporation ("ACC"), insurer, or former employer;

(b) Discuss any medical history or work injury claims of the employee with any medical practitioner, specialist, ACC employee, insurer, or former employer.

…
…

> *22.10 In the event of a work injury which prevents the employee from performing his/her normal duties, the employee agrees to undertake any alternative duties offered by the employer and to participate in any rehabilitation plan that may be required having regard to the employee's physical abilities.*
>
> *22.11 This clause shall remain in full force and effect notwithstanding termination of this employment agreement.*

[40] It is accepted law that there is implied into all employment relationships a duty on the employer to take reasonable care to avoid causing injury to the employee's physical or mental health. *Attorney-General v Gilbert* [2002] ERNZ 31.

[41] For the avoidance of doubt, the Authority has no jurisdiction to investigate whether the respondent committed the tort of personal injury, nor does it have any direct jurisdiction under the Health and Safety in Employment Act 1992. For this reason I decline to investigate whether the respondent unlawfully failed to report a serious harm injury, as Ms Coulston has submitted I should.

Did the respondent act in breach of its statutory and contractual obligations to Mr Brine by exposing him to chemicals that caused him injury?

[42] It is impossible to determine why the fogging of the beef chiller caused such significant effects in several employees given Mr Rickard's credible testimony that he had never heard of such effects in similar environments before in all the years that he had been carrying out sanitising by fogging. Given that the other chillers did not cause these effects and the same chemical mixture in the same concentration was applied to them (albeit, possibly for a shorter period) without expert evidence one can only speculate why the fogging of the beef chiller caused these problems, which it is not helpful to do.

[43] However, I am satisfied on a balance of probabilities that Mr Brine did suffer all of the symptoms he has described in his evidence, although not necessarily in the order and at the time he says he did.

[44] Second, I am satisfied on a balance of probabilities that a causal link has been established between Mr Brine working in the beef chiller after the fogging, and the majority of the ill effects he reported suffering, including the RADS. I reach these first and second conclusions on the basis of the medical evidence that has been

tendered, and in particular the report of Dr Epton, and the fact that Mr Brine's symptoms were accepted as having been caused by an accident at work; namely the inhalation of chemicals.

[45] However, I cannot conclude that the respondent has breached either its statutory or contractual duties towards Mr Brine in having instructed him to enter the beef chiller at 6.30 am on Wednesday 23 July 2014 to wash it down, after it had been subjected to chemical sanitation using a thermal fogging process.

[46] I reach this conclusion first because Mr Rickard and his company had been recommended to the respondent by Mr Ally Graham, who works for Orica New Zealand, which supplies chemicals to the respondent. I believe that it was reasonable for the respondent to have relied on this recommendation.

[47] Second, there was no obvious reason for the respondent not to have relied upon the expertise of Mr Rickard to apply the sanitising chemical mixture using thermal fogging and to be guided by him in respect of the conditions that had to prevail for safely entering the chillers after the fogging. Whilst Ms Coulston points out that the chemical data sheets suggest that Vortexx should not have been mixed with other chemicals, and that ventilation should have occurred after the fogging, it was reasonable for the respondent to have expected Mr Rickard to have operated in accordance with safe practice given his years of experience.

[48] Indeed, there is no clear evidence that Mr Rickard did not operate in accordance with safe practice, as no technical information was presented regarding the composition and use of the fogging mixture, rather than each constituent product. Whilst Ms Coulston says that mixing the products together was contrary to the manufacturer's instructions, this appears to be too simplistic a reading of the data sheets in light of the evidence that the same mixture of products has been in use for many years and is widely used in the sanitization of food processing facilities. In the absence of evidence to the contrary, I have no reason to doubt the evidence of Mr Rickard and Mr Goodsir in that respect.

[49] I believe that Mr Rickard's evidence with respect to the length of time he had been using this mixture and that he had not encountered any problems before, was credible. Although Ms Coulston described Mr Rickard's evidence as self-serving, it is not likely that Mr Rickard would have continued to have used a chemical mix that

was known to cause injury or ill health, as this would soon have become known amongst his clients, and his business would have suffered as a consequence. He would also have been at risk of prosecution under health and safety legislation if he had continued to knowingly use a process which caused workers ill health.

[50] It was Mr Rickard's view that the period of time that elapsed between his application of the chemical mixture to the beef chiller and the time of re-entry around 10 hours later would have been sufficient for the active ingredients to have *volatised, effectively breaking down to harmless by-products*. Mr Rickard accepted that he was not a qualified chemist but I understand that this evidence was based on his many years of experience.

[51] It was therefore reasonable for the employer to have relied upon Mr Rickard's advice that it would be safe to re-enter the chillers after 7 or 8pm. That is to say, there is no evidence that there were contra-indications present at the time when Mr Rickard carried out the fogging which reasonably should have alerted him, or the respondent, that employees entering the chillers a significant amount of time after that period could be exposed to chemical residues which could foreseeably have caused them injury or other ill effects.

[52] Therefore, I conclude that the respondent did not breach its duties to Mr Brine under the Act, nor did it breach its express and implied contractual duties towards him when it instructed Mr Brine to enter the chillers at 6.30 am on Wednesday 23 July 2014 to wash it down.

Did the respondent act in breach of its statutory and contractual obligations to Mr Brine by failing to take steps to avoid further injury to him, once it knew that he was suffering ill effects?

[53] I am satisfied on a balance of probabilities that at least one member of the management of the respondent company became aware on Wednesday, 23 July 2014 that Mr Brine and other workers were suffering at least some physical effects as a result of working in the beef chiller. It was Mr Lindsay's evidence that he was not aware of any effects until the following day, which I am prepared to accept. However, I conclude that Mr Cameron, a supervisor, became aware of at least some of these effects on 23 July.

[54] During Mr Cameron's oral evidence before the Authority, he stated that he could see that Mr Brine was *uncomfortable* but he did not think he had to *get him out of there*. Mr Cameron referred to a *collective group of symptoms* being suffered by Mr Brine and his colleagues.

[55] Section 2 of the AFFCO Group Health and Safety Policies and Procedures sets out the responsibilities of staff, and states as follows:

> ***Supervisors***
> *Are responsible for the effective supervision of all employee's/contractors'* [sic] *under their control, including, their safety according to Section 13 of the Health and Safety in Employment Act 1992.*

[56] I am satisfied that the requirements of the AFFCO Group Health and Safety Policies and Procedures apply to the respondent company and that Mr Cameron was bound by its provisions in his capacity as a supervisor.

[57] Whilst I accept that it was not until several days later that the full effects on Mr Brine of working in the chiller after the fogging became known to the respondent company, it is clear to me that Mr Cameron, and therefore the respondent, was aware early on Wednesday 23 July 2014 that Mr Brine was suffering physical effects directly as a result of working in the chiller after the fogging but that he took no action to remove Mr Brine from those effects.

[58] I am satisfied that Mr Brine suffering the physical effects that he did on Wednesday 23 July 2014 amounted to a disadvantage in his employment. I am further satisfied that the respondent failing to take steps to remove Mr Brine from the chiller once it was aware that he and his colleagues were suffering these effects, was not an action that a fair and reasonable employer could have taken in all the circumstances that prevailed at the time.

[59] Put another way, it is not the action of a fair and reasonable employer to require its employees to continue to work in an environment which causes them one or more types of sustained physical discomfort such as nausea, dry retching, coughing, sore eyes, a runny nose and a strong unpleasant taste in their mouth, where such work was not required as a matter of urgency. This is the case even if those sustained physical effects were not obviously requiring immediate medical attention. Save in very particular circumstances, such as an emergency, no employee should

reasonably be expected to work in an environment which causes them a variety of sustained unpleasant or adverse physical reactions which can be avoided.

[60] Further, I believe that it would have been relatively simple to have vented the beef chiller using an industrial fan or blower (which, presumably, can be easily hired) to have cleared out the residual fogging chemicals that remained in the atmosphere and caused the adverse effects. Ventilation is noted as a requirement in the data sheets relating to all three of the products used by Mr Rickard.[2]

[61] In conclusion, I am satisfied on the balance of probabilities that Mr Brine suffered an unjustified disadvantage in his employment when he was not removed from working in the chiller on Wednesday, 23 July 2014 after he had complained to Mr Cameron of the initial physical effects he was suffering.

[62] I am also satisfied that this failure was a breach of the respondent's express contractual obligation under clause 22.1 of the individual employment agreement to provide to Mr Brine a safe and healthy working environment. Clearly, an environment in which an employee suffers sustained adverse physical effects is not a healthy environment.

Did the respondent act in breach of its statutory and contractual obligations to Mr Brine by requiring him to work in the chillers on 4 August 2014 despite medical advice that he was not to do so?

Was a personal grievance validly raised?

[63] Section 114(1) of the Act provides that 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.

[64] It is a well-established requirement that a personal grievance must be raised with sufficient specificity for the respondent to understand what the personal grievance is. This principle was established by the Employment Court in *Creedy v.*

[2] It should be noted that I did not hear expert evidence on how ventilation could have been achieved, but that this suggested method appears on the face of it to be entirely feasible.

Commissioner of Police [2006] ERNZ517, and was not overturned by subsequent judgements on appeal. The Employment Court stated at [36] the following:

> *It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[65] Whilst Ms Coulston submits that her personal grievance letter dated 13 August 2014 sent on behalf of Mr Brine raised a grievance about the alleged action, I do not accept that it did so with sufficient specificity. Whilst the medical certificate and the prohibition against working in the chillers were mentioned, there is no specific mention of the allegation that the medical prohibition was wilfully ignored by the respondent, which is the allegation now before the Authority. A general reference to Mr Brine being repeatedly ordered to work in the chillers is not sufficient in my view, as the allegation is serious and different in kind to the other allegations that Mr Brine was told to work in the chillers before he had obtained medical advice. Furthermore, the specific allegation that the medical prohibition was wilfully ignored by the respondent was not referred to in the statement of problem.

[66] However, the specific allegation that Mr Lindsay required him to work in the chillers despite the prohibition in the ACC45 form was expressly referred to in Mr Brine's witness statement dated 7 April 2015. This allegation was, in turn, referred to and addressed in Mr Lindsay's undated witness statement which was lodged with the Authority on 21 April 2015.

[67] No objection has been raised by the respondent that the personal grievance relating to the specific allegation (that the medical prohibition was wilfully ignored by the respondent) was not raised with sufficient specificity within the 90 days' time limit or was raised outside of the 90 day time limit.

[68] In *Hawkins v Commissioner of Police*[3] the Employment Court held that s 114 of the Act does not abrogate the common law tests for consent, and an employer may impliedly consent to a personal grievance being raised out of time. In that particular case, the respondent's lack of protest and active engagement provided sufficient evidence of implied consent to the grievance being raised out of time. This approach was approved by the Court of Appeal[4], which held that whether consent has occurred is a matter of fact and degree and that:

> *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.*

[69] In light of this principle, and the respondent's active addressing of the specific allegation in Mr Lindsay's witness statement, I accept that, although the personal grievance was not raised until 7 April 2015 in Mr Brine's witness statement, the respondent impliedly consented to it being raised after the expiration of the 90 day time limit.

The substantive allegation

[70] I do not accept that the respondent *required* Mr Brine to work in the chiller on 4 August 2014 when Mr Brine presented Mr Lindsay with an ACC 45 form which stated that he was not to do so. I conclude that there was a lack of communication between Mr Lindsay and Mr Cameron, which Mr Brine significantly contributed to.

[71] Whilst perhaps not best practice, it was not a breach of either a statutory or contractual duty for Mr Lindsay to have told Mr Brine to ask Mr Cameron to assign him other duties, rather than for Mr Lindsay to have asked Mr Cameron to do so directly. However, having considered the evidence, I believe that Mr Lindsay did not make it clear to Mr Brine that he was to ask Mr Cameron to do this. Understandably, Mr Cameron, not being in possession of the ACC45 form, could not have known about the requirement to assign Mr Brine different duties. His failure to do so is not, therefore, a breach.

[72] However, Mr Lindsay's failure of communication did cause Mr Brine a disadvantage (in that he did not convey to Mr Brine that Mr Cameron was to assign him different duties) and that failure was unjustified, as no fair and reasonable

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[3] [2007] ERNZ 762
[4] *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381

employer could have failed to have effectively communicated an important message, that in the face of a prohibition imposed upon an employee for medical reasons, different duties were to be imposed. Therefore, Mr Lindsay's action was unjustified.

[73] I will consider the effect of Mr Brine's contribution to the outcome of this unjustified action when I consider remedies below.

Did the respondent act in breach of its statutory and contractual obligations to Mr Brine by failing to provide medical treatment and assistance?

[74] It is Mr Brine's case that he should have been afforded immediate access to medical treatment from the point when he complained and advised the respondent of his symptoms on 23 July 2014.

[75] First, I am satisfied that the implied duty on the employer to take reasonable care to avoid causing injury to an employee's physical or mental health extends, in appropriate circumstances, to ensuring that access to appropriate medical attention is provided so that an illness or injury is not exacerbated.

[76] I also accept that the respondent's responsibility to provide a safe and healthy working environment required by clause 22.1 of the individual employment agreement encompasses the provision of access to medical treatment, for the same reason. In addition, the AFFCO Group Health and Safety Policies and Procedures, which have been adopted by the respondent, provide a protocol by which medical treatment injuries are to be dealt with.

[77] However, whilst I am satisfied that the respondent became aware that Mr Brine was suffering physical effects due to him working in the chiller after the fogging, I do not accept that these effects obviously manifested themselves (separately or together) as an injury that clearly required immediate medical treatment.

[78] Mr Brine's evidence is that he first suffered a sore throat, watering eyes, a headache, coughing, dry retching and a *sticky horrible taste.* None of these effects could reasonably be characterised, either separately or together, as an injury requiring immediate medical treatment, as they are all, objectively speaking, effects which, whilst uncomfortable, are of a relatively minor nature and which one could reasonably have expected to have diminished after he had left the chillers. If any of these effects

being experienced by Mr Brine were subjectively more than minor, the onus was on him to say as much, and to ask to be given treatment.

[79] In other words, there is no cogent evidence that these effects manifested themselves in the same way as would a cut, a broken bone, severe pain, fitting, bleeding and so forth, which, objectively, would alert an employer to the need to provide immediate medical treatment.

[80] Whilst Mr Brine should have been sent home on 24 July 2014 after he had reported having had vomiting and diarrhoea after he left work on the previous night, this requirement arose from hygiene requirements set out in the AFFCO Group Health and Safety Policies and Procedures. These procedures do not impose a requirement upon the employer to afford to an affected employee access to medical treatment, although they do impose such a requirement upon the affected employee, under certain circumstances, to seek medical attention.

[81] I am satisfied that Mr Lindsay was being truthful when he said in evidence that he did not consider that the vomiting and diarrhoea was connected with having worked in the chillers the previous day. On balance, I believe that that was a reasonable conclusion for Mr Lindsay to have reached, given that the most discernible after effect of the fogging was a strong smell. In addition, Mr Brine states that he was feeling better that following morning. In conclusion, I do not accept that these reported symptoms should reasonably have alerted Mr Lindsay to the need to afford to Mr Brine immediate access to medical treatment.

[82] With respect to the effect of difficulty in breathing, it is not clear to me whether the respondent ever became aware of this until Mr Lindsay did on 31 July 2014. However, Mr Brine has not given evidence as to the degree of the difficulty he was suffering. Clearly, difficulty in breathing can range from having a slight effect to being life threatening. On balance, I do not find that the respondent became aware that Mr Brine was suffering from such a severe degree of difficulty that it triggered the respondent's duty to provide him immediate access to medical treatment.

[83] I am satisfied that the first time that a serious symptom manifested itself at work in respect of Mr Brine was when he started to cough and bring up blood at some point during the week ending 1 August. Mr Andrews' evidence was that he told Mr

Burgess, who denies this. Mr Brine's evidence on the alleged report to Mr Burgess is, however, hearsay.

[84] Mr Andrews' evidence generally was subject to question because, after serving and lodging a witness statement supporting Mr Brine, he subsequently served and lodged a statement which was more supportive of the respondent. It was for this reason that I allowed Ms Coulston to cross examine Mr Andrews. During this cross examination, Mr Andrews confirmed that he had told Mr Burgess that Mr Brine was *crook*.

[85] On balance, I am not satisfied that Mr Andrews told Mr Burgess that Mr Brine was coughing up blood. Therefore, I accept Mr Burgess' evidence that he was not aware off this. There is no evidence that anyone else in management was told of this, and so I cannot find that there was a breach of the respondent's duty to afford to Mr Brine immediate access to medical treatment when he coughed up blood.

Conclusion

[86] In conclusion, I find that Mr Brine suffered an unjustified disadvantage in his employment when the respondent failed to remove him from working in the chiller on Wednesday, 23 July 2014 after he had complained to Mr Cameron of the initial adverse effects of being exposed to the residue of the thermal fogging.

[87] I also find that Mr Brine suffered an unjustified disadvantage when Mr Lindsay did not effectively communicate to him, or to his supervisor, that different duties were to be temporarily assigned in the face of a prohibition from working in the chillers for medical reasons.

Remedies

[88] Section 123(1) of the Act provides as follows:

> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
>
> *…:*
>
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*
>
> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*

> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.*

Compensation for humiliation, loss of dignity and injury to feelings

[89] In his brief of evidence Mr Brine stated that he *went to* [his] *GP a couple of times about the depression and anxiety* [he] *was feeling as a result of the way SPM treated* [him]. I directed Mr Brine to provide a copy of his GP's medical notes in respect of these consultations. However, the GP's notes subsequently tendered by Mr Brine made no mention of being consulted about depression and anxiety, and so I am unable to conclude that these conditions were diagnosed.

[90] Ms Coulston did lodge with her submissions in reply a page from Mr Brine's medical notes apparently produced by the Union Community Health Piki Te Ora Clinic which showed an entry dated 12 September 2014, which stated *on going stress re chemical poisoning.* However, the respondent has had no opportunity to question Mr Brine over this entry, or to seek to question the doctor or nurse who made the entry. It would not be just to allow this evidence to influence the Authority's assessment of the compensation he seeks.

[91] However, Mr Brine states in his witness statement that, *from when* [he] *first began feeling unwell from working in the chillers and having no support at all from the management team at SPM,* [he] *felt isolated and depressed*. In respect of the failure to remove Mr Brine from working in the chiller after he first manifested sustained physical effects, I accept that he suffered hurt, humiliation and loss of dignity.

[92] I also accept that he would have suffered hurt, humiliation and loss of dignity when he was told to work in the chiller after he had produced a medical certificate temporarily prohibiting him from doing so.

[93] Mr Brine seeks the sum of $20,000 as a result of *the unjustified disadvantages*, which I understand to encompass the entirety of the disadvantages claimed. This sum is predicated upon a finding that Mr Brine suffered anxiety and depression as a result of the unjustified disadvantage grievances. However, I have not been able to find that these alleged conditions were diagnosed.

[94] I must also be careful to distinguish the two instances of unjustified disadvantage which I have found from the RADS with which Mr Brine was eventually diagnosed, as the Authority has no jurisdiction to award compensation for personal injury.

[95] It is not practically possible to separate out the hurt, humiliation and loss of dignity suffered from the two instances of unjustified disadvantage that I have found. I believe that Mr Brine's hurt, humiliation and loss of dignity were moderate, and assess an appropriate level of compensation to be the global sum of $8,000.

[96] Under s.124 of the Act, where the Authority has determined 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; and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[97] I do not believe that Mr Brine contributed in any way to the situation that led to the failure to remove him from the chiller when he first reported the physical effects to Mr Cameron. However, Mr Brine clearly contributed to the situation which led to the personal grievance arising from Mr Lindsay's failure to effectively communicate to Mr Cameron that Mr Brine was temporarily not to work in the chillers. Mr Brine staying silent when told by Mr Cameron to work in the chiller failed to correct Mr Lindsay's ineffective communication, and was blameworthy, as it was in breach of his own obligation under clause 22.6 of the individual employment agreement, which provides that employees bound by the agreement accept their responsibilities under the Health and Safety in Employment Act 1992 and its amendments to take all practicable steps in the course of employment to ensure their own safety. They are also required to report all accidents, incidents and risks promptly to the supervisor.

[98] Mr Brine explained his failure by effectively stating that he did not want to complain because he did not want to lose his job. However, no further evidence was given about this risk, and what his assessment was based on, and so it cannot neutralise his responsibility.

[99] I believe that Mr Brine was at least 50% responsible for the ineffective communication. I believe that this warrants a reduction in the global figure of $8,000 awarded under s.123(1)(c)(i) by 25%.

Penalties

Breach of the employment agreement

[100] Mr Brine seeks that a penalty be imposed for a breach of his individual employment agreement and the respondent's Group Health and Safety Policies and Procedures in the sum of $10,000, that be paid wholly or partly to him.

[101] Section 134 of the Act provides that every party to an employment agreement who breaches that agreement is liable to a penalty under the Act. I have found that there was a breach by the respondent of the duty imposed by clause 22.1 of the individual employment agreement to provide a safe and healthy working environment for Mr Brine once it knew that he was suffering adverse physical effects in the chiller. I have also found that this breach resulted in an unjustified disadvantage to Mr Brine, for which he has been awarded compensation under s.123(1)(c)(i) of the Act.

[102] In *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands*[5] the Employment Court declined a challenge to the Authority's determination not to impose a penalty on the employer for breach of the employment agreement. At [124] and [125] His Honour Judge Couch held:

> *[124] Mr Neutze submitted that I should have regard to what he described as the "flagrancy" of the breach and to the harm caused to the plaintiff by the breach. The difficulty with that submission is that the actions of the defendant relied on for the breach were also relied on by the plaintiff for his personal grievance. In Xu v McIntosh [2004] 2 ERNZ 448, the former Chief Judge expressed the view that this sort of doubling up is wrong in principle — see para 45 of that decision. I agree. Where a remedy has been sought and granted in respect of a personal grievance, it will be unusual for a penalty to be imposed in respect of the same conduct on the basis that it is also a breach of an employment agreement. There would need to be, as the former Chief Judge put it in Xu, "special facets of*

[5] [2006] ERNZ 449

> *the breach calling for punishment of the employer on top of compensation for the employee."*
>
> *[125] In this case, I am satisfied that the defendant's conduct in failing to adopt a fair procedure was sufficiently condemned by the Authority's conclusion that it rendered the dismissal of the plaintiff unjustifiable and by the award of substantial remedies to the plaintiff as a result. That being so, it was not appropriate for the Authority to impose a penalty for the same conduct and it did not err by not doing so. This aspect of the challenge is also dismissed.*

[103] In view of this clear statement by the Employment Court, I do not accept that the Authority is able to impose a penalty in respect of a breach of the individual employment agreement from which arose Mr Brine's personal grievance for unjustified disadvantage.

Breach of good faith

[104] Ms Coulston submits that a penalty should be imposed under s.4A of the Act because the respondent failed to act in good faith and be communicative and responsive when it did not obtain medical care for Mr Brine on 23 July 2014 and subsequently. I have found that there was no statutory or contractual breach by the respondent not affording Mr Brine immediate access to medical treatment.

[105] In so far as Ms Coulston alludes to the failure to prevent Mr Brine from working in the chiller on 4 August 2014, despite the medical prohibition, I have already found that an unjustified disadvantage has arisen from the respondent's failure to communicate effectively in respect of that event, and I have awarded compensation in respect of it. Therefore, I cannot impose a penalty in respect of a possible breach of good faith for the same personal grievance. In any event, I do not accept that the requirements of s.4A of the Act have been met to justify imposing a penalty.

Damages for breach of contract

[106] Ms Coulston seeks the sum of $5,000 in respect of breach of contract. However, there is no evidence that financial damage flowed from the breach of contract that I have found and, in any event, Mr Brine has been awarded compensation under s123(1)(c)(i) of the Act for unjustified disadvantage which arose from unjustified action which also constituted a breach of contract by the respondent. I therefore decline to award any damages under this head.

Damages for breach of statutory duty

[107] This cause of action is founded in tort, for which the Authority does not have jurisdiction (s161(1)(r) of the Act).

Order

[108] I order the respondent to pay to Mr Brine the sum of $6,000 pursuant to s123(1)(c)(i) of the Act.

Costs

[109] Costs are reserved. The parties should seek to agree how costs are to be dealt with between them, but if, within 28 days of the date of this determination, they are unable to reach agreement, Ms Coulston shall have a further 14 days within which to serve and lodge a memorandum of costs and Ms Webster shall have a further 14 days within which to reply.

David Appleton
Member of the Employment Relations Authority