IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 115
5380074

	BETWEEN	ADEBIMPE GEORGE Applicant
	AND	SILVER FERN FARMS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Tunde George, Advocate for the Applicant Tim Cleary, Counsel for the Respondent
Investigation Meeting:	23 October 2012 and 17 May 2013 at Ashburton
Submissions received:	23 October 2012, 17 May 2013, 24 May 2013 and 14 June 2013 from the applicant 23 October 2012, 17 May 2013, 30 May 2013 from the respondent.
Determination:	25 June 2013

DETERMINATION OF THE AUTHORITY

A. The Applicant did not suffer an unjustified disadvantage in her employment, and her personal grievance in this respect is dismissed.

B. The Applicant was not unjustifiably dismissed, and her personal grievance in this respect is dismissed.

C. Costs are reserved.

Prohibition from publication

[1] Evidence was given at both investigation meetings about another employee of the respondent who had suffered a partial hand amputation at work. There is no need to identify this individual by name and I prohibit from publication any further

information other than that already given in this determination that may lead to his identity becoming known. He is referred to as Mr X in this determination.

Employment relationship problem

[2] Mrs George claims that she was unjustifiably dismissed on 8 August 2012 and that that dismissal was by reason of a prohibited ground of discrimination.

[3] Mrs George also claims that she suffered an unjustified disadvantage in 2010 when she was told that she had been dismissed during a meeting with her employer (the 2010 meeting). Her other claims of discrimination by reason of her race, employment status and family status cannot be investigated as she did not raise her personal grievances in respect of these allegations in time, and the Authority has declined to allow her leave to do so out of time ([2013] NZERA Christchurch 29). It was this preliminary determination, which was interposed between the two investigation meetings, which largely accounts for the delay between them and the issuing of this determination.

[4] The respondent denies the allegations. It contends that Mrs George was told that her employment had been treated as terminated in 2010 after she had abandoned her employment in August 2009, but that she suffered no unjustified disadvantage as a result. It further contends that Mrs George was dismissed from her employment in August 2012 at the end of a fair and thorough process which sought to find alternative work for Mrs George following an injury in 2008 which prevented her from carrying out processing work.

Background information

[5] Mrs George started working for the respondent in March 2008 as a meat packer and then moved on to meat processing work. In August 2008, Mrs George sustained an injury to her wrist at work in respect of which she made a claim to ACC on 26 August 2008. Mrs George alleges that she was not properly trained in the use of knives and it was this alleged failure by the respondent which led to her injury. However, Mrs George did not raise a personal grievance at the time of the alleged failure and, insofar as she wishes to claim in the Authority in respect of the resulting personal injury, such a claim is precluded by virtue of s. 317 of the Accident Compensation Act 2001.

[6] Mrs George's injury turned out to be serious, requiring surgery in February 2010. Despite further treatment, Mrs George continued to experience problems with her right wrist and thumb which effectively prevented her from carrying out repetitive movements and lifting heavy weights.

[7] During the period between 2008 and the termination of her employment in 2012, Mrs George had a daughter and then twin girls. During this period she also completed a post-graduate diploma in Resource Studies (Mrs George is an environmental toxicologist by profession).

[8] The respondent is in the Partnership Programme with ACC under the Accident Compensation Act 2001 so that all work injury claims are dealt with by the respondent as the agent for ACC. The respondent employs specialist staff members who case manage all claims made under the ACC. An individual rehabilitation plan for Mrs George was formed in accordance with the ACC Act and Mrs George was on alternative or light duties for some time under that plan. Despite this, she did not regain full capacity and a vocational independence process (VIP) was initiated in March 2012. The VIP is an assessment which tests whether a claimant under ACC has capacity in other occupations so that the weekly compensation that Mrs George would have been receiving throughout her employment could be discontinued.

Brief account of the events leading to the 2010 meeting

[9] In September 2008 Mrs George began a period of parental leave. Under the terms of the collective employment agreement to which her employment was subject, she had a right to return to work with the same level of seniority up to 12 months later. It was common ground that, in July 2009, after the birth of her baby daughter in December 2008, Mrs George rang her supervisor, Mr Kavanaugh, to ask when the 2009/10 season was starting. There was also, it is agreed, a discussion about whether Mrs George could return to work working day shifts (as her husband worked night shifts at that point). Mr Kavanaugh told her she could not, as she lacked the seniority, and so had to work night shifts.

[10] There is, however, a disagreement in the evidence as to whether Mrs George then stated that she would be returning to work on 10 August 2009. She states categorically that she did not say that to Mr Kavanaugh, and that she would not have

been in a position to have done so in any event. Mr Kavanaugh states that Mrs George did say that and that he made a note to that effect in Mrs George's folder.

[11] Mr Kavanaugh's evidence is that, when Mrs George did not turn up to work on 10 August 2009, he tried calling her but found that her number had been disconnected. He believes that he tried calling both her landline and her mobile phone. He says that, after waiting three days, he deemed Mrs George as having abandoned her employment. The Authority saw a note printed off from the respondent's computer system which purported to record the above course of events. Mr Kavanaugh said that the typed note seen by the Authority was made later, when he had been contacted by a colleague, Ms Waddell, the ACC Claims Administrator at Silver Fern Farms at the time, who was enquiring about Mrs George's return under a rehabilitation plan in April 2010.

