

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 153  
5329066

BETWEEN DENNIS DAVEY  
Applicant  
A N D PRIME RANGE MEATS  
LIMITED  
Respondent

Member of Authority: David Appleton  
Representatives: Elliott Mitchell, Counsel for Applicant  
Rex Chapman, Counsel for Respondent  
Investigation meeting: 23 May 2012 and 29 June 2012 at Invercargill  
Submissions Received 20 July 2012 from Applicant  
25 July 2012 from Respondent  
Date of Determination: 27 July 2012

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**DETERMINATION OF THE AUTHORITY**

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- A. The applicant was unjustifiably dismissed.**
- B. The applicant's various unjustifiable disadvantage claims fail for the reason given in this determination.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] Mr Davey claims that he was unjustifiably dismissed for incapacity on 29 April 2010 and that he was unjustifiably disadvantaged in his employment by a failure to consider and implement light duties. He also claims that he was unjustifiably disadvantaged in his employment by being singled out as the only employee who was told to sign in and out during lunch times because of his criminal convictions.

**Brief account of the events leading to Mr Davey's dismissal**

[2] Mr Davey, who has extensive experience of working in the meat industry in New Zealand, joined the respondent in October 2008, working in the rendering department. He injured his right shoulder while working on 7 January 2010 but carried on with his normal duties until 11 January 2010 when he found he could no longer carry out those duties. He states that he had advised his supervisor, Mr Houliston, of the injury immediately and had made a note of it in a diary which was used for such purposes.

[3] On 11 January 2010, when he realised he could not work normally, Mr Davey consulted the company's doctor, Dr Prendergast, who put him on light duties. Mr Davey also completed ACC documentation.

[4] Mr Davey carried out those light duties in the *bin room*, also known as the *hogger room*. In essence, this is the part of the rendering department in which raw materials arrive to be chopped up by a device called the hogger, and then taken to be cooked. The evidence of both Mr Davey and Mr Tony Forde, the managing director of the respondent, was that there was a certain amount of pushing of buttons and monitoring of equipment carried out in the bin room but that more physical work needed to be done on occasion, such as hosing down spillages, chaining and unchaining bins, dealing with blockages and unloading bins. Mr Davey and Mr Forde did, however, disagree as to the extent of the more manual work in the bin room, Mr Davey saying it was more prevalent than Mr Forde believed it was.

[5] Mr Davey's evidence was that, by 21 January 2010, he was finding that the work in the bin room was not suiting him as it was aggravating his injured shoulder, which he reported to the health and safety manager, Mr Anderson. Mr Anderson claims that he had no idea that Mr Davey had injured his shoulder on 7 January or that he had been working on light duties. This seems likely as Mr Anderson did not work in that part of the company and would have had to have relied upon Mr Davey or the supervisor, Mr Houliston, to advise him of the injury. Mr Anderson completed an accident report.

[6] Mr Davey consulted Dr Prendergast again who, this time, signed Mr Davey off completely for 14 days. On 2 February 2010, Mr Davey was signed off for a further 14 days but on 16 February was told by Dr Prendergast that he could carry out light duties, provided that no heavy lifting was carried out and that he had a graduated return to work.

[7] Mr Davey presented himself to work accordingly and was told by Mr Houliston to go to the bin room again. However, within around four hours, Mr Davey found that the work was causing him too much pain and he went to see the doctor again. It seems that the problem stemmed from Mr Davey undertaking duties which he should not have done, although Mr Houliston told the Authority that it was his responsibility as supervisor to ensure the health and safety of an employee. Mr Davey's evidence was that rendering is a continuous process, and that it created difficulties to pull men off their job to help him with heavy work, so he did find himself doing work which he should not have been doing.

[8] On this occasion, Mr Davey saw a locum GP, Dr Pezaro, who completed a medical certificate dated 17 February which stated the following:

*Recommended onto LIGHT work but given same job including SHOVELLING, LIFTING 40kg SACKS, LIFTING 40kg BIN LIDS which is just stupid and likely to complicate his shoulder injury.*

*If no light work available then he will need to be off work.*

*LIGHT DUTIES – NO HEAVY LIFTING*

[9] The medical certificate of Dr Pezaro stated that, if Mr Davey was unable to carry out light work, then he would be signed off for 13 days.

[10] Mr Davey's evidence was that, at some time between 17 February and 24 March (when he attended a meeting with the respondent), he was told that he could go into the *gamble room*, which is where the slides and hooks on which carcasses are hung are sterilised. Mr Davey said that, when he presented himself for working in this room, Mr Anderson sent him away because he had not had time to work out what light duties Mr Davey could do. Mr Davey said that this was because Mr Anderson had been at a funeral and that he told him to go back home and that he would contact Mr Davey when he was in a position to accommodate him in the gamble room, although this did not occur.

[11] Mr Anderson says that he cannot remember either deciding that Mr Davey could work in the gamble room, telling him to go home, nor attending a funeral. Mr Anderson doubted, though, that the gamble room would have been an appropriate place for Mr Davey to have worked given his shoulder injury as it would have involved heavy manual work.

[12] On 2 March 2010, Mr Davey was signed off work for 30 days and referred to an orthopaedic surgeon, Mr Luecker. Mr Davey says that on 24 March 2010 he was asked to attend a meeting with the employer to discuss the future of his employment with the company.

[13] Mr Davey attended this meeting on 24 March with his mother, Mrs Davey. There was a fundamental disagreement between Mr Davey and Mr Forde, who was present at the meeting with Mr Anderson, as to whether Mr Davey had stated at that meeting that he was going to have to have surgery on his shoulder. Mr Davey and Mrs Davey were both adamant in their evidence to the Authority that they did not say that he was to have surgery because, at that point, they did not know that that was the case. Mr Forde, on the other hand, was adamant that Mr Davey had indicated that he was to have surgery.

[14] It is my belief, having heard from all of the witnesses, that the most likely position is that the possibility of surgery was discussed and that Mr Forde inferred from that discussion that Mr Davey was going to have surgery. However, whilst I do not believe that Mr Forde reached this conclusion in bad faith, I do accept the evidence of Mr Davey and Mrs Davey that Mr Davey is unlikely to have said that he was definitely going to have surgery at the meeting of 24 March because copies of medical certificates which post-date that meeting make reference to Mr Davey awaiting an MRI and being referred to Mr Fowler, another orthopaedic surgeon, for a consultation. It was Dr Fowler who eventually operated on Mr Davey, after his employment was terminated.

[15] There were other disagreements between Mr Davey and Mr Forde as to whether the brief notes that were made of the meeting of 24 March 2010 were accurate and comprehensive. However, for reasons that will become clear below, I do not believe that it is necessary for me to reach a conclusion as to whether they are entirely accurate or not. One issue that was raised at the meeting of 24 March 2010, which is not significantly in dispute, is that Mrs Davey asked whether Mr Davey could be put on light duties and that Mr Forde replied that he would not be putting him back on light duties because *last time* [the company] *got ticked off by the Doctor for aggravating the injury*.

[16] Mr Forde explained that he meant by this the comments made by Dr Pezaro in the medical certificate of 17 February 2010, cited above. Mr Forde said that he was

annoyed by these comments in the medical certificate and that he believed that Mr Davey had aggravated his shoulder injury whilst doing light duties in the bin room because he had carried out functions which he should not have done. Mr Davey had conceded during his evidence that he may have carried out some functions which he should not have done, taking into account the extent of his shoulder injury, but explained that it was difficult to keep up with all the work when he had to keep asking his colleagues to assist in the more manual work as this meant that they had to leave their tasks which also had to be carried out.

[17] Mr Forde had expressed doubt that Mr Davey had found it difficult to keep up with all the tasks whilst doing light duties in the bin room, saying that it was perfectly possible to keep the rendering department going with four members of staff, even if one of them was on light duties. In my view, given that it is unlikely that Mr Davey would have deliberately made his injury worse, I prefer his evidence.

[18] After the meeting on 24 March 2010, the company made no further contact with Mr Davey until it wrote to him on 29 April 2010 as follows:

*Dear Dennis,*

*re: Employment Position*

*In view of your unavailability to work since January 7 2010 due to your shoulder condition, and the outlook with regard to that, we must review your employment position with the company.*

*We have considered your circumstances as we discussed with you on 24 March, alongside the medical reports regarding your current impairment and surgery in the future.*

*We have also kept in contact with ACC on developments.*

*We have had several experiences of employees who have undergone surgery for shoulder injury's [sic] and in each case the recovery periods have been lengthy.*

*Having regard to these circumstances, we find ourselves in the position where we must terminate your position with the company.*

*We wish you well for a successful operation when that is scheduled and recuperation period.*

*Tony Forde  
Managing Director*

[19] Mr Davey's evidence was that this letter had come completely out of the blue and that he had been "guttet". Mrs Davey's evidence was that Mr Davey had been

upset by this letter as he much preferred to be working than idle. Mr Forde said that nothing in particular prompted him to write the letter on that particular date but that he had finished the meeting on 24 March by telling Mr Davey that he was to keep him informed as to how things were progressing with the inquiries into his shoulder injury but that he had not heard from him.

[20] Mr Forde said that, not having heard anything from Mr Davey, he concluded that the prognosis was not good and that Mr Davey was not likely to be back to work on full duties for some considerable time. Mr Forde also explained that he took into account the fact that, at least as he understood it, Mr Davey was definitely going to have surgery, at an unknown future date, and that, following that surgery, he would be signed off sick for at least six weeks.

[21] Mr Forde said that he had also taken into account the fact that he had known another employee who had the same shoulder injury (problems with his rotator cuff) who had never recovered and never returned to work. Therefore, all in all, Mr Forde was satisfied that Mr Davey would not be in a position to return to work in the foreseeable future. Mr Forde also explained that Mr Davey's position had been filled on a temporary basis but that this could not go on indefinitely because of a need for staff in the rendering department to rotate their duties and that, ultimately, Mr Davey's position needed to be filled by somebody with the flexibility to rotate their duties and carry out a number of skilled jobs.

### **The issues**

[22] The Authority has to determine the following issues:

- (a) Whether Mr Davey's dismissal was unjustifiable;
- (b) Whether Mr Davey suffered a disadvantage in the way in which he was treated prior to his dismissal and in the dismissal process;
- (c) Whether Mr Davey was subjected to a disadvantage by being singled out as having to sign in and out during his lunch time.

## Findings

### *Whether the dismissal was unjustifiable*

[23] The Authority must consider whether the decision to dismiss Mr Davey was justifiable in accordance with s.103A of the Employment Relations Act 2000 (the Act), as it stood prior to 1 April 2011, when it was amended. The pre-amendment wording of s.103A is as follows:

*For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred*

[24] Section 4(1A) (b) of the Act requires the parties of an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.

[25] Section 4(1A)(c) of the Act states as follows:

*Without limiting para.(b), [the duty of good faith] requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of the employment of one or more of his employees to provide to the employees affected:*

- (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 the decision is made.*

[26] Mr Forde maintains that the onus was on Mr Davey to let him know after the meeting on 24 March 2010 whether anything was changing. However, I do not accept that the onus lay solely on Mr Davey. Mr Forde did not make clear to Mr Davey that he would dismiss him on 29 April 2010 unless Mr Davey provided more information about his medical condition. Mr Forde also did not ask for a report from Mr Davey's orthopaedic surgeon, nor from the company doctor and did not even talk to Mr Davey again. Even if it did turn out that Mr Davey's injury was serious, like the other employee Mr Forde knew of, it was not appropriate to simply assume that it would be so. As it happens, Mr Davey is now, he says, fully recovered, unlike that other employee.

[27] Mr Forde also stated that Mr Davey could have contacted him after he was dismissed to say what was happening with his treatment. However, as Mr Davey stated very succinctly, he had been dismissed, so went to see a lawyer instead and put in a personal grievance. It is certainly not reasonable to dismiss an employee without any further consultation and then blame that employee for not then giving information that should have been sought by the employer in the first place, before deciding to dismiss.

[28] These were not the actions that a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. Accordingly, I must find that the dismissal was in breach of ss 4(1A)(c) and 103A of the Act and procedurally unjustifiable.

*Was Mr Davey subjected to an unjustifiable disadvantage by his treatment prior to dismissal and in the dismissal process?*

[29] This issue breaks down to two sub-issues I believe:

- a. *whether there was sufficient consideration given by the respondent to the putting in place of light duties for Mr Davey; and*
- b. *whether a sufficiently safe regime was implemented in the bin room after Mr Davey's injury to ensure that he did not suffer further injury.*

*Was there sufficient consideration given by the respondent to the putting in place of light duties for Mr Davey?*

[30] In his personal grievance dated 14 June 2010, Mr Davey raised a concern about a promise made by Mr Forde that light duties would be available as they arose, but that he was dismissed instead. I am satisfied, therefore, that Mr Davey raised a personal grievance about the insufficiency of efforts made to explore and implement light duties within the required 90 days time limit, as the alleged failure to implement light duties would be a continuing failure by the respondent up until the date of dismissal.

[31] The duty to make reasonably full and effective enquiries about light duties arises, I believe, from s 4(1A)(b) of the Act which 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. If an employee has been injured and cannot carry out the full extent of his or her contractual duties, given that this may lead to his or her dismissal, the employer is bound by its duty of good faith to take steps to explore ways of avoiding that situation. That involves seeking available duties that the employee may be able to undertake within the business until the injury improves or the employer's business needs change.

[32] The only clear evidence I heard of any consideration actively being given by the respondent to what light duties could be suitable for Mr Davey was from Mr Anderson, who stated that he, Mr Houliston and Mr Davey had met on 17 February 2010 to discuss Mr Davey working in the bin room again that same day. No other evidence emerged that showed that a considered and systematic approach had been taken by the respondent company in trying to identify light duties in the company as a whole for Mr Davey.

[33] For example, Mr Forde said during his evidence that he had had no idea that Mr Davey had worked in slaughter houses for many years in the past and that he had extensive experience of all areas of that industry. If Mr Forde, Mr Anderson or even Mr Houliston had carried out some simple inquiries as to Mr Davey's experience, abilities and skills, they may, in theory, have been able to conclude that other work within the respondent company was both available and suitable for Mr Davey.

[34] Mr Anderson also did not make any meaningful enquiries, and did not even understand in any detail what the work in the bin room entailed. For someone who is responsible for health and safety in the respondent company, this surprises me. Furthermore, Mr Forde expressed his refusal to allow Mr Davey to carry out light duties as not wanting to get *ticked off* by the doctor again. Whilst I believe that this indicates a desire by Mr Forde not to risk exposing his employee to further injury, he cannot simply refuse to consider light duties. The company was ticked off because the light duties regime in the bin room had not been implemented effectively in my view. (Although, as I explain below under the next heading, I am unable to find any disadvantage in respect of that as no valid personal grievance was raised within the required time limit).

[35] All in all, therefore, I consider that the respondent company did not fully comply with its good faith obligations in respect of making reasonably full and

effective enquiries about the availability of light duties. The next step is to consider whether this created an unjustified disadvantage for Mr Davey.

[36] On 30 March 2010 Mr Davey was advised that he could go onto left handed light duties. This was not implemented, although Mr Anderson gave evidence that he believed that left handed duties could have created even more problems for Mr Davey from a health and safety point of view. I accept that evidence. Mr Forde's evidence was that, apart from some ad hoc duties, the bin room was the best place for someone with an injury such as Mr Davey had sustained. Mr Davey's experience of the bin room suggests that this is not correct but, as Mr Davey himself said that the sorts of light duties he could have done were cleaning or weeding of the bio filter, it does appear that there were only ad hoc duties available to him.

[37] My conclusion is that there were very few, if any, suitable light duties available on a sustainable basis in the respondent that Mr Davey could have done given the condition his shoulder was in. This leads me to conclude that, whilst the respondent company should have done more to explore the issue of light duties, them not having done so did not in effect create a disadvantage for Mr Davey. If, on balance, I had been able to find that the failure by the company led to Mr Davey missing out on an opportunity to carry out light duties in a sustainable way, I would have found that Mr Davey would have suffered a significant disadvantage, which would have been unjustified. However, in reality I do not believe that such an opportunity existed, and so I cannot find that any material disadvantage flows from the breach by the respondent.

*Was a sufficiently safe regime implemented in the bin room after Mr Davey's injury to ensure that he did not suffer further injury?*

[38] Mr Davey raised a complaint in his personal grievance dated 14 June 2010 that he had been returned to the bin room on 17 February 2010 doing exactly the same duties as before, which worsened his injury. Unfortunately, Mr Davey did not raise his personal grievance within 90 days of the action alleged to amount to the personal grievance occurred, as is required by s 114(1) of the Act.

[39] The issue had been raised by Dr Pezaro in the ACC 18 form dated 17 February 2010 which had been submitted to the respondent (cited above). Case law has established that an agent for an employee may raise a personal grievance on behalf of

an aggrieved employee. (See, for example, [Dickson v Unilever New Zealand Ltd](#) (2009) 6 NZELR 463 in which the employee's husband raised a personal grievance orally). Dr Pezaro could be said to have been Mr Davey's advocate in the general sense that GPs are advocates for their patients' health and well being.

[40] However, it is well established that the personal grievance must be raised with sufficient specificity, so that the employer knows what it must respond to. (See [Creedy v Commissioner of Police \[2006\] ERNZ 517](#) in which the Employment Court stated *What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[41] Whilst I am satisfied that Dr Pezaro's words made clear that Mr Davey had been asked or expected to do work which was detrimental to his injury, I am not satisfied that the ACC18 form, on its own, made clear that Mr Davey was raising a personal grievance in respect of the matter. Indeed, I believe that Mr Davey did not do so at that point.

[42] I cannot, therefore, accept that a personal grievance was raised by Mr Davey in respect of this alleged disadvantage within 90 days as required by S 114 of the Act. Section 114(3) of the Act allows an employee to apply to the Authority for leave to raise a personal grievance out of time. No such application has been made by Mr Davey however, and I therefore cannot take this particular matter any further.

*Was Mr Davey subjected to an unjustifiable disadvantage by being singled out?*

[43] Whilst Mr Davey gave evidence that he was the only one being asked to sign in and out at lunch times, and that he believed that he had to sign a time sheet attached to the daily cook sheets, Mr Houliston's evidence was that another director (since left) had told him that Mr Davey was not allowed to leave the plant at all during lunch times. Mr Houliston also said that everyone in the rendering plant had to sign a diary when they started and stopped working.

[44] The diary and a small sample of cook sheets for 2009 were located by the respondent, and copies provided to the Authority of parts of the diary and the sample cook sheets. The diary does not appear to show anyone signing in and out. The cook sheets show the start and finish times of Mr Davey and two other staff. One sheet mentions Mr Davey going out to lunch for an hour. No signatures were apparent.

[45] Mr Forde denied that he had ever instructed Mr Houliston to make Mr Davey sign in and out at lunch times, either because of Mr Davey's criminal record or otherwise. Mr Davey surmised that Mr Houliston may have made that part up in order to encourage Mr Davey to sign in and out when he went out for lunch because the rendering process was a continual one, meaning that rendering staff would get paid throughout their breaks, so that they could step in during their breaks if necessary to make sure the process continued. Mr Forde surmised that Mr Houliston may have been concerned that Mr Davey had been leaving the plant during lunch breaks whilst still getting paid and so wanted to make sure he could keep track of Mr Davey's movements.

[46] I do accept Mr Davey's evidence that he was told by Mr Houliston that he must sign in and out because Mr Forde was scared that Mr Davey would "*rob a bank or shoot somebody*". I also accept Mr Forde's evidence that he did not have anything to do with this instruction to Mr Davey.

[47] If Mr Davey had raised a personal grievance at the time that he was told that he must sign in and out because there was concern that he may *rob a bank or shoot someone*, I would have found this to have been an unjustifiable disadvantage in his employment. However, Mr Davey did not raise a personal grievance at that time, and so the Authority does not have jurisdiction to consider that aspect of the disadvantage claim.

[48] Mr Davey gave evidence that he had been obliged to continue to sign in and out at lunch times until the end of his employment. A grievance was raised within 90 days of the end of his employment which included reference to this instruction. I do accept that being made to sign in and out at lunch time, when other staff members were not, would be an unjustified disadvantage in Mr Davey's employment. However, I am not convinced that Mr Davey was the only one to have to account for his movements at lunchtime. Lunch was only 30 minutes, and the plant was on the outskirts of town. To go into town, do whatever one wanted to there and return would probably take more than 30 minutes, and I suspect that the employees rarely bothered. I conclude that Mr Davey was asked to account for his time when he occasionally left the plant at lunchtimes, but that other staff would have had to have done so as well.

[49] Therefore, I do not find that Mr Davey suffered an unjustifiable disadvantage in his employment in this regard.

**Remedies**

[50] Mr Davey does not seek reinstatement. He would have been on ACC for several months after 29 April 2010 due to the extent of the incapacity caused by his injury whether he had been dismissed or not, and so it is not appropriate to award him lost wages under s 123(1)(b) of the Act as the act of dismissal caused him no loss. I therefore turn to the question of section 123 (1)(c) of the Act. Mr Davey gave little evidence of the effect on him of his dismissal save that he had been *gutted*. In his counsel's submissions, he seeks \$5,000 for humiliation, loss of dignity and injury to his feelings. This is a modest amount for an unjustifiable dismissal but, in the circumstances where he may well have been fairly dismissed for incapacity within a few weeks had a fair process been followed by the company, is an appropriate amount I believe.

[51] S 124 of the Act requires me to 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, to reduce the remedies that would otherwise have been awarded accordingly. Mr Davey was dismissed for injury related absence, and incapacity, and I do not accept that he contributed to his dismissal in any blameworthy way. Although counsel for the respondent submits that he did contribute by not keeping the company informed, that was hardly a just reason to dismiss Mr Davey with no warning, and so I do not accept it contributed to his personal grievance in a blameworthy way. I therefore do not reduce his compensatory award.

**Orders**

[52] The respondent is to pay to Mr Davey the sum of \$5,000.

**Costs**

[53] The parties should seek to agree between themselves how costs are to be dealt with. If the parties cannot agree, any claim for costs should be made by lodging and serving a memorandum within 28 days of the date of this determination, and the responding party shall have a further 28 days to lodge and serve any reply.

David Appleton  
Member of the Employment Relations Authority

