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Fredericks v VIP Frames and Trusses Limited [2015] NZEmpC 203 (17 November 2015)

Last Updated: 27 November 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 203](#)

EMPC 31/2015

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN LYNDON FREDERICKS Plaintiff

AND VIP FRAMES AND TRUSSES LIMITED
Defendant

Hearing: 25-27 August 2015
(Heard at Christchurch)

Appearances: D Beck, D Mills-Godinet and R Boulton, counsel for
plaintiff
A Toohey, counsel for defendant

Judgment: 17 November 2015

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Mr Fredericks was employed by the defendant VIP Frames and Trusses Ltd (VIP) as a fabricator. This required him to be on a factory floor where he and others were using powerful nail guns. On 29 January 2014, Mr Fredericks was accidentally shot in the chest from a nail gun being operated by an inexperienced employee. The

19 mm nail pierced the fluid sack around Mr Fredericks's heart, a lung and liver.

[2] The circumstances which followed the injury led to Mr Fredericks resigning from his employment with VIP. He commenced a claim in the Employment Relations Authority (the Authority) claiming he was constructively dismissed and had suffered disadvantage as a result of the unjustifiable actions of VIP. After a two-

day investigation meeting the Authority held that Mr Fredericks was not

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constructively dismissed.¹ Mr Fredericks did succeed in part, in his claims to have been unjustifiably disadvantaged. VIP was ordered to pay Mr Fredericks for some lost wages and a further sum of \$6,000 as compensation.

[3] Mr Fredericks, being dissatisfied with the determination, filed a challenge. His election related to the whole of the determination and he sought a hearing de novo.

[4] Costs were reserved by the Authority and dealt with in a subsequent determination.² Mr Fredericks was awarded costs of \$5,845. There was no challenge to that determination.

The pleadings and remedies sought

[5] Mr Fredericks's pleadings are contained in an amended statement of claim

filed on 31 March 2015. His claims are as follows:

(a) That he was unjustifiably constructively dismissed. The grounds alleged are that VIP breached the duty of trust and confidence and the duty to provide a safe workplace to the extent that it was foreseeable that Mr Fredericks would resign; and/or that VIP embarked upon a course of conduct designed to engineer the resignation of Mr Fredericks.

(b) Additionally or alternatively that Mr Fredericks was unjustifiably disadvantaged by VIP's actions and omissions.

(c) That VIP breached both the express and implied terms of the contract of employment in regard to the following:

(i) the duty to provide a safe workplace;

(ii) the company rehabilitation policy;

¹ *Fredericks v VIP Frames & Trusses Ltd* [2015] NZERA Christchurch 2 (substantive).

² *Fredericks v VIP Frames & Trusses Ltd* [2015] NZERA Christchurch 95 (costs).

(iii) the company accident reporting policy; (iv) the company bullying/harassment policy.

(d) That VIP breached their statutory duty of good faith to him in the following ways:

(i) They misled Mr Fredericks in respect of his gradual return to work, initially indicating that he would be placed away from nail-gun activities and did not engage constructively with the Accident Compensation Corporation (ACC).

(ii) They failed, by initially refusing to attend mediation on Mr Fredericks's claims that VIP had created a hostile work environment and by locking Mr Fredericks out of the workplace, to act in a way designed to constructively maintain the employment relationship in breach of [s 4\(1A\)\(b\)](#) of the [Employment Relations Act 2000](#) (the Act).

(e) That VIP breached [s 71\(2\)](#) of the [Accident Compensation Act 2001](#) in that the defendant failed to take all practicable steps to assist Mr Fredericks with his vocational rehabilitation.

[6] Mr Fredericks claims remedies as follows:

(a) A finding that he was constructively dismissed.

(b) That he be reimbursed for all wages lost as a result of the dismissal.

(c) That he be awarded compensation in the amount of \$20,000 for humiliation, loss of dignity and injury to feelings.

(d) A penalty for a breach of good faith and that the penalty be paid to him.

(e) Compensation for breach of contract for VIP's failure to follow its

own policies and terms of employment, its failure to provide a safe

workplace and its failure to report the accident and injury to Worksafe

New Zealand. (f) Legal costs.

[7] During the course of the hearing and repeated in closing submissions, Mr Beck, counsel for Mr Fredericks, indicated that the claim for separate compensation for breach of contract was not being pursued. It appears that this may have been a claim for damages otherwise it would simply be a repetition of the earlier claim for compensation for the unjustifiable dismissal and/or disadvantage claims. However, if it was in fact a claim for damages, the nature and quantum of the damages was not specified or particularised during the course of evidence. If the claim was for general damages then there was little, if any, evidence directed specifically at this remedy even if it was available to Mr Fredericks.

[8] Insofar as the claim for a penalty is concerned, the Court would only have jurisdiction to consider and possibly award a penalty if that was a remedy sought before the Authority. Mr Beck assured me that a claim for a penalty had been made in the Authority. There was no direct evidence of this and I note that the determination did not consider any claim for penalties. Any claim for a penalty must be raised in the first instance in the Authority and cannot simply be raised as an ancillary matter in the challenge if it was not first placed before the Authority. Even then there is a limitation period for a claim for a penalty being made. These impediments were not raised in the statement of defence on behalf of VIP. In closing submissions, Ms Toohey, counsel for the defendant, did not take issue with Mr Beck's statement that the matter had been raised in the Authority. Accordingly, I will regard the Court as having jurisdiction to deal with that matter.

[9] Similarly, the pleading as to breach of express and implied terms of the contract of employment does not appear to have been a cause of action raised in that way before the Authority. Ms Toohey raised this issue in her closing submissions. The Court does not have originating jurisdiction to consider such a cause of action; certainly not when raised for the first time in a challenge to the Authority's determination. However, the pleaded particulars of such alleged breaches of contract

were covered by the Authority as unjustified disadvantage claims. Mr Fredericks was partially successful with these claims.

[10] Mr Fredericks's pleaded cause of action for breach of [s 71\(2\)](#) of the [Accident Compensation Act 2001](#) relating to vocational rehabilitation is problematic. This would appear to be a claim to breach of statutory duty, which would be outside the jurisdiction of the Court to consider.³ However, no specific remedy is then claimed for the alleged breach of statutory duty. Rehabilitation is also covered in the contractual breach cause of action but only as a breach of VIP's rehabilitation policy.

While it is pleaded as a contractual breach in that way, in opening and closing submissions it was argued as the basis for a disadvantage claim. It also forms part of the claim for a penalty.

[11] The statement of defence to the amended statement of claim contains denials of the plaintiff's allegations as to constructive dismissal, the disadvantage claims, the claims to a penalty and breach of the statutory duties of good faith and as provided in the [Accident Compensation Act](#). VIP admits that it breached the express and implied terms in the employment agreement requiring it to provide a safe workplace but otherwise denies the alleged heads of contractual breach. VIP does not seek to set aside the determination of the Authority granting lost wages and compensation as a result of Mr Fredericks being unjustifiably disadvantaged by virtue of the failure to provide a safe workplace. A positive defence of contributory conduct on the part of Mr Fredericks is now abandoned.

Factual outline

[12] Mr Fredericks was employed by VIP as a permanent employee on 15 January

2013. He had previously worked for VIP and a connected business.

[13] On 24 January 2014, Mr Richard Sim was employed by VIP and three days later commenced work using a nail gun. There is some dispute in the evidence as to

whether Mr Fredericks was specifically the supervisor and trainer of Mr Sim.

³ See *Hally Labels Ltd v Powell* [\[2015\] NZEmpC 92](#) at [\[134\]](#).

Certainly Mr Fredericks and another employee had concerns about the way Mr Sim was using the nail gun and these were raised with a foreman.

[14] On 29 January 2014 Mr Fredericks and Mr Sim were working together using nail guns to fabricate building componentry. They were facing each other in what is referred to as a cross-nailing position. A nail from Mr Sim's nail gun did not properly penetrate the timber and flew across the room shooting Mr Fredericks in the chest. The nail pierced the fluid sack surrounding his heart and nicked both a lung and liver. Witnesses at the hearing agreed this was a most unusual accident as in the unlikely event of a nail becoming airborne it is designed to rotate and not penetrate any object it hits.

[15] Once the accident had occurred, senior employees at VIP, one of whom had previous experience with first aid in the military, arranged to transport Mr Fredericks to hospital. The decision was made that he could be transported to hospital in a private motor car more quickly than waiting for an ambulance. While understandable, in hindsight the decision not to summon an ambulance was inappropriate and breached VIP's own Health and Safety Policy. It also overlooked the fact that an ambulance would have enabled Mr Fredericks to receive treatment and advice from a paramedic even more quickly than transporting him to hospital in a private motor car. It would also have had the added advantage of ensuring that the eventual transportation to hospital was made under safer conditions. Nevertheless, nothing untoward occurred on the way to hospital and once Mr Fredericks arrived there he underwent surgery for removal of the nail.

[16] This accident was obviously extremely traumatic for both Mr Fredericks and for his family, particularly his partner Ms Sioux Ashley. Mr Fredericks, from my assessment of his evidence, appeared to go into a shutdown phase, leaving Ms Ashley to act as his agent in dealing with VIP for the purposes of arranging the period of recuperation and his eventual return to work. Mr Fredericks applied for and received accident compensation. VIP appropriately paid the wages for Mr Fredericks's first week off work and then topped up the earnings-related accident compensation. However, Ms Ashley's overreaction to the matter and the inappropriate way she behaved on Mr Fredericks's behalf, led to the serious

employment relationship problem which arose, culminating in Mr Fredericks's resignation from employment with VIP.

[17] VIP took appropriate action following the accident to notify Ms Ashley and ensure arrangements were in place for her to go to the hospital to be with Mr Fredericks. Clearly this was a distressing time for all concerned. VIP, in order to attend to its obligations under the [Health and Safety in Employment Act 1992](#), engaged its consultant in such matters, Mr Leigh Tobeck. Mr Tobeck, who gave evidence at the hearing, was the director and shareholder of Health and Safety Systems Limited which provides consultancy services to businesses and individuals regarding health and safety issues. VIP appropriately briefed Mr Tobeck and took his advice as to their obligations. This led to a decision by VIP that it was not required to report the accident to Worksafe New Zealand. This decision became a matter of controversy between VIP and Ms Ashley, acting on behalf of Mr Fredericks.

[18] Ms Ashley visited the VIP work premises after Mr Fredericks had been discharged from hospital and was recuperating at home. She noticed that Mr Sim was still working on the factory floor. She then made demands of VIP that Mr Sim's employment be terminated and that the manufacturing operation be closed down while an inquiry was conducted into the circumstances surrounding the accident. She also disputed VIP's decision that it was not required to report the accident to Worksafe New Zealand; and indeed on advice she then received, she reported the accident herself. The demands she made for Mr Sim's employment to be terminated and for the plant to be closed down during the course of an investigation were totally inappropriate and quite beyond her prerogative to

demand. To dismiss Mr Sim in the circumstances where an unfortunate accident had occurred would have left VIP vulnerable to a claim by Mr Sim. To close down the manufacturing plant when there was no need to do so would have not only endangered the business financially but might also have resulted in a large number of employees being left without a means of earning a livelihood. It appears that Mr Fredericks supported his partner in making those demands on his behalf.

[19] The decision by VIP that it was not required to report the accident to Worksafe New Zealand is somewhat more controversial. Ms Ashley's own decision to report the accident resulted in dissension between Mr Fredericks and Ms Ashley on the one part, and on the other part one or more employees of VIP, some of whom were also related to Mr Fredericks and Ms Ashley. In addition there was an allegation made by Ms Ashley that following her meeting with the management at VIP, a foreman was spreading rumours that she and Mr Fredericks were simply seeking money from VIP for what had occurred.

[20] From the evidence of Ms Ashley, it appears that a relative who was also an employee of VIP had attempted to threaten her and Mr Fredericks as a result of Ms Ashley notifying Worksafe New Zealand of the accident. As a result of this notification and the inevitable inspection by Worksafe New Zealand of the premises and practices at the plant, there was apparently a fear on the part of this person that drug-testing at the site would be tightened up and his own drug-taking could be discovered. There were also apparently rumours that other employees were aggrieved at the prospect and consequences of inspections. It is clear, however, that these were only rumours and that the proprietors of VIP were unaware of them until later. The allegations against the foreman relating to his alleged statement that Mr Fredericks and Ms Ashley were merely seeking to take advantage of the accident for money were denied by that foreman. I am satisfied that the proprietors of VIP while becoming aware in part of these allegations properly treated them as merely rumours and were only interested in ensuring a safe return to work for Mr Fredericks. No formal complaint was made by Mr Fredericks or Ms Ashley.

[21] In the course of all of these surrounding events, there were two meetings between Ms Ashley, representing Mr Fredericks, and VIP management. The first meeting occurred on 3 February 2014. At that meeting VIP confirmed that as a result of the consultant's advice, they would not be reporting the accident to Worksafe New Zealand. There was also a discussion of alternative duties that Mr Fredericks could perform on his return to work.

[22] The second meeting took place the following day on 4 February 2014. As with the meeting the previous day, Ms Ashley was accompanied by her sister. This

meeting was attended by management and also the health and safety consultant. Mr Tobeck explained the reason why he believed the injury was not within the definition of serious harm under the [Health and Safety in Employment Act](#) and why VIP was not required to report it. At this meeting Ms Ashley raised her concerns about what she perceived to be a hostile work environment. The meeting appears to have become heated with disagreements between Ms Ashley's sister and the proprietor of VIP, Mr Daniel Caldwell.

[23] At the beginning of February 2014, Mr Fredericks was certified as unfit for work as a result of post-traumatic stress. At this point Mr Fredericks made a request to VIP to attend mediation. VIP was reluctant to go to mediation unless a specific reason for the request was provided. It appears that the purpose for requesting mediation was that Ms Ashley wished to ensure that when Mr Fredericks returned to work it was in a controlled environment and away from nail-gun operations.

[24] By 20 February 2014 discussions were taking place in order that Mr Fredericks could be certified as fit to return to work. Meetings were attended with ACC and discussions were taking place between Ms Ashley and senior managers in VIP.

[25] Mr Fredericks was certified as fit to return to work with gradual exposure to nail gun operations on 26 February 2014. A report was sent to ACC confirming this. However, Ms Ashley had earlier indicated to VIP that even though Mr Fredericks was certified as fit to return to work he was not then immediately psychologically capable of doing so. This comment unfortunately set off a reaction by VIP in which it purported to lock out Mr Fredericks from the worksite for health and safety reasons. It is understandable that in a dangerous work environment VIP did not wish to have Mr Fredericks return to work if he was mentally unfit to do so. However, the adoption of a lockout remedy, which by definition in the Act has application during the course of negotiations for a collective employment agreement, was inappropriate. It appears to have been adopted by VIP acting under a misunderstanding of the provisions of the Act. While it may have had concerns, what it should have done was simply state that it was uncomfortable about Mr Fredericks returning to work until he was certified as mentally capable of coping with the work environment.

[26] There appears to be some dispute as to exactly how Mr Fredericks was to return to work and be gradually reintroduced to the nail-gun operation. There were some unhelpful email exchanges between Ms Ashley and VIP's legal advisers as to whether Mr Fredericks would be offered a position working away from the nail guns. However, he was given the opportunity to return to work in the snip-saw room which is away from nail-guns. That apparently was by then the only position available in which he could work without being exposed to the nail-gun operation of the business.

[27] Mr Fredericks was then certified as psychologically fit to return to work, though through oversight the psychologist's report and clearance was not given to VIP. VIP therefore remained under the impression that Mr Fredericks was still not certified as psychologically fit to return to work. This oversight was discovered just before or when the parties finally attended mediation.

[28] Throughout this period, VIP's evidence was that it was looking forward to Mr Fredericks returning to work and its evidence in this respect impressed me as being genuine. Indeed Mr Caldwell indicated that even at the date of the hearing he would still welcome Mr Fredericks back.

[29] After the mediation took place and VIP were aware that Mr Fredericks by that stage was fully fit to return to work, they referred to lifting the lockout. In reality this was just an expression that the company was satisfied on health and safety grounds that Mr Fredericks could appropriately return to work. Again he was offered the position in the snip-saw room but at that stage elected to

resign from his employment. He would not indicate to VIP when asked where else he could appropriately be employed. In his evidence and submissions to the Court, he raised the suggestion that other temporary employees could have been dismissed to make way for him.

[30] During the course of these events Mr Fredericks had consulted lawyers. They corresponded with the lawyers acting for VIP. There are two letters from Mr Fredericks' lawyers which are significant in the context of his allegation that he was constructively dismissed. Such an allegation requires Mr Fredericks to prove that

the conduct of the employer towards him was of such a repudiatory nature that he was entitled to elect to cancel the employment agreement and did so.⁴ This requires actions to be taken by Mr Fredericks on a prompt basis to cancel; otherwise he runs the risk of his subsequent actions being interpreted as an affirmation and waiver rather than an election to cancel. In letters sent by his legal advisors to VIP's lawyers dated 28 February and 12 March 2014, he confirmed such a result. In the

letter of 28 February 2014 Mr Beck indicated that Mr Fredericks at that point already had a personal grievance in the form of a constructive dismissal. No steps were taken at that point to cancel the contract and in fact Mr Fredericks's actions following that letter and leading up to the mediation, which took place on 12 March

2014, all indicate that Mr Fredericks, having gone through the process of being certified as fit to return to work, intended to do so. Ms Ashley had earlier confirmed in the email exchange with VIP's solicitors prior to the mediation that Mr Fredericks intended to return to work.

[31] Mr Beck's second letter dated 12 March 2014 followed the mediation. By that stage VIP had lifted what it had misnamed a lockout and wanted Mr Fredericks to return to work. It was at that point that he was offered the position in the snip-saw room so that he would not be immediately exposed to nail guns. It was then that Mr Fredericks refused to accept that offer and wanted another position within the factory but was not prepared to say what it was. Instead he elected to resign. Mr Beck's letter contained the submission of a personal grievance based on constructive dismissal.

[32] It is unfortunate that by the time of the mediation, VIP had not been informed that Mr Fredericks was fully fit to return to work both physically and mentally. It continued to maintain its position that until it was satisfied that it was safe to do so Mr Fredericks would not be able to return to work. It is difficult, however, to see what actions VIP deliberately carried out prior to and following Mr Beck's letter of

28 February which could have been interpreted as constructively dismissing Mr

Fredericks. The desire for him to return to work was genuine and it could not therefore be accused of deliberately behaving in order to manipulate a resignation

⁴ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, [1985] 2 ACJ 963 (CA).

from Mr Fredericks. Certainly there was no proposal put to Mr Fredericks that he would be dismissed unless he resigned. Quite the contrary is the case. It is correct that earlier, during the course of these events, VIP indicated to Mr Fredericks via Ms Ashley that when he returned to work the company had an open-door policy insofar as positions of employment away from the nail-gun operation were concerned. The emails from VIP's lawyers did not assist on this point. However, at no stage during the course of evidence did Mr Fredericks indicate what other position he would be prepared to work in as an alternative to the snip-saw room position that was offered to him. Witnesses for the company also indicated that in fact the snip-saw room was really the only alternative for Mr Fredericks. I consider it was then reasonable for Mr Fredericks to be offered that position. Mr Fredericks's and Ms Ashley's insistence that there were temporary employees in other positions, one of whom could have been dismissed to provide a position to Mr Fredericks, could hardly be a satisfactory position in employment law to impose upon VIP in all the circumstances.

Conclusions

Constructive dismissal

[33] The particulars of this allegation are that VIP breached the duty of trust and confidence and the duty to provide a safe workplace to the extent that it was foreseeable that the plaintiff would resign. Alternatively, it is pleaded that VIP embarked upon a course of conduct designed to engineer the plaintiff's resignation. These pleaded clauses rely upon established authority dealing with the doctrine of constructive dismissal and are discussed in Mr Beck's closing submissions.⁵

[34] Throughout the sequence of events following the unfortunate injury sustained by Mr Fredericks, it was constantly emphasised that he wished to return to work and that VIP wanted him to return. Obviously emotions ran high at times but the primary objective of both parties was to ensure that Mr Fredericks was certified as fit for

work and that he would return. Even now VIP wishes Mr Fredericks to return to its

⁵ *Auckland Shop Employees Union v Woolworths (NZ)* [1985] 2 NZLR 372, [1985] 2 ACJ 963 (CA); *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] NZCA 250; [1994] 1 ERNZ 168 (CA).

employment and I assess this was a genuine expression Mr Caldwell made during the course of his evidence.

[35] There are number of reasons why I reject Mr Fredericks's claim that he was constructively dismissed. He was never given the choice of resigning or being dismissed. His resignation did not follow such an ultimatum being given to him. The opposite is the case. After the mediation, VIP reiterated its offer for him to make a gradual return to the use of the nail guns by offering him a position in

the snip-saw room, well separate from the nail guns.

[36] Mr Fredericks's resignation was not procured by VIP following a course of conduct with the deliberate and dominant purpose of coercing him to resign. From all of the evidence such an inference is not possible or reasonable.

[37] VIP breached its contractual duty to provide a safe workplace and admits that. However, the evidence as a whole means that Mr Fredericks's resignation was not a reasonable response to that breach. It was not causative of the resignation and indeed, in the time which elapsed between the accident and Mr Fredericks's resignation, there were many instances where Mr Fredericks through his agent, Ms Ashley, affirmed the contract and expressed a desire to return to work. The resignation in those circumstances was not foreseeable.

[38] Finally, as already discussed, in the period leading up to the mediation and the resignation, correspondence confirms that Mr Fredericks was hedging his bets on the issue of constructive dismissal. The first letter from Mr Beck, dated 28 February

2014, confirmed that Mr Fredericks believed he had been constructively dismissed at that time. Nearly two weeks elapsed following that letter before Mr Fredericks resigned. He had obtained the psychological clearance to return to work. He attended a mediation which was set up to discuss the issue of how he was to be rehabilitated back into the workplace and return to work as contemplated. With that purpose he is unlikely to have reached a decision prior to the mediation to cancel his contract even though he stated in evidence he had reached such a decision. If he had reached a decision to cancel the employment agreement by 28 February 2014, his subsequent actions leading to the mediation and Mr Beck's second letter can only be

interpreted as affirmation or waiver. Following the mediation he had no reason for not returning to work. He was certified as fit both physically and mentally. He was offered a suitable position away from nail guns. There were no other valid reasons for him to resign.

[39] There is no evidence upon which an inference could be made that VIP was trying to force Mr Fredericks to resign. It is difficult to see how when heading into mediation designed to ease the way back into the workplace it could be foreseeable that Mr Fredericks would resign. To find an unjustifiable constructive dismissal in all these circumstances would run counter to the legal principles well enunciated in Mr Beck's closing submissions.

Unjustifiable disadvantage/breach of contract

[40] That is not to say that some of the actions taken by VIP did not unjustifiably disadvantage Mr Fredericks in his employment. However, the way that the combination of allegations of dismissal, disadvantage and breach of the terms of the employment agreement are pleaded in the amended statement of claim causes some confusion. This is particularly so from the way the remedies are linked to the causes of action. I shall deal with the claims to a penalty separately. I also understand that Mr Beck accepts that the Court has no jurisdiction to consider the statutory breach cause of action in paragraph 11 of the amended statement of claim. In any event, it is difficult to tell whether a remedy is sought for this alleged statutory breach, which relates to Mr Fredericks not being properly rehabilitated back into his employment. That is covered by other causes of action and remedies sought.

[41] Similarly, the claim to compensation for the specified contractual breaches causes some confusion. As indicated earlier, I initially thought these particulars were pleaded to form the basis for a claim for damages for breach of the employment contract. There was some discussion with counsel during the course of the hearing and closing submissions on this point. This in turn led to considerable confusion as to which causes of action and remedies Mr Beck was still pursuing on Mr Fredericks's behalf. If the remedy specified in paragraph 58 of the amended statement of claim is a claim for damages, it is not adequately specified or

particularised. The terminology used is compensation for such breaches. The nature of the damages has not been clearly enunciated and while there was substantial evidence on the loss suffered by Mr Fredericks under the dismissal and disadvantage causes of action, there was not adequate evidence upon which to consider a separate claim for damages, whether they were special or general damages. If the alleged breaches of contract are treated as the basis for the unjustifiable disadvantage claims, which appears to be the way it is pleaded and may have been dealt with by the Authority, then the claim to compensation in paragraph 58 makes more sense. That is the way I propose to treat it. I perceive that Ms Toohey also treated the allegations in this way in her closing submissions. Otherwise there are no separate particulars pleaded as a basis for the unjustifiable disadvantage claims, which are simply combined as alternatives to the constructive dismissal pleading contained in paragraph 7 of the amended pleadings.

[42] Mr Beck indicated that he would not pursue a claim for damages for the alleged breaches and agreed there may not be an evidential basis for doing so. Even if both compensation and general damages had been pursued, Mr Fredericks could only succeed on one remedy and not both, because he could not receive double reimbursement for the same actions of the employer.

The duty to provide a safe workplace

[43] VIP does not dispute that it breached its contractual obligations to provide a safe workplace on the date that Mr Fredericks was injured. Mr Fredericks was affected to his disadvantage by this breach. It cannot be argued that the actions of VIP and its failures were justifiable. VIP in evidence and during counsel's closing submissions set out the steps it had taken since the accident to make the workplace safer so that such an event does not happen again. This included ceasing cross-nailing, closer supervision and training and consistent reporting of accidents to Worksafe New Zealand. No doubt it presented similar information to the District Court when it was prosecuted for offences under the [Health and Safety in Employment Act 1992](#). The fact that it had to take such steps establishes that the state of the workplace at the time of the accident was unsatisfactory, both as to work

practices and supervision, and its actions in allowing such a state of affairs were unjustifiable.

[44] Mr Fredericks in these proceedings cannot be compensated for the effect of his injuries, as that is a matter dealt with by way of

accident compensation. To the extent that he suffered emotional harm as a result of his being a victim of VIP's offending, Mr Fredericks has been awarded reparation by the District Court. That reparation was reduced, somewhat controversially, to take account of the compensation already awarded to him by the Authority in its determination. The compensation awarded in the Authority's determination was an award to take account of Mr Fredericks' humiliation, loss of dignity and injury to feelings resulting from his personal grievance arising under his employment relationship and not anything arising as a result of him being a victim of VIP's criminal offending. It would seem that as the awards are to satisfy different purposes they are not related, nor capable of being taken into account when the separate awards are being considered. While a copy of the sentencing Judge's notes has been produced in evidence, I can take no cognisance of them in assessing Mr Fredericks's entitlements in the present case. Whatever sum he was awarded for emotional harm as a victim of VIP's offending bears no relation to the compensation he may be awarded by virtue of the provisions of the Act.

[45] The Authority awarded Mr Fredericks the sum of \$6,000 as compensation for the disadvantage suffered by him as a result of the breach of the contractual obligation to provide a safe workplace. In view of what transpired, that might be a little inadequate. However, I consider there was another area where VIP acted to Mr Fredericks's disadvantage. Accordingly, I shall make an assessment of the overall compensation based on all of the actions I consider the employer took which disadvantaged Mr Fredericks in his employment or his conditions of employment.

The company rehabilitation policy

[46] This is the second of the particulars of breach of contract alleged in the amended statement of claim. This allegation is a common theme in the pleadings and submissions made on Mr Fredericks's behalf. It provided one of the alleged

grounds for his claim to have been constructively dismissed. In addition to being raised in the context of breach of contract, it also formed a basis for the allegation of breach of the statutory duty of good faith and therefore the claim to a penalty. It is also the sole basis for the breach of statutory duty claim in reliance upon [s 71\(2\)](#) of the [Accident Compensation Act 2001](#). As already mentioned, the Court has no jurisdiction to consider this latter claim. In any event no separate remedy is sought for it in the amended statement of claim.

[47] The allegation centres mainly on Mr Fredericks's request to be assigned initially upon his return to work to duties away from the nail-gun operations. There was conflicting evidence as to exactly what the company was prepared to do for Mr Fredericks in this respect. The evidence shows that initially VIP was prepared to consider a number of options, although these were not specified. Eventually the only available option was in the snip-saw room.

[48] In addition to Mr Fredericks's duties upon return to work, the rehabilitation issue also involves VIP's initial refusal to attend mediation and the unfortunately provocative step of purporting to lock him out from the workplace.

[49] When Ms Ashley sought mediation on Mr Fredericks's behalf, VIP perhaps understandably, asked the reasons for this before agreeing. This proved to be an unnecessary point of conflict, which appears to have arisen through a misunderstanding on both sides. For some reason, VIP regarded the request as elevating what had transpired into a legal dispute. It then appeared to take a more formal position on how it would deal with Mr Fredericks's reintegration into the workplace. The request for mediation was also motivated by Mr Fredericks's and Ms Ashley's wishes to try and resolve what they saw as antagonism towards them by Mr Fredericks's fellow employees. But of course the proprietors of VIP were not fully apprised of those events occurring until later. There was also the previous background of the unreasonable stand Ms Ashley had taken on the continued employment of Mr Sim and her written request for the workplace to be closed down while an inquiry took place. Nevertheless, mediation was eventually agreed to. The mediation took place and then Mr Fredericks was invited to start work, VIP being satisfied as to both his physical and mental wellbeing.

[50] VIP's indications to Mr Fredericks as to the positions available to him for a return to work away from the nail guns were inconsistent and contradictory. I am satisfied that VIP did initially indicate to Mr Fredericks that in order for him to return the positions available would be wide ranging. Mr Caldwell referred in his brief of evidence to the fact that VIP would be accommodating about Mr Fredericks's return. I am sure Mr Fredericks was led to believe that the positions he could fill were wider-ranging than just working on the snip saws. As the time when Mr Fredericks would be cleared as fit to return approached, it is plain that VIP realised the only position they could offer him would be in the snip-saw room.

[51] On 19 February 2014 Ms Ashley sent an email to the solicitors then acting for VIP. This confirmed that Mr Fredericks was physically fit to return to work and attached a copy of his medical clearance. It also set out that the request for mediation was made to discuss how VIP would provide a safe and controlled environment for Mr Fredericks' return to work. VIP's solicitors responded on 20

February 2014 by making it clear that Mr Fredericks would need to return to full duties on the nail guns. That is the clear inference which must be taken from this email. Following a response from Ms Ashley, the solicitors wrote a further email which was also partly unconciliatory by indicating that VIP did not consider rehabilitation was necessary and that this would be clarified with ACC. Ms Ashley responded to this email by advising that Mr Fredericks was affected by the psychological impact of the injury and was to undergo a psychological assessment. The solicitors for VIP then responded with an email indicating that Mr Fredericks was locked out until VIP was satisfied health and safety grounds no longer existed. It also indicated that Mr Fredericks would not be entitled to any remuneration during the lockout period.

[52] This correspondence, presumably authorised by VIP, was unnecessarily antagonistic. It also presented a clear contradiction to VIP's earlier undertakings that Mr Fredericks would be offered a position away from nail guns. It was contrary to Mr Caldwell's earlier statements that VIP would be accommodating. While not providing grounds for Mr Fredericks to claim a constructive dismissal, it was an action to Mr Fredericks's disadvantage and not an action that a fair and reasonable employer could take in all the circumstances.

What should have happened was an

approach directly to Mr Fredericks at this point to indicate that in view of the dangerous nature of the workplace it was essential that he be mentally as well as physically fit. Until he got his psychological clearance he had to remain away. It is unclear whether VIP had ascertained that Mr Fredericks was no longer in receipt of earnings-related accident compensation. Its decision to withhold his income or any further top up at that point was unreasonable. In the circumstances where VIP knew there was still an impediment to Mr Fredericks returning to work in his previous position, its actions were in breach of the company's rehabilitation policy which required consultation and provision of alternative duties if required. In the exchange of correspondence, however, Mr Fredericks, through Ms Ashley, was nevertheless initially still indicating that he wished to return to work.

The company accident-reporting policy

[53] The decision not to report Mr Fredericks' accident to Workplace Safety was made by VIP on the advice of Mr Tobeck. Mr Tobeck's advice was based on his somewhat narrow interpretation of the definition of "Serious harm" in the first schedule to the [Health and Safety in Employment Act 1992](#). Mr Tobeck considered that Mr Fredericks's injury was not serious harm requiring reporting because it was not within the list of injuries in the schedule and Mr Fredericks remained in hospital for less than 48 hours. I do not agree with Mr Tobeck's interpretation. The injury which Mr Fredericks had suffered was clearly a laceration, albeit a small piercing injury, to the fluid sack surrounding the heart, a lung and liver. I note that in the sentencing notes in the prosecution against VIP, the District Court Judge was under no doubt that Mr Fredericks had suffered serious harm.

[54] Even if there was no requirement to report under the [Health and Safety in Employment Act](#), VIP was bound to report the accident in any event under its own Health and Safety Policy. If Mr Fredericks's injuries did not constitute serious harm, a serious accident had nevertheless occurred. Under its prescribed procedures in the case of a serious accident, VIP had imposed upon itself a requirement to advise OSH (now Workplace Safety) as soon as possible. There was therefore a contractual, if not a statutory, obligation to report the accident.

[55] While VIP has appeared to breach its own accident-reporting policy, no separate disadvantage has been occasioned to Mr Fredericks. Ms Ashley reported the accident to Workplace Safety and events necessarily proceeded from there, with Workplace Safety becoming involved in the worksite and VIP being prosecuted. As a victim of VIP's clear offending, Mr Fredericks received reparation.

The company bullying/harassment policy

[56] The full circumstances surrounding the deterioration in the relationship between Mr Fredericks and his fellow workers became apparent to VIP somewhat late in the piece. It is difficult to see how they could have acted differently than they did. It is clear Mr Fredericks and Ms Ashley were disturbed by some of the communications they received. There were clearly rumours floating around the worksite. However, at the hearing there was no direct firsthand evidence on these rumours. Assertions as to them being made were purely hearsay. I cannot see how there was any action in respect of this allegation on VIP's part which would either amount to a breach of the employment agreement or establish a disadvantage personal grievance. Under the policies and procedures there is a prescribed formal procedure for a complaint to be made. That procedure was not adopted by Mr Fredericks or Ms Ashley in this respect.

[57] I accept Ms Toohey's submissions also that for reasons already set out, the company's bullying and harassment policy was not engaged in this instance. VIP could not be expected to initiate action until there was a formal complaint. If that had been done then obviously VIP would have needed to carry out enquiries, but it could not be expected to act purely on rumour and conjecture.

Mr Fredericks's claim to compensation

[58] There was sufficient evidence that Mr Fredericks suffered humiliation, distress and injury to his feelings as a result of VIP's failure to provide a safe workplace and its equivocation in providing proper and sensitive rehabilitation for him. These were unjustifiable actions taken by the employer affecting Mr Fredericks's employment generally and the conditions of his employment agreement

to his disadvantage. Care needs to be taken, in awarding compensation for such breaches, not to be awarding compensation for Mr Fredericks's injuries or to overlap into the area of reparation to him as a victim of the offending. Failure to protect Mr Fredericks from the accident and to properly rehabilitate him back into the workplace after the accident has amounted to Mr Fredericks losing trust and confidence in his employer to provide a safe workplace and abide by the terms of his employment agreement. The actions also caused him distress at a time when he was vulnerable in trying to recover so as to be able to return to work. The actions taken by the employer under these heads were not the actions a fair and reasonable employer could have taken in all the circumstances and a personal grievance arises.

[59] While VIP took steps to remedy safety deficiencies and made genuine assurances to Mr Fredericks about his return to work, it overreacted to Mr Fredericks's overtures to attend mediation. It also responded in an inappropriate and insensitive way to what should have been the obvious; that the nature of Mr Fredericks' injury would have left him with psychological difficulties about returning to the nail-gun operation immediately. However, this needs to be seen in light of the background context that emotions had been running high between the parties. Also, as Ms Toohey referred to in closing submissions, the contemporary documents show that there was an unfortunate failure of ACC to send the return-to-work plan to VIP's correct address. There was also a failure on Mr Fredericks's part not to properly enunciate his reluctance to return to the nail-gun operation and a failure to provide VIP with his final psychological clearance until just prior to or when the mediation occurred.

Claim to penalties

[60] Penalties are claimed by Mr Fredericks for breach of VIP's statutory duty of good faith. This is alleged to be in respect of the way

that VIP dealt with the reinstatement of Mr Fredericks to the workplace following his recuperation from his injuries and its failure to engage constructively with ACC. There is also a penalty sought for VIP's initial refusal to attend mediation to deal with the allegation by Mr Fredericks that VIP had created a hostile work environment and by locking him out of the workplace.

[61] While I have held that the inconsistent way VIP dealt with the reinstatement of Mr Fredericks was not satisfactory, nevertheless VIP was always intent on ensuring that Mr Fredericks came back initially to a position away from nail-gun activities. There was some unfortunate, inconsistent correspondence from VIP's solicitors which seemed to imply that VIP had backed away entirely from offering Mr Fredericks a position other than with the nail-gun activities, but having heard from Mr Caldwell and the other witnesses for VIP, the inferences which could be taken from the solicitors correspondence were not in fact the case. Offering Mr Fredericks a position within the snip-saw room, while it did not appear to satisfy Mr Fredericks, was in fact a reasonable offer to him in order to ensure his rehabilitation and gradual return to the nail gun operations.

[62] Insofar as the request to attend mediation was concerned, it was reasonable for VIP to seek some clarification from both Mr Fredericks and Ms Ashley as to exactly what was proposed at mediation. They were not initially forthcoming in this regard. It has to be remembered that while Mr Fredericks and Ms Ashley were being faced with some hostility from Mr Fredericks's co-workers, the proprietors of VIP were not aware of what had gone on even though perhaps Ms Ashley assumed that they did.

[63] The purported lockout was inappropriate. It is hard to understand what motivated use of that terminology. However VIP was entitled to be satisfied that Mr Fredericks was fully fit both physically and mentally to return to work. If he had residual psychological difficulties as a result of his injuries that would be understandable. This was clearly a dangerous worksite and VIP was entitled to ensure that safety was not compromised. ACC in correspondence with VIP and its solicitors indicated its support of this stand VIP was taking. Indeed ACC assisted Mr Fredericks in obtaining a psychological clearance as requested by VIP's solicitors. I do not consider VIP failed to engage constructively with ACC. Where VIP made a mistake was in using what was inappropriate and insensitive language in the way that it informed Mr Fredericks that he was not at that time to return to the workplace.

[64] This particular aspect of the entire episode was nevertheless not handled well by VIP. However, none of these actions by VIP could be regarded as of such an

egregious nature that a penalty would be appropriate. Despite these actions by VIP, it maintained the attitude throughout that it wanted to ensure Mr Fredericks's full recovery and a return to work. It even holds to that view now. I am not prepared in the circumstances to find that VIP breached any statutory duty of good faith and the claim for penalties is declined.

Disposition

[65] Mr Fredericks's challenge to the determination succeeds to the extent that the level of compensation awarded for his disadvantage grievances should be increased. I agree with the Authority's finding that Mr Fredericks terminated his employment by resigning in circumstances where he could not claim to have been constructively dismissed. His claims to have been constructively dismissed and for penalties are dismissed.

[66] There are two areas where I consider VIP acted in a manner giving rise to a disadvantage to Mr Fredericks in his employment generally and in relation to the conditions of his employment agreement. VIP has admitted that it breached the employment agreement by not providing a safe workplace. It also acted in an unsatisfactory manner in the way that it dealt with his rehabilitation although ultimately it was always prepared to reinstate Mr Fredericks to a position where he would be away from the nail guns and be reintegrated into that part of the factory on a gradual basis if that was what he wanted. The manner in which that was handled, however, was contradictory and insensitive.

[67] The Court has no jurisdiction to consider the allegation of breach of a statutory duty as claimed in respect of [s 71\(2\)](#) of the [Accident Compensation Act](#)

2001. That particular claim is also dismissed, although it too related to the issue of rehabilitation which has been covered under other causes of action and in which Mr Fredericks has been partially successful.

[68] In respect of Mr Fredericks's claim for compensation, I have already indicated that I consider the award by the Authority of \$6,000 for the one disadvantage claim it held established following the investigation meeting was too

light. Mr Fredericks claimed \$15,000 as total compensation in the proceedings before the Authority but now claims \$20,000. I consider that an appropriate total level of compensation for both of the disadvantage claims which I have upheld should be \$12,000. Accordingly, VIP is ordered to pay that amount to Mr Fredericks.

[69] In view of the fact that Mr Fredericks has not been successful with his claim to have been unjustifiably dismissed, he is not entitled to any lost wages following his resignation. However, counsel provided a schedule as to the quantum of loss of wages both before and after the resignation. I consider that it was not reasonable for VIP to have withheld wages from Mr Fredericks if he was no longer in receipt of earnings-related accident compensation and while he was still in employment but not able to return to work on medical grounds. Counsel have quantified the loss of wages for this period at \$1,289.52 and VIP is ordered to pay that amount to Mr Fredericks, if it has not already done so.

Contributing behaviour

[70] VIP in its statement of defence made an allegation against Mr Fredericks that he had contributed to the circumstances giving rise to his claim of personal grievance by his conduct. This was pleaded as a positive defence. At the hearing Ms Toohey indicated that VIP was withdrawing those allegations and that was appropriate. While there was some unreasonable and inappropriate behaviour by Ms

Ashley on Mr Fredericks's part, I put that down to the stress which Mr Fredericks and his family were suffering as a result of the serious injury he received from the accident with the nail gun. In the same way that I have held that VIP, while at times acting inappropriately, had genuine concerns for Mr Fredericks's wellbeing and a desire to see him return to the workplace, Mr Fredericks and Ms Ashley also had an underlying desire to act towards VIP in good faith.

[71] There are no circumstances established in this case for a finding that Mr Fredericks contributed towards the situation which gave rise to the personal grievances which he claimed.

Costs

[72] Costs should follow the event. As Mr Fredericks has succeeded in respect of parts of his challenge against the determination, the parties may be able to resolve the issue of costs between themselves. There is of course the order of costs which was made by the Authority which has not been challenged; that will stand as it is. If the parties are unable to reach an agreement on costs in respect of the proceedings before the Court then Mr Fredericks will have 14 days from the date of this judgment in which to file and serve submissions in respect of any claim for costs. VIP shall then have a further 14 days thereafter to file and serve any submissions in reply.

Comment

[73] During the course of the hearing, as I have mentioned, Mr Caldwell, who is the proprietor of VIP, expressed the wish for Mr Fredericks to return to employment with VIP even at this late stage, although Mr Fredericks appears to have now settled himself into alternative employment. However it appears that he has skills which would be of considerable benefit to VIP. It would not be appropriate to direct the parties to mediation at this stage, I simply make the comment that further mediation on a voluntary basis may be of benefit if there is any prospect that Mr Fredericks might consider resuming employment with VIP.

M E Perkins

Judge

Judgment signed at 3.30 pm on 17 November 2015

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