[12] As far as the conflict in evidence about whether or not Mrs George said she was going to return on 10 August 2009 is concerned, I accept Mrs George's evidence that she did not say this to Mr Kavanaugh. However, there is no obvious reason why this would have been invented by Mr Kavanaugh given that Mrs George was reemployed in or around April 2010 as part of her rehabilitation plan, once it had become clear that her injury at work was serious and required on-going treatment. The most likely scenario, in my view, is that there was a misunderstanding between the two when Mrs George and Mr Kavanaugh spoke on the telephone in July 2009.

[13] In regards to whether Mr Kavanaugh had really tried to contact Mrs George using her landline and mobile phone, Mrs George's evidence is that she had never given a landline number to the company when she began employment because she had not had a landline. She also said that her mobile telephone number had never changed. However, on 24 May 2013 the respondent provided the Authority and Mr George (Mrs George's husband), with a copy of Mrs George's written application for seasonal employment dated March 2008, which recorded a home landline number and an email address for Mrs George, but no mobile number. It also recorded Mr George's mobile telephone number in the *next of kin* section. The respondent also provided information that email addresses are not used to contact staff and that next of kin information is only used in emergencies. Mrs George has not responded to this information or denied that the landline was provided to the respondent as shown on the form.

[14] I believe that Mr Kavanaugh did make an effort to contact Mrs George on or around 10 August 2009, but did not make exhaustive efforts, given that he would have been busy trying to contact other workers due to return around the start of the season. Whether there was any breach of duty by the respondent in this respect which is covered by the personal grievance will be examined below.

[15] In February 2010 Mrs George had surgery in relation to her work-related injury and on 6 April 2010 her surgeon recommended a graduated return to work over the following three weeks. In accordance with the respondent's obligations as an employer in the ACC Partnership Programme, the respondent contacted Mrs George to arrange a meeting to explore her graduated return under a rehabilitation plan. She was contacted by Ms Waddell on 13 April 2010 and asked to attend a meeting the following day.

[16] It is the evidence of Mrs George that she was surprised the following day to be asked to undertake a drug test, as she was concerned that the respondent believed she had been taking drugs. The respondent, in fact, asked her to do so because they were treating her as a new employee, and because they believed that she had abandoned her employment in August 2009.

[17] Ms Waddell's evidence is that she had told Mrs George in the telephone call on 13 April that she was to take a drugs test and that she was to be starting work as a new employee due to the fact that she had abandoned her employment from 10 August 2009. She referred to an email that she had sent to a colleague on 13 April 2010 to this effect, which also states that Mrs George had agreed to this. I must say that I am sceptical that the contents of this email are accurate, in that I doubt that Ms Waddell did tell Mrs George everything that the email indicates she did, or at least that there was a serious failure in comprehension between Mrs George and Ms Waddell on the telephone, due to the strongly differing accents with which the two women respectively speak. In any event, I prefer the evidence of Mrs George that she did not know that she was to be treated as a new employee until she attended the meeting on 14 April 2010.

[18] Mrs George's evidence is that, at the subsequent meeting on 14 April, at which Mr Kavanaugh, Ms Waddell and Mr Renner, the respondent's Personnel Officer, were present, she was told by Ms Waddell that she had to sign a new employment agreement. When Mrs George said she did not want to sign a new employment

agreement, Ms Waddell said to her that her employment was terminated and she and her husband were walked out of the office. Mrs George's evidence is that Ms Waddell shouted at her, told her that she had nothing to do with the company anymore and was *rude and uncouth*. Mrs George says that Mr Renner apologised to her for Ms Waddell's conduct on or around the following day, and she also gave evidence that Ms Waddell herself apologised to her some months later when they ended up working together.

[19] Mrs Waddell's evidence is that she did not speak at the meeting about Mrs George's employment having terminated as that was not her role, being an ACC Claims Administrator. She also stated that she did not walk Mr and Mrs George out of the office as she left before they did. She said that the meeting was already heated when she arrived. She denied shouting at Mrs George and also denied apologising to Mrs George and being aware that Mr Renner had done so (Mr Renner also denied apologising).

[20] Mr Kavanaugh said in evidence that he did not recall anything in particular about the meeting, except that there was a discussion but no raised voices. He did not recall Ms Waddell being rude to Mrs George.

[21] Mr Renner said that he spoke to Mrs George about having to sign a new employment agreement (having been deemed to have abandoned her employment) because she could not be part of a rehabilitation plan if she was not an employee. He said that Ms Waddell did not talk about Mrs George's employment being terminated and that she acted very professionally. Mr Renner said that the meeting did get heated but that was because Mr George had been using a raised voice. Mr Renner said that he may have raised his voice to try to get Mr George to understand.

[22] It is not possible to be certain as to the exact course of events that transpired at the meeting, but I believe it is probable that both parties ended up in a heated discussion.

Was Mrs George disadvantaged in her employment at the meeting on 14 April 2010?

[23] First, there is a jurisdictional point that must be considered which was not addressed in the Authority's determination dated 11 February 2013 as, at that point, it was not appreciated by the Authority that the respondent was arguing that Mrs George

had abandoned her employment with effect from 10 August 2009, nor was it appreciated that Mrs George had been off work for several months by the time of the 14 April 2010 meeting.

[24] If, indeed, Mrs George had abandoned her employment on or around 10 August 2009, the actions she complains of in respect of the meeting on 14 April 2010 would have taken place after 10 August 2009, but before she had entered into a new employment relationship with the respondent. Therefore, the respondent argues, she would not have been an employee as defined by section 6 of the Employment Relations Act 2000 (the Act) at the time of the alleged actions and would not have the standing to raise a personal grievance in respect of them. If Mrs George had abandoned her employment on or around 10 August 2009, the respondent's argument is correct as to the Authority's lack of jurisdiction to consider Mrs George's disadvantage personal grievance insofar as it relates to alleged actions by the respondent on 14 April 2010.

[25] It is my view that Mrs George did not abandon her employment on 10 August 2009. I accept her evidence that she did not know that her employer expected her to return to work from her parental leave on that day. In addition, she appears to have had no contact from the respondent in its capacity as her employer (as opposed to as an agent of ACC) between July 2009 and April 2010. Under these circumstances, she cannot be said to have abandoned her employment on or around 10 August 2009.

[26] However, what seems to have happened is that Mrs George continued to be absent beyond the expiry of her parental leave period in September 2009 because she did not want or was unable to work night shifts which the respondent required her to. She then had surgery in February 2010. Clause 35 of the Silver Fern Farms Limited Meat Processors Agreement 2009 to 2010 states as follows:

> *Subject to the provisions of clause 27 of this Agreement* [which gives the employer full power to manage and control their own business] *the employer shall when engaging labour at the commencement of each season give prior consideration to applications from employees who have in the employer's opinion been competent and satisfactory employees at that particular plant during the previous season and who are ready, willing and able to commence employment when the employer requires.*

[27] Other pertinent clauses of the collective agreement are as follows:

> *16 Parental Leave*

(a) The Parental Leave and Employment Protection Act 1987 shall apply to employees covered by this agreement in accordance with the Act's terms and provisions.

(b) ……Re-employment after leave shall be dependent on employment being available at the workplace and as provided for in the seniority clause of this Agreement.

34 Seniority

(a) Every employee shall acquire and retain, as agreed at the works, seniority according to the date of their commencement of employment.

(b) Seniority will operate on a departmental and/or group basis except where otherwise agreed.

(c) Consistent with the departmental needs and the individual's competency, layoffs and re-employment will be based on departmental and/or group seniority.

:

(g) Seniority shall be broken in the following circumstances:

(ii) Failure to return from a layoff after being notified by management and given at least five working days' notice by the employer's customary procedure;

(iii) In exceptional circumstances and upon the request of the delegate of the department, additional time shall not be unreasonably refused.

[28] It has been accepted for some time that seasonal meat workers are not continually employed between the date of the end of a season and the commencement of a new season. *New Zealand Meat Workers Union Inc. v. Alliance Group Ltd* (2006) 7 NZELC 98, 350 [2006] ERNZ 664. By my analysis, Mrs George's employment was protected, even during the off season, during her 12 month parental leave period until its expiry on or around 25 September 2009. Upon its expiry, Mrs George was entitled to return to work *dependent on employment being available at the workplace and as provided for in the seniority clause of this Agreement.* It is accepted by both parties that Mrs George told Mr Kavanaugh in July 2009 that she did not want to work night shifts, and that her seniority rights did not allow her to work day shifts. Mrs George had not challenged that position.

[29] Neither Mrs George nor the respondent appears to have taken any active steps upon the expiry of the parental leave period to get Mrs George back to work. The respondent's failure to do so may be explained by its belief that she had abandoned her employment. Mrs George had not taken up the opportunity to be re-employed on night shifts and the respondent did not have any duty to accommodate her on day

shifts. No request was made by a delegate of the department in question, pursuant to clause 34(g)(iii) for Mrs George to be given additional time to return to work.

[30] As a result of this sequence of events, in my view, Mrs George's employment ceased on the day following the expiry of the parental leave period, on around 25 September 2009, when she both failed to return to work and to contact the respondent about her return. This cessation was a function of the seasonality of Mrs George's work, her contractual obligations under the seniority provisions of the collective agreement and the seniority rules to take night shift work, and clause 34.

[31] It would appear, incidentally, that Mrs George did not have the protection of the Parental Leave and Employment Protection Act 1987 (PLEPA) at the material time as she did not satisfy the requirements set out in s.7 of PLEPA in relation to the average weekly hours worked in the six or twelve months prior to the expected date of delivery. Her parental leave was therefore entirely governed by the terms of the respondent's policy and collective agreement.

[32] Mrs George has argued that she could not have abandoned her employment when she continued to receive pay throughout her period of absence. This same argument may be made in respect of my analysis above to argue that her employment could not have come to an end at the end of her parental leave period. During the period from 10 August 2009 to 14 April 2010 Mrs George was in receipt of weekly compensation payments made under the Accident Compensation Act 2001. These payments were made by the respondent in its capacity as an accredited employer and the respondent was statutorily required to make those payments to Mrs George whether she was its employee or not. The fact that, administratively, the respondent made these payments through its payroll system does not make it her employer. Therefore, I am satisfied that the fact of continued payment from August 2009 does not prove that Mrs George was treated as an employee by the respondent after the expiry of her parental leave period.

[33] In conclusion, by the time of the meeting of 14 April 2010, Mrs George had not been employed for over six months by the respondent. I must therefore accept that the Authority does not have the jurisdiction to consider Mrs George's personal grievance in respect of the alleged actions of the respondent at the meeting on 14 April 2010.

[34] However, before dismissing Mrs George's disadvantage personal grievance in its entirety, it is necessary to examine the contents of her personal grievance letter sent to the respondent the day after the meeting on 14 April 2010. Its contents were as follows:

> *To Haritat Simes*
>
> *I am writing this letter to express my discontent with the discussion Silver Ferns Farm* [sic] *made concerning my employment with the plant. I was to resume work today on a graduated return to work rehabilitation plan when my case officer Myra* [Ms Waddell] *informed me that I had been terminated from work and that my return to work was a temporary one.*
>
> *I do not understand how that came to being, I was later told that Warren the foreman* [Mr Kavanaugh] *had alleged that he had called me and because he could not get in contact with me I was terminated. When I moved to Lincoln I received my pay slips and my letters from my case officer Haritat at my new address.*
>
> *Warren the foreman made an allegation that he called me several times and I did not pick my call* [sic], *and that I had called him late last year when I was coming back to work.*
>
> *Late in June 2009 I called warren* [sic] *and asked him when the season was going to start and if it was possible for me to join the day shift, he carefully explained to me why I could not join the day shift and I reasoned with him and he said that the season was going to start in July. He did not ask me if and when I would be back. I left for my maternity leave late October 2008 and before I left for my leave I asked Francis Renner how long my job will be on hold for me to return to. He told me that my job would be there till October 2009.*
>
> *During this period my plan was to go back to work but I was still feeling sour* [sic], *I spoke to one of the nurses at the Lincoln clinic and explained to her that I had a wrist injury that I acquired while I worked for Silver fern farms some months back and she advised me to talk to the doctor about it.*
>
> *To my surprise the doctor told me to draft a letter to the plant and I did and immediately I received a reply and was told to see the specialist and that was when I got in contact with my first case officer who I believed would have got in contact with the plant to make enquiries there was no time during this period was I informed that my placement in Silver Fern Farms was a temporary one.*
>
> *Now I am humiliated, deprived from my freedom and left with a severe injury on my right wrist and only God knows when the injury will ever get healed. Myra would have handled things much more professionally and not to the way she did, she addressed me in an unjustly manner, and I felt humiliated.*
>
> *Psychologically I am zapped, I came into this country on the 1st of march 2008 to get a break from my country, Silver fern farms was my first ever place of employment and I started work there on the 10th of*

> *march 2008 and was promised an enjoyable working environment. Now am dreading ever working for the company. I had my first child December 2008 and I never enjoyed my motherhood I had to endure this same wrist injury bearing in mind that I am totally dependent on my right hand because of a wrist injury that could have been avoided if I was taught how to sharpen a knife during my course of training. I had my operation done just 8 weeks ago and am still going through pain. Now I that I was told I was terminated, who in their right mind will employ a woman with an ACC injury that is still recovering. I think this is the height of injustice and intimidation.*
>
> *Yours faithfully,*
> *Ade*

[35] In my view Mrs George complains of four interconnected issues in the personal grievance letter:

a. Being told on 14 April 2010 that her job was terminated;

b. Mr Kavanaugh assuming that Mrs George had agreed to come to work on 10 August 2009 and then treating her employment as terminated through abandonment when she did not abandon it;

c. Mr Kavanaugh not making adequate efforts to contact her on or around after 10 August 2009; and

d. Ms Waddell not handling things professionally, and addressing her *in an unjustly manner* during the meeting on 14 April 2010.

[36] As far as the complaints identified in (a) and (d) are concerned, the Authority does not have jurisdiction to entertain them because they relate to alleged actions that occurred when Mrs George was not employed by the respondent.

[37] As far as the complaints in (b) and (c) are concerned, I accept Mrs George's evidence that she did not know about being treated as having abandoned her employment, and Mr Kavanaugh not being able to contact her, until she was told this on 14 April 2010. She raised her grievance regarding these issues in the above letter the following day. Section 114(1) of the Employment Relations Act 2000 (the Act) requires every employee who wishes to raise a personal grievance to do so with their employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later. This, Mrs George did, as soon as the alleged actions came to her notice. The Authority does, therefore, have jurisdiction to consider the

allegations set out at paragraph 35 (b) and (c) above, as they occurred while Mrs George was still employed by the respondent, albeit away on parental leave.

The law in relation to a personal grievance for unjustified disadvantage

[38] Section 103 (1)(b)of the Employment Relations Act 2000 provides as follows:

> ***103 Personal grievance***
>
> *(1) For the purposes of this Act,* ***personal grievance*** *means any grievance that an employee may have against the employee's employer or former employer because of a claim—*
>
> *.....*
>
> *(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.*

[39] Section 103(A) of the Act, in the form in which it was in force in April 2010, provided as follows:

> *For the purposes of section 103(1)(a) and (b), the question of whether a 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.*

[40] The three elements that must be satisfied are that:

a. Mrs George's employment, or one or more conditions of her employment was affected;

b. They were affected to Mrs George's disadvantage; and

c. The disadvantage was caused by an action by the respondent which is unjustified.

Was it reasonable for Mr Kavanaugh to have treated Mrs George as having abandoned her employment on 10 August 2009?

[41] I believe that Mr Kavanaugh mistakenly but genuinely believed that Mrs George had agreed to come back to work on 10 August 2009. There appears to

be no reason why would lie about this. However, Mrs George having her employment treated as abandoned when she was not aware that she was expected to attend work on 10 August 2009 is capable of affecting her employment to her disadvantage.

[42] However, by 14 April 2010, the date she found out that her employment had been treated as abandoned since August 2009, Mrs George's employment had lapsed by virtue of her failing to return to work after the end of her parental leave for over six months. Therefore, it cannot possibly be the case that, having been treated as having abandoned her employment in August 2009 without her knowledge, affected Mrs George's employment, or one or more conditions of her employment, to her disadvantage, as the situation in August 2009 had been overtaken by her failing to return to work in September 2009.

[43] I therefore do not find that Mrs George's personal grievance succeeds in this respect.

Should Mr Kavanaugh have made more efforts to contact Mrs George before he concluded that she had abandoned her employment?

[44] I am not satisfied that Mr Kavanaugh made enough efforts to establish Mrs George's intentions after her unexpected no-show on 10 August 2009. I do believe that Mr Kavanaugh rang the landline telephone number he had on the file (Mrs George's home number as noted on her application form for seasonal employment) but no other number.

[45] Mr Kavanaugh and Mr Renner gave evidence that the company did not write to employees who did not turn up at the start of the season, as there was always some turnover of staff each season. This may be a reasonable stance to take in general terms and it is also, of course, the responsibility of individual staff members to keep their employer apprised of any changes to their contact details. However, in this case, Mrs George was not an ordinary seasonal worker returning after the seasonal layoff, but had (in Mr Kavanaugh's mind at least) told him she was returning from her parental leave on a given date. Even if, as the respondent argues, Mrs George was not subject to the terms of PLEPA, she was still an employee on the respondent's parental leave scheme.

[46] In conclusion, I do not believe that a fair and reasonable employer would have taken no further steps other than to have made just one telephone call before deciding

that its employee had abandoned her employment in circumstances where she had failed to return from parental leave despite having (in the respondent's belief) given a definite date of her return.

[47] However, by the time Mrs George found out about the arguably inadequate attempt by Mr Kavanaugh to contact her, again, her employment had lapsed for at least six months. Therefore, I cannot see how this lack of effort by Mr Kavanaugh in August 2009 without her knowledge at the time had any adverse effect on Mrs George's employment or conditions of her employment.

[48] Accordingly, I do not find that Mrs George's personal grievance succeeds in this respect.

[49] I now turn to Mrs George's dismissal in 2012.

Brief account of the events leading to the dismissal in 2012

[50] At the time of her dismissal in 2012, Mrs George was employed pursuant to the Silver Fern Farms Limited Meat Processors Agreement 2011–2012 between the respondent and New Zealand Meat Workers and Related Trades Union Inc. Pertinent clauses include the following:

> *27.* ***Management***
>
> *The employer shall retain and have full power to manage and control their own business and the conduct of their employees in connection therewith and to make reasonable rules and regulations not inconsistent with the provisions of this agreement relating to the management thereof, and to the hiring, conduct, duties, and dismissal of persons in their employment.*
>
> *28.* ***Work Accidents and Alternative Work***
>
> *...*
> *(d)* *Every plant shall have an effective alternative work scheme whereby persons with work injuries who are diagnosed by a medical practitioner as being fit for alternative duties may be provided with suitable work. Such work shall be compensated at the rate of 100% of pre-injury earnings (instead of 80%) as defined in the legislation governing employees compensation.*
>
> *Pursuant to clause 27 of this agreement, any person who refuses to perform alternative duties may be subject to disciplinary action, including dismissal, and will not be entitled to sick leave or first week compensation.*

[51] After Mrs George had undergone further surgery on 5 October 2011, in December 2011 the respondent requested a vocational independence reassessment, which was carried out by a Dr Marshall on 8 February 2012. The vocation independence reassessment concluded that there were a number of positions that Mrs George could carry out, all of which were of either sedentary or medium physical demand. Whilst some required occasional to frequent repetitive hand and finger movements (when using hand held objects and equipment for example) these would not require a loaded action and would not cause issues or pain. Of the positions indicated by the assessment, it is clear that Mrs George indicated that she could or would carry out 11 of them. She indicated that she would need training to carry out a further three of the positions suggested. One position that the assessment regarded as potentially problematic was a meat packer which would have involved loaded repetitive actions with the right wrist/hand and which could have caused her issues with her right thumb or wrist. The assessment states that Mrs George indicated that she did not wish to do that but if she did not have any choice she would.

[52] Following the assessment, a case manager for the respondent wrote to Mrs George by way of a letter dated 9 March 2012 setting out the positions in which Dr Marshall assessed she would have an ability to work for 30 or more hours a week. The letter stated that, as it had been determined that Mrs George now had vocational independence and her injury no longer prevented her from working full time, she was entitled to receive weekly compensation for a further three months only. It stated that her last day for weekly compensation payments would be on 9 June 2012. The letter invited Mrs George to contact the writer if she required regular case management contact, job search assistance with a job search agency, budgeting and counselling assistance or enrolment with Work and Income. It stated that she would be contacted on a regular basis to determine any further assistance she may need from the respondent. The letter also set out the process that Mrs George should follow if she wished to have the decision formally reviewed.

[53] Mrs George raised a personal grievance by way of a letter dated 12 April 2012 alleging that she had been unjustifiably dismissed and lodged her application with the Employment Relations Authority on 3 May 2012. On the basis that the respondent made representations during the Authority's directions conference that the respondent had not yet determined what would happen to Mrs George's employment, the matter

was put on hold until the respondent had decided whether or not it could accommodate Mrs George in other employment.

[54] Silver Fern Farms responded to Mrs George's personal grievance by way of a letter dated 26 April 2012 stating that she was still an employee of the respondent and stating that, as part of her rehabilitation plan, the respondent undertook to train Mrs George in various clerical tasks through the vocational independence programme. It stated that this commenced on 13 November 2011 until 9 March 2012 when its obligation to her under the programme concluded. It also recorded that, during a discussion on 10 January 2012, Mrs George had advised that, due to the issues with her wrist, she would prefer not to work in a processing department. Mrs George accepted during the Authority's investigation meeting that she had said this. The letter concluded that the respondent's obligations under the vocational independence programme and the Accident Compensation Act had ended and that, at that time, it did not have any suitable roles as outlined in her assessment decision letter or any suitable clerical/administrative roles available. If any suitable roles were available within the next two months (until 9 June 2012) the company would be in contact. If nothing was available as at 9 June it would issue her with one month's notice of termination.

[55] On 3 May 2012, Ms Timms, an orthopaedic hand surgeon, wrote to Mrs George's doctor to state that Mrs George's wrist had slowly deteriorated. The letter also stated that she had written to Silver Fern Farms asking them to consider reopening her case.

[56] On 8 May 2012, Mrs George wrote to Ms Stevens (the author of the respondent's letter dated 26 April 2012) denying that she had stated that she preferred not to work in the processing department and that she had asked about vacancies that she had heard had come up in the freezer department and the export offal department. In her letter she said that she was very happy to take an offer to work in the processing department or any other department in the plant if given the opportunity. However, Ms Timms' letter dated 3 May 2012 stated that she did not think that Mrs George should return to work involving highly repetitive activities with her hand, particularly packing and boning which is what she was doing at the time of the onset of her symptoms.

[57] By way of a letter dated 5 July 2012, Ms Timms wrote again to Dr Ryan stating that Mrs George was *back to where she was not long after her surgery…* and that Ms Timms did *not think she will be able to look at any form of employment that required repetitive use of her thumb.*

[58] A meeting then took place between Mrs George and her husband and Ms Stevens, Mr Palmer (the respondent's case officer responsible for Mrs George's rehabilitation programme) and Mr Renner (personnel officer). The minutes of the meeting shown to the Authority record that Ms Stevens stated that, due to the nature of the injury and advice received, the respondent would not ask Mrs George to perform any work that could lead to her reinjuring herself and that this would preclude any production line type work. It was acknowledged that Mrs George had been carrying out a wide range of clerical roles and that everybody had been impressed with the standard of her work. Mrs George stated during this meeting that she enjoyed the work that she had been doing in this department and hoped to continue her working career with Silver Fern Farms. The meeting concluded with Ms Stevens saying that Mr Renner and she would review the clerical staff situation in the Fairton Plant and would enquire at the Belfast Laboratory whether there were any suitable positions available.

[59] By way of a letter dated 30 July 2012, another case manager for the respondent wrote to Mrs George to advise her that it was unable to accept that Mrs George's vocational independence or capacity for work had deteriorated.

[60] A further meeting took place between Mrs George and her husband and Ms Stevens and Mr Renner on 2 August 2012. Ms Stevens advised Mrs George that they had considered production areas where Mrs George could work but that these were not suitable due to her injury; that they had carried out a thorough review of the suitable clerical positions but there were no vacancies and they were not aware of any pending resignations; that work in the general stores required a lot of lifting which was not suitable for Mrs George and that there were no vacancies at the Belfast Laboratory. Ms Stevens gave Mrs George a few more days to come back with any comments.

[61] A final meeting took place between Mrs George and her husband and Ms Stevens and Mr Renner on 8 August 2012. Ms Stevens explained that she and Mr Renner had reviewed the options again and that there were no further

opportunities available given Mrs George's current work capacity limitations. She was given a letter and asked to take it home and read it and let her know if she had any questions. It was stated that Mr Renner would be more than happy to be a referee if it would assist Mrs George with seeking employment.

[62] The letter given to Mrs George, signed by Ms Stevens and dated 8 August, confirmed that they had considered vacancies in the processing areas but that that type of work was not suitable due to the repetitive nature and often heavy lifting involved. It stated that there were no current clerical vacancies and that the clerical work she did during her light duties did not equate to a full time position. It also confirmed that the clerical work in the stores involved a considerable amount of lifting and that there were no vacancies at the Belfast Laboratory. The letter concluded that Mrs George's employment would therefore terminate with effect from that day.

The issues arising out of the dismissal

[63] The Authority must consider the following:

a. Whether the decision to terminate Mrs George's employment was justified; and

b. Whether the decision to terminate Mrs George's employment was by reason of a prohibited ground of discrimination.

Was Mrs George's dismissal justified?

[64] In order to consider this issue, the Authority must consider s.103A of the Employment Relations Act 2000 (the Act) as it stood at the time of the dismissal (post 1 April 2011 amendment). This states as follows:

> *(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
>
> *(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
>
> *(3) In applying the test in subsection (2), the Authority or the Court must consider –*

> *(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
>
> *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
>
> *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
>
> *(d) whether the employer generally considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
>
> *(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
>
> *(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
>
> *(a) minor; and*
> *(b) did not result in the employee being treated unfairly.*

[65] Mr George, on behalf of his wife, argues that, effectively, because the respondent caused Mrs George's injury in the first place (through an alleged failure to comply with health and safety obligations and by an alleged failure to properly train Mrs George in the use of knives), the respondent cannot dismiss Mrs George for incapacity.

[66] The Authority has not investigated whether the respondent did indeed breach its health and safety obligations and/or failed to properly train Mrs George in the use of knives as it does not have the jurisdiction to consider such claims, because Mrs George did not raise a personal grievance in relation to these alleged disadvantages in her employment within the requisite time limit.

[67] It has been argued in previous matters before the Authority that in situations of workplace injury an employer has a limited ability to dismiss the injured employee and bears an increased responsibility to redeploy. For example, this argument was deployed before the Authority by the Applicant in *Khan v Air New Zealand Ltd*

[2010] ERA Auckland 155. However, there is nothing in the Act, nor in case law, which prevents an employer from justifiably dismissing an employee who is no longer able to carry out his or her duties when that incapacity has been caused by the employer, provided that a fair and lawful procedure has been followed prior to that employee's dismissal. Otherwise, an employer would be forced to have on its books indefinitely employees who have ceased to be able to carry out any duties required by the employer.

[68] Whilst it may feel very unfair to Mrs George that, in her strongly held opinion, her employer caused an injury which is then used to dismiss her, that does not affect the respondent's right to review Mrs George's employment in the light of her incapacity.

[69] A second argument used by Mr George in support of his wife's claim is that clause 28(d) of the Silver Fern Farms Limited Meat Processors Agreement 2011-12 gives a mandatory requirement on the respondent to offer alternative work whereby people diagnosed as capable of doing other work are provided with suitable jobs.

[70] The wording of clause 28(d), cited above, made clear that persons with work injuries who are diagnosed by a medical practitioner as being fit to return to duties *may* be provided with suitable work. I agree with the submission of Mr Cleary on behalf of the respondent that this clause must be construed in accordance with the plain meaning of the words and the use of the word *may* certainly does not import an imperative on the respondent. If an imperative were intended, one would expect the words *shall* or *must* to be used rather than *may*. Therefore, I cannot accept that the terms of the 2011-12 Meat Processors Agreement requires the company to provide injured employee with suitable alternative duties.

[71] I also note that the terms of the Silver Fern Farms Fair and Alternative Work Policy, which is declared to form part of the employees' contract of employment, states as follows:

> *If we are unable to provide suitable alternative duties or further training opportunities, the usual provisions of ACC compensation will apply.*

[72] This clearly contemplates a possibility where the company cannot find alternative employment.

[73] Mr George also contends that the search for alternative work carried out by the company was not done in good faith. In support of this argument, Mr George submits that Mr Renner advised Mrs George in March 2012 that she was being dismissed because the company was undergoing a restructuring exercise. However, Mrs George gave no evidence about this and, it must be said, that if the company was intent on going through a sham exercise of seeking alternative duties for Mrs George, which took them between March and August 2012, it would be highly unlikely that the company would, at the same time, admit that she was being dismissed because of a restructure. If the company was intent on going through a sham exercise, it would never have mentioned a restructure.

[74] Mr George also submits that Mr Cleary confirmed in the course of a conference call prior to the investigation meeting that he knew that Mrs George would be dismissed anyway. It must be said that I took part in all of the conference calls between Mr Cleary and Mr George and that I have no recollection of such a statement having been made by Mr Cleary. Indeed, if he had made such a statement, it would have rendered the alleged sham of looking for alternative positions for Mrs George totally pointless as such a declaration by Mr Cleary would have given the game away. Therefore, despite what Mr George asserts Mr Cleary said, I do not believe that Mr Cleary did make such a declaration prior to Mrs George's dismissal.

[75] Finally, Mr George argues in the alternative that Mrs George was entitled to compensation pursuant to clause 39 of the Meat Processors Agreement. This is on the basis that Mrs George's dismissal has rendered her redundant. In order to address this issue, it is necessary to set out the terms of s.39 of the Meat Processors Agreement:

> *39.* ***Redundancy***
>
> *...*
>
> *39.2* ***Redundancy definition***
> *Redundancy shall be defined to mean:*
>
> *(a)* *An employee's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the employee is or will become, superfluous to the needs of the employer; or*
>
> *(b)* *In the case of a seasonal employee, that employee's usual seasonal of employment is made unavailable by the employer, the unavailability being attributable, wholly or*

mainly, to the fact that the employees position or usual position is, or will become, superfluous to the needs of the employer; but

(c) Does not include a situation solely involving a seasonal lay-off or the completion of a fixed term engagement;

(d) No redundancy shall arise from the sale, transfer, lease, merger or contracting out of the whole or part of the business by the employer, providing the new employer is able to offer the employee(s) employment on the same or similar terms and conditions contained in this agreement, and agrees to treat service as continuous.

[76] It is clear that Mrs George's employment was terminated for a reason other than redundancy. Redundancy involves the loss of one or more posts and the definition cited above reflects that. Mrs George was not dismissed because any post or position that she held was superfluous but because she was unable to carry out her normal work due to an injury and because no other suitable work was available.

[77] Accordingly, I do not accept that Mrs George's dismissal falls within the definition of redundancy as set out in clause 39.2 of the Meat Processors Agreement and she is therefore not entitled to any compensation pursuant to that agreement.

Was a fair and reasonable process followed prior to dismissal?

[78] I am satisfied that a fair and thorough process was followed by the respondent prior to Mrs George's dismissal. This can be seen most starkly from a brief chronology of the major steps taken by the respondent between Mrs George's injury and her dismissal;

a. 26 August 2008, the injury is sustained;

b. September 2008, Mrs George goes on parental leave;

c. 14 April 2010 the parties meet to discuss Mrs George's rehabilitation plan;

d. Mrs George goes on parental leave;

e. 13 November 2011, Mrs George commences training in clerical duties under the VIP;

f. November 2011 to March 2012 Mrs George works for the company in a range of temporary clerical positions;

g. 17 January 2012, Mrs George meets with HR to discuss her prospects when the VIP will be completed. She is told she will be considered for available clerical jobs;

h. 22 February 2012, further discussions taken place between Mrs George and HR about her prospects. She is told she is a strong contender for clerical roles should such roles become vacant;

i. 9 March 2012, Mrs George is advised that her VIP has been completed but that her employment would continue until 9 June 2012. During this time she is invited to contact her VIP Case Manager if she requires help with, *inter alia*, job searches and is advised that the company would be in contact if a suitable clerical or administrative role becomes available;

j. May and July 2012, Mrs George's hand surgeon, Ms Timms, writes and states in both letters that Mrs George should not undertake work involving highly repetitive activities with her hand/thumb;

k. 24 July 2012, Mrs George meets with the respondent which promises to check whether there are any clerical positions for her in the Fairton and Belfast plants;

l. 2 August 2012, Mrs George meets with the respondent to discuss the results of the job search by the respondent. A final check is promised;

m. 8 August 2012, Mrs George and the respondent meet and she is told that no vacant suitable posts have been found, and she is given notice of the termination of her employment.

[79] Mrs George was clearly able to carry out a range of duties which did not involve heavy lifting or repetitive use of her wrist or thumb. Unfortunately, many of the roles available at Silver Fern Farms did involve heavy lifting and/or repetitive use of her wrist or thumb. Although certain processing jobs had elements of work which

did not involve heavy lifting or repetitive use of the thumb or wrist, the company was not able to make these available to Mrs George on a permanent basis as it is necessary for fully able employees undertaking these processing jobs to rotate between the more demanding tasks and the lighter tasks so that they can avoid injury themselves. I accept that evidence.

[80] I also accept the evidence given by Ms Stevens on behalf of the respondent that she and Mr Renner did take steps to identify roles within the Fairton Plant and the Belfast Laboratory which Mrs George could have carried out on a permanent basis. I accept that there were no vacancies available to her.

[81] Although some of the steps taken by the respondent outlined above were required of them on behalf of ACC in its capacity of accredited employer, they were also the steps required of them under the Employment Relations Act 2000 prior to dismissal being implemented. I am satisfied that the requirements of s. 103A have been complied with and that dismissal was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

Was Mrs George discriminated against by reason of a prohibited ground by being dismissed?

[82] Mrs George, who was born in Nigeria and is of African descent, argues that non-African workers, all of whom were of New Zealand descent, had suffered injuries of a similar or worse nature than hers but had been able to continue to carry out light duties. In one case, one of these workers was able to carry out light duties for several years. At the initial investigation meeting on 23 October 2012, Mrs George was unable to name this latter individual and it was agreed she would find out the name of the individual so that the respondent could answer this allegation. It emerged that she was speaking of an individual (called in this determination, Mr X) who had suffered the amputation of some fingers while operating a saw. The evidence of the respondent was that this individual was unable to return to his work operating a saw once he had recovered but worked as a packer instead. This was work he was capable of doing.

[83] The element of discrimination material to this allegation is defined in s. 104 of the Act, as follows:

> *For the purposes of section 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, …….*
>
> *…….*
>
> *(b) dismisses that employee or subjects that employee to any detriment, 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;*
>
> *……..*
>
> *(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.*

[84] It is my understanding that Mrs George is alleging that she was dismissed by reason directly of her colour, race and/or ethnic or national origins.

[85] In *New Zealand Workers IUOW v Sarita Farm Partnership* [1991] 1 ERNZ 510 (LC) Chief Judge Goddard stated at 516:

> *The question for the Court is whether it has been shown that, but for one of the reasons mentioned in the section, the worker would not have been dismissed. The 'but for' test has been adopted by the House of Lords in dealing with the differently expressed provisions of the United Kingdom Sex Discrimination Act 1976 and Race Relations Act 1976 (R v Birmingham City Council [1989] IRLR 173 and James v Eastleigh Borough Council [1990] IRLR 288). We think that test is appropriate under s 210(1)(c) and s 211 of the Labour Relations Act 1987. However, the use of the words 'by reason of' in s 211(1), by contrast with the words 'on the grounds of' in the United Kingdom legislation shows that it may not be enough in New Zealand merely to show that a worker has been involved in union activities and has suffered detriment soon afterwards in his or her employment. While some inference may be available from the temporal connection between the two events, the Court looks also for proof of causal connection between them in the sense that the head of prejudice in issue must be shown to have been the reason which actuated the dismissal, the reason 'but for' which the dismissal is unlikely to have taken place*

[86] Mrs George has not adduced any direct evidence to show that the respondent was motivated by her colour, race, ethnic or national origins in deciding to dismiss her. Instead, Mrs George relies on a comparator, Mr X, to show that, unlike him, who was not dismissed, she was. This argument would have some merit if Mrs George's situation had been, in all material respects, the same as Mr X's but for the difference in colour, race, ethnic or national origins. In such a circumstance, the Authority might have been able to infer that the only plausible reason for the difference in treatment was one or more of those prohibited grounds.

[87] However, there was a material difference not based on prohibited grounds between the two employees. Mr X's injury did not preclude him from carrying out a core duty required by the respondent (namely, packing) whereas Mrs George's injury

did. That, I conclude, is the reason for the difference in treatment between the two employees; not Mrs George's colour, race, ethnic or national origins.

Costs

[88] The parties are to seek to agree between them how costs should be dealt with. In the absence of such agreement within 28 days of the date of this determination, any party seeking a contribution to their legal costs must serve and lodge a memorandum setting out their case. Any reply to that memorandum must be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority