IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 203
5400013

	BETWEEN	RONAN CONNELL Applicant
	A N D	SEPCLEAN LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Ralph Webster, Advocate for the Applicant Victoria Reid, Director of the Respondent
Investigation meeting:	27 June 2013 at Nelson
Submissions Received	At the investigation meeting
Date of Determination:	30 September 2013

DETERMINATION OF THE AUTHORITY

A. Ronan Connell was unjustifiably dismissed.

B. Ronan Connell was discriminated against in his employment by reason of his disability.

C. Sepclean Limited must pay Ronan Connell $528.00 gross unpaid notice.

D. Sepclean Limited must pay Ronan Connell $2,640.00 gross lost remuneration.

E. Sepclean Limited must pay Ronan Connell $10,000 in compensation.

Employment relationship problem

[1] Ronan Connell is a professional driver with a Class 5 licence, amongst others. He has a prosthetic leg after a partial amputation.

[2] Mr Connell was employed by Sepclean Limited for a minimum of eight hours a week. Mr Connell undertook the 'sludge run' and worked with other staff on other jobs. He began work in July 2012 and was dismissed by reason of redundancy on 19 September 2012.

[3] Mr Connell claims that he was unjustifiably dismissed and unjustifiably disadvantaged and discriminated against in his employment by reason of his disability. He also says that the process used to dismiss him was procedurally unfair. By way of remedies Mr Connell seeks pay in lieu of three weeks' notice he was entitled to under his employment agreement, lost wages up to 28 February 2013 and compensation of $12,000 for humiliation, loss of dignity and injury to his feelings.

[4] Sepclean resists all of Mr Connell's claims. It says he was engaged under a 90-day trial period and therefore he is not entitled to bring a personal grievance claim for dismissal. It also says that it did not negatively discriminate against Mr Connell and, if anything, it did so positively by creating a part-time job for him.

Issues

[5] The Authority needs to determine:

- whether there is a valid 90-day trial period under s.67A of the Employment Relations Act 2000 (the Act) which prevents Mr Connell from bringing a personal grievance of unjustified dismissal;

- if not, whether Mr Connell was unjustifiably dismissed or justifiably made redundant. That requires an examination of the reason for the redundancy and the process Sepclean used to decide Mr Connell would be made redundant;

- whether Mr Connell was discriminated against by reason of his disability;

- whether Mr Connell was unjustifiably disadvantaged in his employment;

- whether Mr Connell is entitled to any remedies; and

- legal costs. However, that determination will be reserved.

Determination

Factual background

[6] Sepclean specialises in liquid waste disposal. Mr Connell was principally engaged to do a sludge run for a contract Sepclean had with Nelmac Limited. Ms Reid also considered that someone of his considerable driving experience would be useful to Sepclean as far as training and advising the other drivers, only two of whom also held Class 5 licences with dangerous good endorsements as Mr Connell did.

[7] Mr Connell, Malcolm Furness and Graham Hay were interviewed in July 2012, after applying for a vacancy for a *driver/self manager* advertised on Trade Me as a full-time permanent role.

[8] Mr Furness had a Class 4 licence. He was employed in the driver/self manager position and was very quickly identified as being suitable to assist Andy Delaney who manages Sepclean's day to day operations. Mr Hay was employed on 27 August 2012 to do general labouring work although he had applied for the driver/self manager role. However, Sepclean:

> *had work for someone with his broad experience, which included drain-laying and Graham wanted to work. On 27th August Graham had a class 4 drivers' licence but he did not have a dangerous goods endorsement and he did not have a class 5 drivers' licence.*
>
> *Graham was still doing general labouring when we offered him a full-time, vacuum truck and general operating role on 2nd October. This was the job left by James*[1].

[9] Mr Connell was interviewed on 16 July 2012 by Victoria Reid and John Reid, the owners of the business. He was told there was likely to be a second interview. On 19 July 2012 Ms Reid rang Mr Connell to tell him Sepclean had appointed someone

[1] Further information provided at the Authority's request by Ms Reid on 23 September 2013.

else to the full-time position but that there may be some other work for him if he was interested.

[10] On 19 July Ms Reid and Mr Connell agreed that he would come and speak to her the following day and have a 'trial run'. Ms Reid says the purpose of the trial run was because she was not sure if he could do the role and she wanted to give him an opportunity to experience it first-hand.

[11] On Friday, 20 July 2012 Mr Connell came in to Sepclean. He says he thought that his discussion with Ms Reid that day and the trial run were in the nature of a second interview. He went out with Richard Hibberd[2] to do the Nelmac sludge run. He was then asked to work on Saturday 21 July 2012, again with Mr Hibberd, which he did.

[12] It was arranged that Mr Connell would work with Andrew Delaney on 23 July but Mr Delaney was unable to come into work that day. Instead Mr Connell visited Mr Delaney at home on 24 July 2012.

[13] Also on 23 July Ms Reid told Mr Connell there might not be enough work for him but that if there was work for him he would be needed as a Class 5 driver. Mr Connell asked Ms Reid if he had been taken on. She said it was not certain he would be taken on and that he should look for other work too. Ms Reid says that after Mr Connell meet with Mr Delaney he told her he had reservations about Mr Connell's suitability for the role given his disability. However, he agreed with Ms Reid they should offer Mr Connell a part-time position.

[14] Ms Reid says that during Mr Connell's trial Sepclean:

> *…didn't send him out to the hardest of jobs in the dark and rain to walk down muddy banks – or on his own digging septic tanks or to be in the hold in a small area in boats and dragging a hose down.*

[15] The reason for that was she was not sure if Mr Connell could do the job and she did not want to be responsible for any injuries to him.

[16] On 24 July 2012 Ms Reid sent an email to Mr Connell which attached:

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[2] A former Sepclean employee, also a qualified Class 5 driver, who resigned and finished work on 24 August 2012.

> *…an employment agreement, schedule and position description; in other words an offer of employment. Take your time to consider the offer. I will keep the originals in the office ready for you to sign. The staffing situation is unsettled however I believe there will be steady work for you going forward…If we start off with Mondays and Wednesdays from pay week* (sic) *commencing 26th July then that should give us a solid platform on which to build.*

[17] Ms Reid and Mr Connell signed the employment agreement on 27 July 2012. Ms Reid signed the attached position description on 24 July 2012 and Mr Connell signed it on 27 July 2012.

[18] Mr Connell was appointed as a general operator to perform the duties set out in the job description attached to the agreement. Relevant clauses of the agreement read:

> ***3.*** *…*
>
> ***3.1*** ***Individual Agreement of Ongoing and Indefinite Duration subject to a Three Month Trial, if specified in the schedule***
> *This Employment Agreement is an individual employment agreement entered under the Employment Relations Act 2000. This agreement is effective from* ***20th July 2012*** *and replaces, if any, all previous agreements between the Employer and Employee. The agreement is effective from the date it is signed by both parties and shall continue until either party terminates the agreement in accordance with the terms of this agreement. The clauses in this agreement may be varied or updated by agreement between the parties at any time.*
>
> ***3.2*** ***Trial Period***
> *A trial period will apply for a period of 90 CALENDAR DAYS. During the trial period the Employer may terminate the employment relationship, and the Employee may not pursue a personal grievance on the grounds of unjustified dismissal. The Employee may pursue a personal grievance on grounds as specified in sections 103(1)b-g of the Employment Relations Act 2000 (such as: unjustified disadvantage; discrimination; sexual harassment, racial harassment; duress with respect to union membership; and the employer not complying with Part 6A of the Employment Relations Act 2000).*
>
> *Any notice, shall be given within the trial period, even if the actual termination date does not become effective until after the trial period ends. This trial period does not limit the legal rights and obligations of the Employer or the Employee (including access to*

mediation services), except as specified in section 67A(5) of the Employment Relations Act 2000.

[19] The schedule attached to the individual employment agreement makes no mention of the three month trial referred to in the heading of clause 3.1 of the employment agreement. However, I understand Sepclean to be relying on clause 3.2 to establish that a trial period under s.67A of the Employment Relations Act 2000 (the Act) applied.

Is there a valid 90-day trial provision preventing Mr Connell from bringing a personal grievance for unjustified dismissal?

[20] Sepclean submits that there was a 90-day trial period in Mr Connell's employment agreement which prevents him from being able to bring a personal grievance for unjustified dismissal. If that is correct then I would not have the jurisdiction to determine Mr Connell's claim for unjustified dismissal.

[21] Ms Reid submits that at the commencement of Mr Connell's employment, irrespective of the date of that, both the employer and the employee believed that the position was subject to a 90-day trial period.

[22] The heading to clause 3.1 of the employment agreement states that the employment agreement is *subject to a Three Month Trial, if specified in the schedule*. No three month trial was specified in the schedule. Also the clause itself does not refer at all to a three month trial and how that might work. However, clause 3.2 clearly outlines Sepclean's intention to have a *trial period for a period of 90 CALENDAR DAYS*.

[23] The two sub-clauses (3.1 and 3.2) may be read together to mean that in the absence of a three-month trial period specified in the schedule clause 3.2 is negated. However, despite that possible impediment to a valid 90-day trial period it is important to determine whether Mr Connell met the criteria set out in s.67A(3) of the Act. If Mr Connell was employed by Sepclean before he signed the employment agreement containing clauses 3.1 and 3.2 he was not *an employee who had not previously been employed by* Sepclean. In that case the Act does not permit the parties to enter into a valid s.67A trial period.

[24] Section 67A of the Act provides:

> - if a trial period provision for a period not exceeding 90 days is included in the written individual employment agreement starting at the beginning of the employment of an employee who has not previously been employed by the employer, during that trial period the employer may dismiss the employee, and
> - if the employer does so the employee is not entitled to bring a personal grievance or other legal proceedings in respect of that dismissal.

[25] Section 67B(1) and (2) provide that if an employer terminates an employment agreement containing a trial period provision under s.67A by giving the employee notice of the termination before the end of the trial period, whether the termination of the employment takes place before or after the end of the trial period, the employee may not bring a personal grievance or legal proceedings in respect of the dismissal.

[26] However, s.67B(3) says that neither s.67B nor the existence of a trial provision prevents an employee from bringing a personal grievance under any of the grounds specified in s.103(1)(b) to (g).

[27] Section 103(1) defines the term 'personal grievance' to include:

> *(a) that the employee has been unjustifiably dismissed; or*
> ***(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer****; or*
> ***(c) that the employee has been discriminated against in the employee's employment****; or*
> *(d) that the employee has been sexually harassed in the employee's employment; or*
> *(e) that the employee has been racially harassed in the employee's employment; or*
> *(f) that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of a union or employees organisation; or*
> *(g) that the employee's employer has failed to comply with a requirement of Part 6A;*[3]

[3] Emphasis added because Mr Connell is claiming these types of personal grievance as well as unjustified dismissal.

[28] Therefore, employees dismissed under a valid s.67A trial period provision are denied the ability to bring a personal grievance for unjustified dismissal only. A number of other personal grievance claims are still open to them.

[29] In *Smith v Stokes Valley Pharmacy* Chief Judge Goddard of the Employment Court considered the application of s.67A and s.67B trial periods and said that the provisions:

> *remove longstanding employee's protections and access to dispute resolution and to justice. As such, they should be interpreted strictly and not liberally … legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated.*[4]

[30] Chief Judge Colgan went on to say:

> *The … sections are neither simple nor the very broad and blunt prohibition against bringing legal proceedings that is sometimes portrayed rhetorically. They provide a specific series of steps to be complied with cumulatively before a challenge to the justification for a dismissal can be precluded. There is a risk to the employer of disqualification from those immunities if these steps are not complied with. Significant obligations of good faith dealing remain upon employers.*[5]

[31] A key issue decided in the *Stokes Valley Pharmacy* case was the effect of s.67A(3); that is, who is an *employee who has not been previously employed by an employer*? In Ms Smith's case she worked for the employer before signing an employment agreement containing ss.67A and 67B provisions. The Chief Judge decided that she did not meet the statutory definition of 'employee' set out in s.67A(3).

[32] Ms Reid says that Mr Connell was compensated for his time when he went out and assisted Sepclean employees, at least on 20 and 21 July 2012[6], before he was formally made an offer of employment via her email of 24 July 2012 and signed that agreement on 24 and 27 July 2012. However, she says he was not an employee at that stage. In effect Ms Reid argues that prior to her offer of employment on 24 July 2012 Mr Connell was being trialled for his suitability for employment only and had not become an employee.

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[4] *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] ERNZ 253, page 265
[5] *Smith*, page 271
[6] Mr Connell's and Richard Hibberd's evidence establish that Mr Connell performed work and did not just observe Mr Hibberd working.

[33] In the recent Employment Court case of *The Salad Bowl Limited v Amberleigh Howe-Thornley*[7] Chief Judge Colgan decided a number of issues about trial periods. He upheld a decision of the Authority[8] in which it was found that Ms Howe-Thornley had become an employee when she was undertaking work for the employer on a trial basis, for which the employer intended to pay her.

[34] I consider that Mr Connell, whilst being trialled, gave his labour at least on 20 and 21 July 2012 in exchange for remuneration. The fundamental characteristics of an employment agreement were present. Mr Connell worked as an employee for Sepclean on a casual basis before he was presented with an offer of a minimum of eight hours a week employment in the email of 24 July 2012, and before he accepted that offer by signing the agreement on 27 July 2012.

[35] In addition, I note that when Ms Reid sent Mr Connell the employment agreement it included *the agreement is effective from 20th July 2012*. I consider that to be evidence that at the time of drafting that agreement Ms Reid considered that Mr Connell had been an employee since 20 July 2012, although that is not her view now.

[36] That means that the 90-day trial period is not effective to prevent Mr Connell bringing a claim for a personal grievance of unjustified dismissal because he was not *an employee who has not been previously employed by an employer* when he was offered and accepted the written employment agreement.

Was Mr Connell unjustifiably dismissed?

[37] On 1 August 2012 at a meeting of all drivers to discuss a planned job involving barge work Ms Reid asked Mr Connell if he was able to work on the beach and wade in sea water. He did not give her a direct answer in front of the other workers because he was embarrassed but approached her the next day to tell her he could not work on the beach because salt water could damage his prosthetic leg which would be very expensive to replace. He says that Ms Reid said *that's fair enough. I can understand that*. Mr Reid says that he remained on call that weekend instead in case there were call outs while the other employees were engaged in the barge work.

[7] [2013] NZ EmpC 152
[8] [2013] NZERA Christchurch 25

[38] One Sunday evening at least two weeks before Mr Connell was dismissed Ms Reid rang him at home and told him that the Class 5 driving work was slowing down. She told him that he would have to start doing septic tank work. He told her that was fine but that he would have to be trained properly and learn how to operate the other trucks and pumps.

[39] In the first few weeks Mr Connell had worked for more than eight hours a week and had noticed that work had dropped off for him. He suspected he was not getting so much work because he had raised some concerns about what he considered a certain lack professionalism and adherence to their legal obligations on the part of a couple of other driving staff.

[40] Ms Reid says that was not the reason and that Mr Connell had worked extra hours in the first few weeks because another driver, Simon Goodman[9], was on holiday. However, he was mainly engaged to do the sludge run which was usually twice a week taking approximately four hours each time. Initially Ms Reid also considered that Mr Connell could work the one day a week it was proposed that Mr Goodman would not work. However, Mr Goodman finished work in late August.

[41] On 23 August 2012 Sepclean advertised on Trade Me for a full-time vacuum truck operator/driver requiring a Class 4 licence at the minimum, with a Class 5 licence preferable. The work was described as varied and included emptying septic tanks. Mr Connell says he saw that ad and thought it was odd because it appeared to be for the kind of work he had been employed to do. James Radford was appointed to that position and began work on 31 August 2012. Mr Radford's employment ceased on 14 September 2012.[10]

[42] Adam Ross was subsequently also employed as of 11 September 2012, with a Class 2 licence and a dangerous goods endorsement and to be a trainee driver with a view to eventually gaining at least a Class 4 licence. Mr Ross had worked for Mr Delaney in another business and was offered the role.

[43] On 19 September 2012 Mr Connell came to work. While he was going to get his overalls Ms Reid approached him. She told him that because of the diminution of

[9] Mr Goodman also resigned effective 24 August 2012.
[10] The Authority has also made a determination on claims by Mr Radford which is [2013] NZERA Christchurch 202. At issue was whether Mr Radford had been unjustifiably dismissed or had abandoned his employment.

truck and trailer work she was terminating his employment. It is likely that Ms Reid believed that there was a valid 90-day trial period in place at the time. However, that was not so. Therefore, I need to consider whether the termination of Mr Connell's employment was justified.

[44] Ms Reid says that the loss of the Nelmac contract for the sludge run and the consequent lack of sufficient truck and trailer work requiring an employee with a Class 5 licence meant that Mr Connell had to be dismissed. It submits it had no suitable work for Mr Connell. That raises the issue of whether Mr Connell was justifiably made redundant.

[45] It is established law that an employer is entitled to make its business more efficient by the introduction of cost saving steps, including reducing the numbers of employees by way of redundancy. The Authority is not able to substitute its own judgment for the employer's judgment on whether it would have made the employee redundant or not, but must consider the issue objectively[11].

[46] However, if the justification for the redundancy is challenged by an employee the employer must be able to prove to the Authority that the decision made and how it was reached were what a fair and reasonable employer could have done in the circumstances that existed at the time[12]. In applying the tests under s.103A of the Employment Relations Act 2000 (the Act), Chief Judge Colgan of the Employment Court has recently explained that:

> *[54] It will be insufficient under section 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision and the Court (or the Authority) is not entitled to enquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.* [13]

[47] The relevant clauses of Mr Connell's employment agreement are:

> ***12. Restructuring and Redundancy***
> …

[11] *GN Hale & Sons Ltd v Wellington Caretakers IUOW* [1991] 1 NZLR 151 (CA)
[12] Section 103A Employment Relations Act 2000.
[13] *Michael Rittson-Thomas trading as Totara Hills Farm v Davidson* [2013] NZEmpC 39

> ***12.4 Definition of redundancy***
> *Redundancy is a situation where the position of employment of an employee is or will become surplus to the requirements of the Employer's business.*
>
> ***12.5 Redundancy process***
> *In the event the Employer considers that the Employee's position of employment could be affected by redundancy or could be made redundant, the Employer shall, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with redundancy is made, whether there are any alternatives to dismissal (such as redeployment to another role). In the course of this consultation the Employer shall provide to the Employee sufficient information to enable understanding and meaningful consultation, and shall consider the views of the Employee with an open mind before making a decision as to whether to make the Employee's position of employment redundant. Nothing in this clause limits the legal rights and obligations of the parties.*
>
> ***12.6 Notice of Termination due to redundancy***
> *In the event the Employee's employment is to be terminated by reason of redundancy, the Employee shall be provided with* ***30 days****' notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.*
>
> ***13. Termination of Employment***
>
> ***13.1 General Termination***
> *The Employer may terminate this agreement for cause, by providing* ***1 weeks'*** (sic) *notice in writing to the Employee. Likewise the Employee is required to give* ***1 weeks'*** (sic) *notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.*

Was the redundancy substantively justified?

[48] Ms Reid submitted that Sepclean had lost money on Mr Connell's employment.

[49] I am satisfied that in the time Sepclean employed Mr Connell it invoiced Nelmac $10,800 excluding GST for the 30 sludge runs undertaken between 20 July and 19 September 2012. It paid Mr Connell $3,437.50 gross. That included payment for work he did other than the sludge runs. I accept that other drivers than Mr Connell

did some of those sludge runs. However, it is not proved that Sepclean lost money through employing Mr Connell.

[50] Sepclean had a genuine need to talk to Mr Connell and consider whether or not his position could continue in light of the end of the Nelmac contract.

[51] There is conflicting evidence about *when* Sepclean became aware that it would lose or had lost the contract. The letter to Sepclean from Nelmac advising of the loss of the sludge contract is dated 3 October 2012. It is signed by Lindsay Bell, Contracts Manager – Water and Wastewater. Ms Reid says that Sepclean found out that it would have no more work much earlier, less formally not directly from Mr Bell but from another Nelmac employee. She also says the last Nelmac sludge run was 7 September 2012. Mr Bell's letter says:

> *You will have noticed a sharp drop in sludge volumes requiring transport from the Wakapuaka plant during this last month and a trend in this direction is planned to continue as changes are made at the plant in the coming year or two.*
>
> *From the review we have undertaken a decision has been made to change the service provider of the transport of sludge ….*

[52] I accept Ms Reid's evidence that when Mr Connell was dismissed Sepclean had not yet had formal notification that it was losing the contract but it was at least aware the contract might come to an end. I also accept that as Mr Bell's letter shows the sludge volumes in September 2012 had dropped sharply and that caused Ms Reid to reconsider Mr Connell's employment.

[53] Ms Reid says she considered whether Mr Connell was physically able to do other Sepclean work but concluded that his disability limited him too much to redeploy him to another role with Sepclean.

[54] Mr Hay was appointed to Mr Radford's vacated role on 2 October 2012; which was just less than three weeks after Mr Radford's role was vacated and two weeks after Mr Connell was dismissed. Ms Reid says that even if Sepclean had considered Mr Connell for appointment to Mr Radford's former role he would not have been appointed as Mr Hay brought other strengths that were valuable to Sepclean.

[55] Sepclean submits, and Mr Delaney's evidence supports the view[14], that Mr Connell would not have been able to cope with the day to day demands of a general operator's role because of the terrain, sometimes sloping, and sometimes wet, on which operators were frequently required to work.

[56] Mr Connell disagrees that he was unable to perform the duties other than driving and is supported in that by evidence from Mr Hibberd. Mr Hibberd says that when Mr Connell came with him to do the sludge run and the following day to work on a ship there were *no issues* and that:

> *Ronan came down into the hold to see what the job involved (he didn't have to) – again no issues. I was not of the belief that he could not do the job…*
>
> *I worked with Ronan on a number of jobs which involved climbing ladders, going into ship's holds, changing of hoses on trucks and even emptying a septic tank where we had to clear 4m^{3}of soil before we could find the lid for a septic tank (this was in pouring rain too) Ronan was a hard worker and was able to complete any task I could do. The only time I heard about Ronan mentioning his leg was at a company meeting regarding barge work … I was not at the meeting but I heard afterwards.*

[57] Mr Hibberd resigned from Sepclean after a proposal that he and Mr Goodman put to Sepclean that was not accepted. I have no reason to suspect Mr Hibberd was motivated to give evidence by any ill will towards Sepclean and found him to be a sincere and credible witness.

[58] Mr Hibberd's evidence contrasts with Ms Reid's view that Mr Connell could not potentially *climb ladders, carrying heavy hoses on uneven ground, or crawl into tight spaces on fishing vessels* as he might be expected to do as a general operator.

[59] Mr Connell says that he worked with Mr Goodman as well as Mr Hibberd and performed a number of tasks other than driving. He also undertook a number of varied duties when Mr Goodman was away on holiday.

[60] I accept Mr Connell's evidence that at his interview, conducted by Ms Reid and Mr John Reid, Mr Connell was told that there would be septic tank work and also that for work on industry sites he would have a 3-month training period, which would include getting site specific certification to work on client sites.

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[14] He said that Mr Connell had difficulty walking on uneven terrain carrying hoses. Mr Connell disputed that.

[61] Mr Connell was appointed as a *general operator* with the following purposes set out in his job description*:*

- ***To carry out the day-to-day operations of the business.***
- *To follow all reasonable instructions.*
- ***To operate trucks (up to Class 5), vacuum pumps and other equipment.***
- *To develop and maintain productive relationships with customers and potential customers.*
- *To maintain effective cost control and manage expenditure.*
- *To maintain and produce timely and relevant operational reporting.*
- *To facilitate the development, maintenance and implementation of effective operating procedures.*

[Emphasis added]

[62] Mr Radford was also employed as a *general operator*. His role ended on 14 September 2012. Mr Radford's position description was different to Mr Connell's as it did not specify *purposes* but *core competencies*:

- *Excellent team player*
- *Honest, trustworthy and reliable*
- *Adaptable, flexible and resilient*
- *Organised, tidy, careful*
- ***Sound understanding of truck operations and health and safety requirements***
- ***Sound understanding of vacuum truck operating environment***
- ***Class 4, 5 and dangerous goods drivers license***
- *Comprehensive understanding of all Sepclean services*

[Emphasis added]

[63] I am satisfied that Mr Connell was employed as more than solely a driver on sludge runs for the Nelmac contract.

[64] Mr Connell and Mr Radford were both equally qualified as drivers, both employed as general operators and both required to operate vacuum pumps as part of their roles. Mr Connell had undertaken and could have again undertaken a number of other duties for Sepclean when another general operator's position was left vacant by Mr Radford's departure.

Was the redundancy procedurally fair?

[65] Clause 12.5 of the employment agreement imposed a duty on Sepclean to consult with Mr Connell about any proposed redundancy. I do not consider there were any exceptional circumstances that would have negated that duty. Sepclean also had a duty under clause 12.5 to provide Mr Connell with sufficient information about the proposal to make any consultation meaningful, to consult with him about whether there were any alternatives to dismissal, and to consider his views on the proposal before reaching a final decision about his redundancy[15].

[66] Section 4 of the Act addresses the requirement for parties to the employment relationship to deal with each other in good faith. Both parties have a duty to be active and constructive in maintaining a productive employment relationship in which they are responsive and communicative.

[67] In addition to the general mutual duty of good faith set out in s.4 of the Act s.4(1A)(c) imposes a special duty of good faith on an employer. It requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide that employee with:

> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before a decision is made*

[68] In her letter of 17 October 2012 to Mr Webster giving reasons for Mr Connell's dismissal Ms Reid wrote:

> *Before we terminated Mr Connell's employment agreement, we considered his suitability for other work however his disability was too limiting. We only have enough work for two, sometimes three driving operators. Every operator must have the potential to perform every type of operational task, this includes climbing ladders, carrying heavy hoses on uneven ground, crawling into tight spaces on fishing vessels etc. Hardly a day goes by when our operators are not required to do strenuous physical labour with dexterity.*

[69] That was information Sepclean was taking into account in reaching a decision to dismiss Mr Connell. Ms Reid discussed Mr Connell's future employment

[15] That duty is also an integral part of Sepclean's duty of good faith considered below.

prospects with Mr Delaney and Mr Reid[16] before making her decision. At the investigation meeting Mr Delaney said that he thought Mr Connell was not suitable to offer a full-time job or further on-going work because of his *attitude*. However, Ms Reid did not discuss Mr Delaney's view of Mr Connell or her view about the limitations of his disability with him.

[70] Had Mr Connell been consulted and given access to all information relevant to the continuation of his employment he may have suggested that Mr Hay and he could perhaps between them fulfil the duties left unstaffed by Mr Radford's departure. Ms Reid considered that Mr Hay had other skills useful to Sepclean but did not specifically explore with Mr Connell whether he also had other useful skills to contribute to the general labouring duties Mr Hay was undertaking. However, he was not given the chance to come up with alternatives to redundancy.

[71] I accept that the Class 5 (truck and trailer) work had dried up with the diminution and eventual loss of the Nelmac contract. At the beginning of Mr Connell's employment Ms Reid considered that he was so well qualified and experienced as a driver that he would be a good influence. She told him he would be their trainer to train other less experienced drivers. There was still driver training work necessary, especially for Adam Ross and Malcolm Furness who were both only Class 2 learner drivers at the time.

[72] However, Ms Reid says she was disappointed in Mr Connell's ability to perform a leadership role partly because there were cliques that had developed amongst Sepclean's employees. However, there is no evidence that Ms Reid had ever made clear to Mr Connell her change of heart about his leadership role. Also when he did make observations about other drivers, such as Mr Delaney's log book hours, she did not believe they were borne out. Again, in making the decision to dismiss Mr Connell Ms Reid took account of factors she did not put to him for his comment.

[73] The Chief Judge of the Employment Court held in *Simpsons Farms Ltd v Aberhart*[17]:

> *Consultation required more than simply a prior notification, and sufficient time was to be allowed. It was never to be treated as a mere formality. Sufficiently precise information was to be given to allow*

[16] She said at the investigation meeting *I had hours of conversations with John and Andy about Ronan's capacity but I am not sure if I spoke to Richard.*
[17] [2006] ERNZ 825

> *employees to state a view, together with a reasonable time and opportunity to do so. That might include an opportunity to state views in writing or orally. Genuine efforts had to be made to accommodate the views of the employees, and there was a tendency to at least seek consensus. A proposal was not to be decided or acted upon until after the consultation was completed*[18].

[74] Ms Reid's phone call to Mr Connell at home on a Sunday evening was insufficient to be considered consultation or even to be giving him access to all the information Sepclean took into account in deciding to make him redundant. Sepclean did not consult with him at all let alone give him an opportunity to comment on the information it was taking into account before making the decision to make him redundant. Instead, without the required consultation, Sepclean decided that it was not possible to redeploy Mr Connell to another role. That was in breach of Sepclean's duty of good faith under s.4(1A)(c) of the Act and in breach of clause 12.5 of Mr Connell's employment agreement.

[75] Any action of an employer resulting in a dismissal must be assessed for justifiability under s.103A of the Act; that is, was what Sepclean did how a fair and reasonable employer could have acted in all the circumstances at the time of Mr Connell's dismissal?

[76] In the Employment Court case of *Jinkinson v Oceana Gold (NZ) Limited (No 2)* [19], Judge Couch said:

> *The relationship between s4(1A)(c) and s103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure which does not comply with s4(1A)(c) will not be justifiable.*

[77] Therefore, the dismissal is not justifiable. However, I will also briefly consider the s.103A(3) tests. It requires the Authority to consider whether Sepclean acted fairly in deciding to dismiss Mr Connell. The requirements of s.103A(3) of the Act are not directly able to be applied to a redundancy situation but to assess the fairness of the process I need to consider whether Sepclean:

- Sufficiently investigated the allegation against him - having regards to its resources;

- Raised its concerns with him;

[18] Ibid, at paragraph 62.
[19] [2010] NZEmpC 102

- Gave him a reasonable opportunity to respond to the concerns; and

- Genuinely considered any explanation regarding the allegations.

[78] If an employer fails in its four duties listed in s.103A(3) a dismissal may be found to be unjustified. Sepclean had a view that Mr Connell's disability limited him too much to be a more general worker once the sludge run Class 5 driving work dried up. However, I am not satisfied that view was reached after a sufficient investigation into the actual limitations Mr Connell faces due to his prosthetic leg. Sepclean certainly did not raise its concerns with him. So, it follows that he was not given a reasonable opportunity to respond to the concerns, and that Sepclean could not genuinely hear what he had to say before making its decision to dismiss him. The defects in Sepclean's process of decision-making were more than minor and affected Mr Connell to his disadvantage.

[79] The law has developed to impose duties on employers to genuinely consider redeployment and, if possible, to redeploy an employee whose role would otherwise be made redundant if they are suitably qualified and experienced for the role[20]. I am not suggesting that Sepclean had a duty to redeploy Mr Connell to the whole of Mr Radford's vacant role. However, Mr Radford and Mr Connell were both Class 5 drivers with dangerous goods licences. With Mr Radford's departure Sepclean lacked a Class 5 driver who also had a dangerous goods endorsement. I accept that there may not have been eight hours of work every week that required an employee with such qualifications. However, there may well have been other tasks for which Mr Connell was suited for a minimum of eight hours a week, especially when Mr Hay's role was considered.

[80] A fair process in all the circumstances would have required more investigation into whether Ms Reid's view of Mr Connell's physical limitations was a reasonably justified view. That would have required trialling Mr Connell in at least some of the work arising out of Mr Radford's termination of employment and discussing any limitations discovered with Mr Connell and hearing his views on how they could be overcome before Sepclean could have made a fairly informed decision about the continuation of his employment.

[20] For example *Wang v Multicultural Services Trust* [2010] NZEmpC 142

[81] Mr Connell's view, supported by Mr Hibberd's evidence, is that Sepclean wanted to get rid of Mr Connell because he had brought up health and safety issues and breaches of driving rules by other staff that he observed. Sepclean denies that and also denies that there were any health and safety problems or breaches of driving rules. Mr Connell has not proved that Sepclean had that motive for terminating his employment and I do not find that he was dismissed for that reason.

[82] I have considered whether Sepclean was such a small employer that it affected its ability to act as a fair and reasonable employer in all the circumstances. However, that is not the case. Sepclean was going through a period of great change, particularly with its staff. It could have sought professional advice on its obligations and rights in relation to engaging employees, especially when it intended to impose s.67A 90-day trial periods, and on whether it was entitled to dismiss Mr Connell in all the circumstances. I consider Sepclean's failures to adequately inform and consult Mr Connell, and adequately consider him for redeployment were more than minor and affected him unfairly.

[83] The process undertaken and the resulting decision Sepclean made to dismiss Mr Connell were not actions that a fair and reasonable employer could have made in all the circumstances. Therefore, Mr Connell was unjustifiably dismissed and is entitled to remedies.

Was Mr Connell discriminated against in his employment?

[84] Under s.103(1)(c) of the Act an employee being discriminated against in their employment amounts to a personal grievance. Section 104(1) of the Act says for the purposes of s.103(1)(c):

> *an employee is* **discriminated against in that employee's employment** *if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105 …*
>
> *(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or*
>
> *(b)* ***dismisses that employee or subjects that employee to any detriment*** [emphasis added], *in circumstances in which other*

> *employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or*
>
> *...*
>
> *(2) For the purposes of this section,* **detriment** *includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction…*

[85] Section 105(h) of the Act includes disability amongst the prohibited grounds of discrimination referred to in s.104. The list of prohibited grounds of discrimination contains the same grounds specified in the Human Rights Act 1993.

[86] Section 21(1) of the Human Rights Act contains the definition of *disability* that also applies to the use of the term within the Employment Relations Act[21]:

> *disability, which means—*
> *(i) physical disability or impairment:..*
> *(v) any other loss or abnormality of psychological, physiological, or anatomical structure or function:*
> *(vi) reliance on a guide dog, wheelchair, or other remedial means:*

[87] There is no dispute that Mr Connell has a disability as defined in s.21(1) of the Human Rights Act. Subject to limited exceptions, if Mr Connell was dismissed by Sepclean by reason of his disability in circumstances in which other employees employed by that employer on work of that description would not have been dismissed then he was discriminated against in his employment in breach of s.104(1)(b) of the Act.

[88] In Sepclean's submissions Ms Reid says:

> *Ronan's physical impairment was not taken into account when deciding to end the trial of the eight hour position. Ronan's physical impairment was taken into account when considering Ronan for the full-time position left by James* [on 14 September 2012].
>
> *In the absence of any physical impairment Ronan would not have been offered the job because Mr Hay was the better all-round candidate.*
>
> *Had Ronan been an ideal match in all other respects, he would not have been offered the job because of his physical impairment.*

[89] That establishes that if Mr Connell had not been disabled he would have been considered by Sepclean to have been suitable to replace Mr Radford, for at least part

[21] Section 105(2) Employment Relations Act 2000

of the vacant full-time position; that is any required Class 4 or Class 5 driving work or driving work requiring a dangerous goods licence. Once Mr Radford's employment ended Sepclean had no other Class 5 driver than Mr Connell and only Mr Ross had a dangerous goods endorsement.

[90] Ms Reid says that Sepclean *positively discriminated in favour of Ronan to trial a part-time position accommodating Ronan's physical impairment*. Having employed Mr Connell, with his disability, Sepclean became subject to an employer's obligations under the Act and the Human Rights Act. There is no exception in law for employers who have *positively discriminated* by creating a job in order to employ a person with a disability.

[91] Ms Reid also says that there was no complaint of discrimination even after Mr Connell had raised a personal grievance for unjustified dismissal until Ms Reid's email to Mr Webster on 17 October 2012. That is because Mr Connell did not know until then that Sepclean considered that his disability justified it in not considering him for redeployment.

[92] I consider that Mr Connell was dismissed by reason of his disability in circumstances where another employee of his experience and qualifications but without his disability would not have been dismissed.

[93] I also consider that Mr Connell was subjected to detriment by Sepclean by reason of his disability by not being considered for redeployment rather than redundancy in circumstances where other employees engaged in his work as a general operator, a part of whose job included driving up to Class 5 vehicles, but without his disability, would have been considered for redeployment.

[94] However, before I can determine whether either or both of those amounted to a personal grievance of discrimination against Mr Connell I need to examine whether any of the exceptions in the Human Rights Act 1993 apply.

[95] Section 106(f) of the Act says that in relation to disability s.104 of the Act must be read subject to s.29 of the Human Rights Act. Different treatment based on disability is not prohibited by s.104 of the Act in certain conditions set out under s.29 of the Human Rights Act, meaning that Sepclean would have been entitled to treat Mr Connell differently to other employees without his disability in relation to his employment or dismissal by reason of his disability if because of his disability:

- To perform his duties he needed special services or facilities and it was not reasonable to expect Sepclean to provide those; or

- the environment in which his duties were to be performed or the nature of those duties, or of some of them, was such that he could perform those duties only with a risk of harm to himself or to others and it is not reasonable to take that risk. Unless without unreasonable disruption Sepclean could have taken reasonable measures to reduce the risk to a normal level.

[96] However, those exceptions do not apply to terms of employment or conditions of work that were set after taking into account any special limitations that the disability of the employee imposed on his capacity to carry out the work[22]. Mr Delaney says that Mr Connell told him his disability would not prevent him from being able to complete any duties, but that he might take a little longer than other people. Sepclean employed Mr Connell as a general operator, not just as a Class 5 driver. It did so knowing exactly what his disability was, and that he may be a slower worker, but it did not set any particular terms of employment or conditions of work to take account of any special limitations Mr Connell's disability imposed on his capacity to carry out the work. At least none that were openly expressed and agreed to by Mr Connell.

[97] In addition s.35 of the Human Rights Act provides a general qualification to the s.29 exceptions so that:

- Sepclean was not entitled to rely on the exceptions to accord Mr Connell any different treatment based on his disability, even if some of the duties of his position would fall within the exceptions if with some adjustment another Sepclean employee could carry out those particular duties, and

- that adjustment would not unreasonably disrupt Sepclean's activities.

[98] According to the authors of Mazengarb's Employment Law (NZ):

> *Section 35, which provides a general qualification on exceptions, has particular relevance to s 29 since both relate to what is generally termed a duty of "reasonable accommodation". Taken in combination, in order to successfully defend a claim based on*

[22] Section 29(3) of the Human Rights Act

> *unlawful discrimination based on disability under s 22, brought by an otherwise qualified employee, the employer has the burden of proving:*
>
> *that it is not reasonable to provide special services or that the work would create an unreasonable risk for the person concerned (or others) with any necessary risk-reduction measures being unreasonably disruptive (s 29); and*
>
> *that any adjustment of the employer's activities to allow other employees to take on the tasks which the person with a disability cannot perform would be unreasonably disruptive (s 35)*[23].

[99] There is one limitation that became obvious after Mr Connell's employment. At the interview Mr Connell told Ms Reid and Mr Reid that his disability would not affect his ability to undertake any duties. It later became apparent that Mr Connell could not work in conditions that meant his prosthetic leg could have been exposed to salt or salt water. However, I am satisfied that such duties did not form a large part of Sepclean's work for any general operator. In any event, Sepclean was able to reasonably accommodate that particular limitation by arranging for Mr Connell to be on-call in case of any other call-outs that particular weekend.

[100] That was an adjustment by Sepclean that did not unreasonably disrupt Sepclean's activities. Mr Connell's inability to work on the beach cannot be used to except Sepclean under s.29 of the Human Rights Act.

[101] There are very few New Zealand cases on disability and the exceptions under sections 29 and 35 of the Human Rights Act provision and fewer still in the area of employment. An Australian case *Kitt v Tourism Commission and others*[24], admittedly under different legislation, considered the issue of whether it was reasonable to take the risk that due to his disability an employee may harm himself or others or in Mr Connell's case to himself:

> *The question is not one of what the employer believed, nor of whether any such belief was reasonably held or based upon adequate grounds. The sole question is whether, from an objective point of view, the employment constituted a risk to other persons*[25] *…*

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[23] At [4029.5]
[24] (1987) EOC 92-196, decided by the New South Wales Equal Opportunity Tribunal
[25] *Kitt* at 76,887

[102] Ms Reid says her main concern was that she did not want Mr Connell to be hurt or injured in any way at work. She believed that his disability exposed him to an unacceptable level of risk of injury.[26] If that is correct then the s.29 Human Rights Act exception may have applied to render Sepclean's treatment of Mr Connell justified to the extent it could not be said to be discrimination under s.104(1)(b) of the Act. However, that would only apply if Sepclean could objectively prove:

- that Mr Connell could have performed the duties of the position satisfactorily only with the aid of special services and facilities, and
- it was not reasonable for it to have provided those special services or facilities to Mr Connell; and
- to enable him to undertake his duties Sepclean could not have made adjustments to those of Mr Connell's duties affected by his disability by having another employee undertake them without unreasonably disrupting Sepclean's activities.

[103] The key question under s.29(1)(a) is whether it is reasonable to expect the employer to provide special services or facilities. The test is an objective one and the burden of proof is on the employer[27].

[104] In the Employment Court case of *Motor Machinists Limited v Craig*[28], although not required to decide the question of exceptions under s.29 of the Human Rights Act, Chief Judge Goddard pointed to how the Human Rights Act exceptions may have been applied in relation to an employer having decided it was too risky to retain an employee who had developed industrial dermatitis:

> *In this case, there is no evidence that the appellant made any effort to assess the magnitude of the risk or to identify measures that might be taken to reduce it.*

[105] Sepclean's failure to properly investigate and assess Mr Connell's ability to perform the required tasks other than those required for the sludge run, as opposed to relying on its belief of the limitation of his disability, means it is not possible to objectively assess whether he was only able to perform other general operator duties with the aid of special services and facilities. That failure of investigation and

[26] Again, this is a view she did not share with Mr Connell and give him an opportunity to comment on.
[27] Mazengarb's Employment Law [4029.6.1]
[28] [1996] 2 ERNZ 585, at 594

assessment also means that it is not possible for Sepclean to prove it was not reasonable for it to provide any such special services and facilities.

[106] There is insufficient evidence to prove objectively that Mr Connell had any limitations because of his disability in the performance of general operator duties, other than not being willing to work on wet sand or in salt water. That limitation was reasonably accommodated by Sepclean and there is no evidence it would not have been able to accommodate it in future. Therefore, I find that Sepclean cannot rely on the exceptions set out under s. 29 of the Human Rights Act to justify its dismissal of Mr Connell by reason of his disability in circumstances that an employee without his disability would not have been dismissed.

[107] I also consider Sepclean cannot rely on the exceptions set out under s.29 of the Human Rights Act to justify the detriment that Mr Connell was subject to by not being considered for redeployment rather than redundancy in circumstances where other employees engaged in his work as a general operator, a part of whose job included driving up to Class 5 vehicles, but without his disability, would have been considered for redeployment. Both of those types of discrimination amount to personal grievances.

Was Mr Connell unjustifiably disadvantaged?

[108] It is unnecessary to go into depth in determining this claim. Any unjustified disadvantage suffered by Mr Connell would be in the process used to make the decision to make his position redundant and to terminate his employment. I have already determined that this amounted to unjustified dismissal. No additional remedies would be awarded if I made a further finding of unjustified dismissal and I decline to do so.

Remedies

Unpaid notice

[109] Clause 12.6 of Mr Connell's employment agreement provides for him to get 30 days' notice if his employment was terminated by reason of redundancy. In fact he was only paid 1 week's notice which is allowable under clause 13.1 of his employment agreement only for termination of employment by the employer for

cause. Mr Connell was not dismissed for cause but by reason of redundancy, although unjustifiably.

[110] Having been dismissed by reason of redundancy Mr Connell argues that he should have been paid a further three weeks' pay in lieu of notice. I agree.

[111] Mr Webster submits that Mr Connell earned an average of $381.94 per week. Mr Connell was paid $22 per hour and guaranteed eight hours work per week.

[112] Mr Connell's pay averaged out over the whole period of his employment is for greater than the minimum hours he was guaranteed and reflects the longer hours he worked in many weeks. He averaged 17.36 hours per week over the 9 weeks of his employment. The minimum number of hours he actually worked was 8.5 per week. However, for his further notice period of three weeks I consider that Sepclean must pay Mr Connell only the minimum contracted hours of 8 per week being $176 per week x 3 = $528.00 gross. This reflects the fact that the sludge run work no longer existed and even if he retained his employment the hours of work would have decreased.

Lost remuneration

[113] Section 123(1)(b) of the Act allows me to provide for the reimbursement by Sepclean of the whole or any part of wages Mr Connell lost as a result of his grievance. Section 128(2) of the Act provides that I must order Sepclean to pay Mr Connell the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration (equivalent to thirteen weeks).

[114] Had adequate good faith information been provided and consultation been undertaken I consider it highly likely that Mr Connell would not have been dismissed and would have remained employed for a minimum of eight hours per week.

[115] Generally speaking a dismissal occurs on the day that the employment ceases[29]. Had Mr Connell been given 30 days' notice that would have expired on 19 October, therefore, his dismissal by way of redundancy occurred on 19 October 2012. Three months from 19 October 2012 goes up to and including 18 January 2013. In this case Mr Connell's lost remuneration over that period would be equivalent to three months ordinary time remuneration of $176 per week x 13 = $2,288.

[29] *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413, at 418

[116] Mr Connell gave evidence about extensive job search efforts. During his job search time Mr Connell's father-in-law asked him to accompany him on a trip to Australia as his companion and driver. I am satisfied that Mr Connell did so between 11 November to 8 December 2012 inclusive. Mr Connell was not paid for his role during that time. I am satisfied that Mr Connell recommenced job seeking when he got back from Australia. I am satisfied he acted reasonably to mitigate his loss. However, I do not consider Sepclean should reimburse him for the time of his absence in Australia and to the extent his lost remuneration is limited for that period.

[117] I also do not consider it fair that Sepclean pay Mr Connell for his pre-booked holiday to visit Australia that he took on 21 to 26 September 2012, because he has been paid all the holiday pay owed by Sepclean to 19 September 2012 which would have covered that week if he had remained employed.

[118] Mr Connell did not earn any income in the three months after his dismissal. He is entitled to be paid $2,288 - $704 (4 weeks for time in Australia) = $1,584.00 gross in lost remuneration for the three months after his dismissal.

[119] Mrs Connell was able assist Mr Connell to get seasonal employment as a forklift driver at NZ Cider Ltd, a part of the Tasman Bay Food group where she is the operations manager. His work began on 28 February 2013. However, it is seasonal work and commenced as full-time but at the time of the investigation meeting Mr Connell was only working part-time.

[120] In addition, s.128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s.128(2); that is, for more than thirteen weeks. I consider in all the circumstances that it is reasonable that Mr Connell is paid his lost remuneration for the six weeks from 19 January to 27 February 2013 – an amount of $1,056.00.

Compensation

[121] Mr Connell seeks compensation of $12,000 for humiliation, loss of dignity and injury to his feelings under s.123(1)(c)(i) of the Act. Mr Connell first became aware that Ms Reid decided that his disability was too limiting to make him suitable for other work with Sepclean in October 2012.

[122] Mrs Aileen Connell, Mr Connell's wife, gave evidence about the effect on Mr Connell of his dismissal. She said that although he looked for other work he could not find any and became depressed and started to drink more:

> *He was drinking lots of beer (previously would have had a couple of beers at a time). This got worse especially after he heard that Victoria was saying his disability was the root cause of the dismissal. Everything Ronan is asked to do he does. Since having his leg amputated he has let nothing stop him from working whether at work or at home (digging for fence posts, cutting trees, building etc.).*
>
> *Ronan has been of the belief that he is discriminated against because of his prosthetic leg – everything that Victoria has said and done since his dismissal has compounded that belief in his head.*
>
> *The depression came to a head one weekend where I could not get reasonable communication out of Ronan as he was getting angrier and angrier with nothing in particular. Everything I said was wrong and my fault. I was concerned he was going to do something stupid.*
>
> *I was getting to the point where I was considering asking him to leave.*

[123] At the investigation meeting Mrs Connell said:

> *I actually thought he'd jump in a car and hit a brick wall or drive off a cliff.*

[124] In desperation Mrs Connell contacted Mr Connell's sister in Australia in the hope that she could persuade him to limit his drinking and stop what she considered to be self- destructive behaviour.

[125] Mr Connell said that he had been disappointed to lose the work at Sepclean but when he found out it was because of his disability:

> *I lost it. I couldn't believe it was actually an issue. I couldn't understand it. I just lost my temper – I got so annoyed and so angry – why it was an issue and why it was never raised with me before?*

[126] Mr Connell says that he became depressed and extremely short-tempered and started drinking too much. He says he drank 10-16 bottles of beer a day every day, a situation which went on for months.

[127] Both Mr and Mrs Connell say that it took intervention from Mr Connell's sister in December or January who him *to get hold of myself* for Mr Connell *to get his head back together again*.

[128] At the investigation meeting, despite the passage of time, Mr Connell was still visibly upset and emotionally affected by his unjustified dismissal particularly because it was in great part based on his disability. I consider that the humiliation, loss of dignity and injury to his feelings Mr Connell suffered was severe. The evidence from Mr and Mrs Connell was among the most compelling I have heard. I consider that $10,000 is a reasonable amount of compensation for Sepclean to pay Mr Connell.

Contribution

[129] Having determined Mr Connell has a personal grievance under s.124 of the Act I must now consider whether he contributed to the situation which gave rise to his dismissal and if so reduce remedies accordingly. Mr Connell did not engage in any blameworthy conduct, so remedies are not to be reduced on the grounds of contribution.

Costs

[130] Costs are reserved. Mr Connell as the successful party is entitled to a reasonable contribution towards his actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then Mr Connell has 28 days within which to file a costs memorandum and Sepclean has 14 days within which to respond.

[131] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The notional daily tariff is $3,500 and $1,750 for half a day. The investigation meeting took most of one day, finishing at 3.10 p.m. The parties are therefore invited to identify any factors which they say should result in an adjustment upwards or downwards to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority