

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 19
5342603

BETWEEN MELISSA MACKIE
Applicant
AND SOUTH PACIFIC MEATS
LIMITED
Respondent

Member of Authority: David Appleton
Representatives: Lauren Beecroft, Counsel for Applicant
Graeme Malone, Counsel for Respondent
Investigation Meeting: 23 January 2012 at Invercargill
Submissions Received: 23 January 2012 from the Applicant and the Respondent
Date of Determination: 2 February 2012

DETERMINATION OF THE AUTHORITY

- A. The applicant was not an employee as defined by the Employment Relations Act 2000 when the respondent failed to re-employ her, and so the Authority lacks the jurisdiction to consider her personal grievance claims of unjustifiable dismissal and discrimination.**
- B. The applicant was entitled to the protection of a term of the Collective Employment Agreement for seasonal workers relating to re-employment for the 2010/11 season.**
- C. The respondent did not breach those terms of the Collective Employment Agreement in not re-employing the applicant.**
- D. The respondent did breach the term requiring consultation with plant representatives, but that does not give rise to any damages to the applicant.**
- E. The applicant has suffered an unjustifiable disadvantage entitling**

her to remedies under s. 123 of the Employment Relations Act 2000.

F. Costs are reserved.

Employment relationship problem

[1] Ms Mackie was a seasonal meat worker who, until the employment relationship problem arose, had worked four seasons for the respondent, commencing in 2006.

[2] It is common ground that seasonal workers in the meat processing industry are laid off at the end of each season, at which point they cease to be employees. Typically, and the respondent was no different, potential employees for the new season are identified shortly before it begins.

[3] Ms Mackie received a letter from the respondent dated 19 July 2010, shortly before the start of the 2010/2011 season, which stated as follows:

Dear Melissa,

As advised in April 2010, offers of employment for the 2010-2011 season are contingent on employees returning a negative drug test result. To prepare for the commencement of bobby calf processing, you are being invited to undertake a drug screening test.

[There follows paragraphs relating to the details of the test].

On the completion of a negative test result, you will receive a separate letter confirming an employment offer and a start date on or about 4 August 2010.

Yours sincerely

*Malcolm Hampton
Plant Manager*

[4] Ms Mackie duly took the drug test and received a negative test result but, after having not received the offer of employment referred to in the 19 July letter, made inquiries through her union (the New Zealand Meat Workers and Related Trades Union –hereinafter referred to as *the Union*). She shortly afterwards received a letter from the respondent company dated 30 July 2010 which stated the following:

Dear Melissa,

We have further assessed our employment needs for the 2010-2011 season and I regretfully confirm for you that SPM will not be offering you employment during this season.

Yours faithfully

*Malcolm Hampton
Plant Manager*

[5] At the time that Ms Mackie received this letter, the Union was progressing a private prosecution against the respondent company on behalf of Ms Mackie's de facto partner, Henry Kingi, in relation to alleged breaches of the Health and Safety in Employment Act 1992.

[6] Ms Mackie contends that the refusal to re-employ her for the 2010-2011 season gives rise to a personal grievance, that she had been unjustifiably dismissed from her employment and that she had been unlawfully discriminated against on one or two prohibited grounds; her marital status and/or her family status.

[7] In addition, Ms Mackie contends that the respondent had breached a term of the collective employment agreement in force at the time, which set out the basis upon which seasonal workers were to be re-employed at the start of the seasons covered by the collective agreement.

[8] Although not expressly raised by Ms Mackie, I am also bound to consider whether one or more condition of her employment was affected to her disadvantage by an unjustifiable action by the respondent.

The issues

[9] In order for the Authority to have jurisdiction to consider Ms Mackie's personal grievance claims of unjustifiable dismissal and discrimination, she must have been an employee (as defined in s 6 of the Employment Relations Act 2000) at the date when she received the letter dated 30 July 2010 confirming the respondent company's decision not to re-engage her. Ms Mackie argues that, at that date, she was an employee by dint of satisfying s.6(1)(b)(ii) of the Employment Relations Act 2000; namely, she was *a person intending to work*. A *person intending to work* is defined in section 5 of the Act as *a person who has been offered, and accepted, work as an employee*. Ms Mackie contends that the letter from the respondent company

dated 19 July 2010 constituted an offer contingent upon her receiving the negative drug test result. She contends that her acceptance of the offer occurred when she agreed to and presented herself for the drug test.

[10] The respondent argues that the letter of 19 July 2010 was not an offer of employment but detailed a preliminary hurdle to receiving an offer; namely successfully passing a drug test. Therefore, the respondent asserts, as the offer was never sent, it could not have been received and accepted and, therefore, Ms Mackie was not an employee at the time the decision was made not to re-engage her. In turn, it follows, the respondent says, that the Employment Relations Authority has no jurisdiction to entertain Ms Mackie's personal grievance.

[11] The issues that the Authority has to determine are as follows:

- (a) Whether the letter from the respondent to Ms Mackie dated 19 July 2010 constituted an offer of employment;
- (b) Whether Ms Mackie's undergoing a drug test pursuant to the letter constituted an acceptance of that offer;
- (c) If the answers to the above two questions can be answered in the affirmative, whether Ms Mackie was unjustifiably dismissed when the company sent its letter to her dated 30 July 2010 advising her that it did not intend to employ her for the 2010-2011 season;
- (d) If the answers to the first two questions are in the affirmative, whether the respondent's failing to employ Ms Mackie for the 2010-2011 season was for a reason that constituted unlawful discrimination pursuant to s.104 of the Employment Relations Act 2000; namely, by reason of Ms Mackie's marital status and/or family status;
- (e) Whether or not the first two questions can be answered in the affirmative, whether the respondent company acted in breach of the collective employment agreement for seasonal workers by failing to adhere to those provisions dealing with the re-engagement of employees;

- (f) Whether or not the first two questions can be answered in the affirmative, whether the applicant has a disadvantage claim against the respondent.

Was Ms Mackie an employee at the date when the respondent company advised her that she was not to be employed for the 2010-2011 season?

[12] Counsel for the applicant stated that Ms Mackie and the Union accept the decision of the full Court in *New Zealand Meat Workers Union Inc. v. Alliance Group Ltd* (2006) 7 NZELC 98, 350 [2006] ERNZ 664 which, in the context of the Holidays Act 2003, confirmed that seasonal meat workers are not continually employed between the date of the end of a season and the commencement of a new season.

[13] The Authority heard from the respondent in evidence that the 2010 season was the first season in which a negative drug test result had been imposed as a condition for employees being re-employed for the new season (or in the case of new employees, employed for the first time). Therefore, reviewing the previous practice of the respondent is not particularly constructive in helping the Authority to determine whether the letter of 19 July 2010 to Ms Mackie was an offer of employment or an invitation to attend the pre-employment process. I agree with the submission of counsel for Ms Mackie that the matter must be determined on the basis of the documentation exchanged at the time, in light of the relevant provisions of the collective employment agreement.

[14] I note that the wording of the first paragraph of the 19 July letter states that *offers of employment* for the 2010-2011 season are contingent on employees returning a negative drug test result. It expressly does not state, contrary to the submission of counsel for Ms Mackie, that *employment* is contingent on the return of a negative drug test result. I also note that the concluding paragraph of the letter states that, on the completion of a negative test result, Ms Mackie would receive a separate letter confirming *an employment offer* and a start date on or about 4 August 2010. Again, the letter did not state that a separate letter would be received confirming *employment*.

[15] The evidence of Mr Hampton, the then Plant Manager for the respondent, was that, when the start of the 2010/11 season had been approaching, he had obtained from the payroll department a printout of the employees who had worked the previous season and a preliminary list had been made, with the help of the supervisors, of those to whom the letter regarding the drug test was to be sent. The evidence of Mr

Hampton was that this letter had been sent out to more employees than the company had necessarily anticipated needing for the season because he had believed that not all of those employees would either choose to take the test or return a negative result. Mr Hampton said that this was how it had turned out in fact, with some people not taking the test and others returning a non negative result. He also gave evidence that, as the test results came in, the negative test results were noted and decisions made as to who would be contacted in order to invite them to an induction where certain forms would need to be signed.

[16] Mr Hampton provided the Authority with a copy of a document that had been given to one of the employees who had been re-employed at the beginning of the 2010-2011 season. This document was printed on the respondent's headed note paper, dated 4 August 2010, and on one side had the heading *OFFER OF EMPLOYMENT* written on it. It was expressed to be between the respondent company and the employee and commenced with the words:

South Pacific Meats Ltd offers the employee employment for the 2010-2011 season at its Awarua Plant.

[17] The letter continued as follows:

The Employee, [sic] acknowledges that during the first thirty days the Employee's terms of employment will be according to the South Pacific Meats Limited and New Zealand Meat Workers Collective Agreement (CEA). The employee may by joining the Union (or if a member) remain on that agreement or take up an individual employment agreement (IEA) with the company (both the collective and the IEA are provided).

You are employed as a ... but may be moved to other positions or asked to undertake other duties within your capabilities during the season.

During peak season for the 2010-2011 year the employer currently intends to operate shifts so as to allow 7 day operation during the day and a Monday to Friday night shift. Unless notified otherwise, the shifts will be as worked during the 09/10 season comprising a 555 working minute day covering four 10 hour days (Monday to Sunday), and four ten hour nights (Monday to Friday) 4x10.

Note that the above shift pattern does not prevent the employer making changes to shifts pursuant to your employment agreement.

[18] On the back of the letter was a declaration in which the employee declares, inter alia, that;

- he or she had received a copy of the CEA and IEA as well as a copy of the Code of Conduct and had read and understood its terms and conditions;
- he/she had been advised that he/she was entitled to seek independent advice about the agreement;
- the employer had considered any issues that he/she had raised and responded to them;
- he/she had been advised of his/her entitlements under the Holidays Act;
- he/she would at all times comply with reasonable orders and instructions;
- he/she did not have any disability, medical condition, injury or illness that would effect his/her ability to carry out the duties;
- he/she would immediately inform the company of any disability, medical condition, injury or illness;
- the information provided was true and correct;
- the agreement could be terminated immediately if the company discovered that he/she had supplied any false information or misled the company in any way; and
- the employee might have to undertake a drug test at any time.

[19] Counsel for the applicant stated that this document was not contemplated by the terms of the Collective Employment Agreement and did not affect her contention that an offer and acceptance had already occurred by way of the letter of 19 July being sent and Ms Mackie having undertaken the drug test.

[20] It is my finding that the document produced by Mr Hampton dated 4 August 2010 is an amalgam, being in part an offer of employment and partly consisting of an agreement between the parties. Mr Hampton confirmed that, if the employee had not

signed the document, he or she would not have been allowed to work for the 2010/11 season.

[21] Taking into account the plain words of the two documents dated 19 July 2010 and 4 August 2010, on balance I believe that the letter to Ms Mackie of 19 July 2010 did not constitute an offer of employment and that her undertaking the drug test did not constitute an acceptance of an offer of employment. I believe that the less strained interpretation of the letter of 19 July is that given by the respondent; namely, that it served to advise Ms Mackie (and all other prospective employees for the 2010-2011 season) that part of the pre-employment screening process would be the requirement to pass a drug test. I do not believe that the fact that the Collective Employment Agreement does not contemplate a document such as that shown to the Authority dated 4 August 2010 precludes the company from producing a document of that kind. In any event, the declaration which comprised part of the document dated 4 August 2010 was contemplated in the Collective Employment Agreement in the most part.

[22] In view of my finding that the letter sent to Ms Mackie dated 19 July 2010 was not an offer of employment and that she did not accept such an offer by attending a drug test, Ms Mackie was not *a person intending to work* at the date when the respondent told her it was not re-employing her for the 2010-2011 season, and so was not an employee at that date as defined by the Act.

[23] Therefore, the Authority does not have the jurisdiction to consider Ms Mackie's personal grievances in relation to alleged unjustified dismissal and discrimination.

Breach of contract claim

[24] Having disposed of Ms Mackie's personal grievances, I now turn to consideration of her claim for breach of contract. Ms Mackie contends that the respondent company's failure to re-engage her at the beginning of the 2010-2011 season constituted a breach of the terms of the Collective Employment Agreement for seasonal employees that was in force at the time. The relevant clauses of this Agreement are as follows:

1. Application and coverage of Agreement

1.1 *This Collective Agreement binds and is enforceable by:*

- (a) *South Pacific Meats Limited and the New Zealand Meat Workers and Related Trades Union Incorporated.*
- (b) *The employees who are employed by South Pacific Meats Ltd at it's [sic] Awarua, Invercargill Plant, and who are, and become members of the New Zealand Meat Workers and Related Trades Union Incorporated but does not include management/supervisory staff/Tradesmen/office or administrative personnel.*

1.2 *This CEA may also be binding on new employees for the first 30 days of their employment in accordance with the provisions of the Employment Relations Act 2000.*

:
:

1.3 *This Agreement shall cover employees of South Pacific Meats Limited carrying out processing and associated work at the Company's processing Plant at Awarua Invercargill and who are members of the Meat Workers Union of New Zealand but does not include management/supervisory staff/tradesmen/office or administrative personnel, nor employees who have instead elected to be covered by an Individual Employment Agreement.*

:
:

2.2 *The terms and conditions of this agreement shall come into force on the 1st day of October 2009 and shall continue in force until the 30th September 2011.*

2.3 *Despite clause 2.1, where the employee was employed by the company prior to the date that this agreement takes effect, any information given by the employee or warnings given by the company pursuant to any prior agreement or document shall be deemed to have been given under and pursuant to this agreement. In addition service shall be deemed to have been continuous.*

:
:

3. Terms and Conditions

3.5 *Upon termination at the end of the season you are responsible for keeping the company advised of your current address and phone number for contact purposes for advice of the commencement of the next season.*

3.6 *After being notified of a return to work you have five working days to return, failure to do so within that time, will result in employment no longer being offered.*

3.7 *It is agreed that the SPM Invercargill plant operates in a seasonal industry. As a result staffing levels need to change during the season to match the required production levels. In selecting employees to be seasonally laid off or re-engaged the following criteria will be considered:*

- 1 *The original starting date of the employee provided they have been continuously employed during the season;*
- 2 *Competency to perform the work required, including skill levels, physical ability, reliability and adaptability in being able to work in a variety of positions.*

Selection on this basis shall be made by the Plant Manager in consultation with the departmental supervisor and plant representatives.

[25] The evidence of Ms Mackie and of Mr Carran for the Union was that the respondent was obliged to re-engage individuals on the basis of their *seniority*. Mr Carran says that the concept of *seniority* is determined by start date and grade and that, until the 2010 season, the respondent company had followed this practice, only departing from it when a potential employee had suffered from disciplinary issues. Ms Mackie and the Union assert that, in accordance with the *seniority* rule, Ms Mackie should have been one of the first workers to have been re-engaged in the 2010 season, going on to a day shift. (Ms Mackie had been a B grade trimmer at the end of the 2009/10 season).

[26] It was the evidence of the respondent that the concept of *seniority*, as it applies to older meat companies such as AFFCO, Alliance and Silver Fern Farms, is not a contractual term of employment under the respondent's employment agreements but that length of service is a factor that is taken into account. Mr Hampton gave evidence that the company also considers other factors such as the skill mix required, attendance and accident record.

[27] Mr Hampton's evidence with respect to his reason for not re-employing Ms Mackie for the 2010-2011 season was that, to the best of his recollection, he took into account the staffing needs at the time, the fact that Ms Mackie had been on ACC at the end of the previous season and the fact that her partner had been recently convicted for growing marijuana, which had caused Mr Hampton concern that Ms Mackie may be a cannabis user herself despite initially having returned a clear test in order to get a start to the season. He stated that he was also concerned that Ms

Mackie had been aware of the use of cannabis by a co-worker (her partner Mr Kingi) and had not made this fact known to the company.

Did the terms of the Collective Employment Agreement bind the respondent in respect of Ms Mackie?

[28] In deciding whether Mr Hampton had acted within the terms of the Collective Employment Agreement when deciding not to offer Ms Mackie re-employment in the 2010-2011 season, it is first necessary to determine whether or not the terms of the Collective Employment Agreement bound the respondent in respect of Ms Mackie at the time that Mr Hampton had decided not to re-engage her.

[29] On the face of clauses 1.1(b) and 1.4 (cited above) the terms of the Collective Employment Agreement did not bind the company in respect of Ms Mackie as Ms Mackie was not an employee at the time the decision not to re-engage her was made. The terms set out in clause 1.1(b) and 1.4 make clear reference to *employees of South Pacific Meats Ltd.*

[30] However, I am satisfied that the terms set out in clauses 3.5, 3.6 and 3.7 are terms which survive termination of employment. They are clearly expressed to deal with individuals who were between seasons, clauses 3.5 and 3.6 imposing an obligation upon the former employees who were covered by the Collective Employment Agreement in the previous season, and clause 3.7 binding the respondent company with respect to its obligations in re-engaging those former employees. If such terms were not to survive the termination of the employee's employment at the end of a season, the inclusion of clauses 3.5 – 3.7 would serve no purpose.

[31] Therefore, I am satisfied that Ms Mackie, who had been an employee covered by the terms of the Collective Employment Agreement in the 2009-2010 season, had the benefit of protection under clause 3.7 at the point when the Company decided not to re-employ her for the 2010-2011 season.

[32] I am also satisfied that she has the standing to have her breach of contract claim considered by the Authority under sections 161 and 162 of the Employment Relations Act 2000.

[33] Section 161 gives the Authority exclusive jurisdiction to make determinations about employment relationship problems generally. The definition of *employment*

relationship problem includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship. The concept of *any other problem relating to or arising out of an employment relationship* has been widely construed. In *Waikato Rugby Union v New Zealand Rugby Football Union*, [2002] 1 ERNZ 752 (approved in *Rolling Thunder Motor Company Limited v Diane Kennedy* [2010] NZEMPC 109) Judge Shaw adopted a wide construction of the expression *related to*, having regard to the associated expression *arising from*. The test the Judge adopted was that an action will arise from or be related to an employment relationship if the action would not have arisen if the employment relationship did not exist. Adopting this test, I am satisfied that Ms Mackie's complaint of breach of contract in relation to the terms set out in clause 3.7 of the Collective Employment Agreement is an *employment relationship problem*. Section 162 of the Act provides that, subject to sections 163 and 164, the Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts.

[34] The next question to consider is whether the decision by the respondent company not to re-employ Ms Mackie for the 2010-2011 season constituted a breach of clause 3.7.

Was the Company in breach of the Collective Employment Agreement?

[35] Ms Mackie asserts that Mr Hampton did not re-employ her because of Mr Kingi's bringing of a private prosecution against the company. The respondent had been served with a copy of the summons in respect of the private prosecution by fax at 18.19 on 14 July 2010. Even if this was not noticed by the respondent until the following day, it was still before the date (19 July 2010) that the letter was sent out to Ms Mackie inviting her to take a drug test. Whilst this does not preclude the respondent from having decided not to re-employ because of the private prosecution, I do not consider that there was cogent enough evidence presented to me to enable me to conclude that this was the case.

[36] Mr Hampton's evidence was that one of the reasons he decided not to re-employ Ms Mackie was the company's staffing needs. Whilst Mr Hampton no doubt did take into account the respondent company's staffing needs when deciding who to re-employ, if he had relied on that issue alone, and had been following the criteria set out in clause 3.7, he would still have been bound to have offered Ms Mackie

employment for the 2010-2011 season due to her original start date (2006) which placed her reasonably high up the list of former employees who would be called upon, and her competency to perform the work, which the respondent was not able to criticise in any convincing way in terms of her work performance itself. (Although Mr Hampton said her performance had not been excellent because she had received a warning in the past, he was unable to cite with confidence when she had received it or precisely why. Ms Mackie denied ever having received a warning). Therefore, the respondent's reliance on staffing needs alone would not have enabled it legitimately to have refused to re-employ Ms Mackie pursuant to clause 3.7.

[37] However, Mr Hampton did not rely solely upon staffing needs. The second reason given by Mr Hampton was that Ms Mackie had been on ACC at the end of the previous season. Ms Mackie's evidence was that she had sustained a shoulder injury whilst at work but had returned to light duties before the conclusion of the 2009-2010 season. Ms Mackie had received a \$500 attendance bonus at the end of that season and Mr Hampton confirmed that an employee who was on available sick leave or was on ACC could still qualify for an attendance bonus.

[38] Clause 22.1 of the Collective Employment Agreement states that an employee who worked a full season (commencing with the 2009-2010 season) and who achieved a 98% attendance level during that season would be paid a lump sum bonus of \$500 (gross). It states expressly that approved paid leave would not be treated as absence in relation to the calculation of the qualifying attendance percentage.

[39] Although the first criterion to be considered under clause 3.7 in re-employing someone is the original starting date of the employee, the second set of criteria, *competency to perform the work required*, clearly allows the respondent to take those factors into account, as a filter notwithstanding someone's start date. The concept of *competency to perform the work required* is clearly a portmanteau concept in clause 3.7, as the sub clause goes on to state that it includes *skill levels, physical ability, reliability and adaptability in being able to work in a variety of positions*. Furthermore, the list of *skill levels, physical ability, reliability and adaptability* is a non exclusive list, as is connoted by the word *including*.

[40] I believe that the second reason given by Mr Hampton for failing to re-employ Ms Mackie falls within the terms of clause 3.7 as expressly stated, given that clause 3.7 contemplates that he may take into account *reliability and physical ability*.

Reliability is not defined in the Collective Employment Agreement. It is defined in the Oxford English Dictionary (3rd edition, December 2009, accessed in the on-line version) as *the quality or fact of being reliable; ability to be relied on with confidence; trustworthiness, sureness, reliableness*. The corresponding concept of *reliable* is defined in the OED as *able to be trusted; in which reliance or confidence may be placed; trustworthy, safe, sure*. The New Zealand Oxford Dictionary (OUP, 2005) defines *reliable* as *that may be relied on and of sound and consistent character or quality*. These definitions import a wide meaning to the word *reliability*.

[41] The term *reliability* is given as a non exhaustive example of *competency to perform the work required* in 3.7. *Reliability* is therefore to be read in the context of that requirement. *Physical ability* speaks for itself, meaning in my view the physical ability to do the job required.

[42] Focussing purely on the issue of whether Mr Hampton acted in terms of clause 3.7 of the Collective Employment Agreement, on balance, I have no reason to disbelieve Mr Hampton when he states that he took Ms Mackie's ACC record into account when deciding not to re-employ her. I also find that it does not stretch the meaning of the terms *reliability* and *physical ability* too far in concluding that a previous, recent shoulder injury is a matter that can be taken into account within the meaning of those two terms.

[43] Therefore, I find that Mr Hampton did not breach clause 3.7 in declining to re-employ Ms Mackie for the reason of her recent shoulder injury.

[44] The final reason given by Mr Hampton for not re-employing Ms Mackie was the fact that her partner had been convicted for growing marijuana, which had caused Mr Hampton concern that she may be a cannabis user herself. Ms Mackie confirmed that her partner had been convicted of the cultivation of cannabis.

[45] Mr Hampton's conclusion that Mr Kingi's conviction meant that Ms Mackie was a cannabis user herself appears to have been reached as a result of mere supposition on his part, without any enquiry having been made whatsoever about the likely truth or accuracy of the conclusion. If this approach had led to the dismissal of an employee of the respondent, it would almost certainly have been an unjustifiable dismissal. However, this is not a case of Ms Mackie being an employee, protected by the full panoply of the Employment Relations Act 2000. This is the case of an

applicant for re-employment protected by one term of the collective agreement (not the agreement in its entirety). It is my view that I am therefore restricted to considering only whether Mr Hampton told me the truth when he said that he had taken Mr Kingi's conviction into account and whether that reason falls within the terms of clause 3.7.

[46] Mr Hampton gave evidence that Mr Kingi's conviction had influenced him in two ways; first, that someone living in a house with another person who cultivated cannabis was more likely to be a user herself and, secondly, that Ms Mackie had not alerted the respondent to the fact that a co-worker, (her partner Mr Kingi) had been cultivating cannabis.

[47] Addressing the second point first, I do not consider that the respondent can legitimately have expected an employee to have told the company that her partner had been cultivating cannabis. No evidence was given that Ms Mackie was under a contractual obligation to have disclosed this fact about her partner. I do not therefore believe that Mr Hampton had genuinely relied on this reason in choosing not to have re-employed Ms Mackie.

[48] However, I have no reason to disbelieve Mr Hampton that he genuinely considered that someone living in a house with another person who cultivated cannabis was more likely to be a user herself than someone who did not. Mr Hampton's concern that Ms Mackie may be a cannabis user because of Mr Kingi's conviction was not an unsustainable concern to have held, even if a *fair and reasonable employer* may not have held it without further enquiry. I therefore do believe that this genuinely was a factor in Mr Hampton's decision not to re-employ Ms Mackie.

[49] The second step to take is to consider whether Mr Hampton's belief that Ms Mackie could be a cannabis user herself fell within the criteria he was entitled to take into account in clause 3.7. Taking into account the wide definition of *reliability*, and being mindful of the environment in which the employees are required to work, using potentially dangerous implements such as very sharp knives and saws, I am satisfied that, if a prospective employee was considered to be a cannabis user, then that is a factor that the respondent would be entitled to take into account under clause 3.7, as it would be reasonable for the respondent to conclude that a cannabis user may not be *reliable*.

[50] Although Mr Hampton was not entitled to refuse to re-employ Ms Mackie on account of *staffing needs*, that breach of clause 3.7 of the Collective Employment Agreement does not give rise to an award of damages to Ms Mackie because I have found that Mr Hampton was entitled under that clause not to re-employ her on account of the other two reasons he took into consideration. Therefore, even if the respondent had not breached clause 3.7 in respect of the staffing needs issue, it still could have decided not to have re-employed her pursuant to clause 3.7 because of the other two factors he took into account.

[51] As an aside, as already hinted at, if Ms Mackie had been an employee in law during this period, the fact that Mr Hampton did not take any steps to discuss his concerns with Ms Mackie could well have resulted in a finding of unjustifiable dismissal. However, this is not a matter I have jurisdiction to consider (although it is relevant to my consideration of unjustifiable disadvantage below). I also do not have the jurisdiction to consider whether Mr Hampton taking into account Ms Mackie's partner with respect to her possible potentiality for unlawful drug use, or his taking into account her ACC history would have amounted to breaches of s.104 of the Employment Relations Act 2000.

Can the Authority consider whether the respondent acted in breach of the Human Rights Act 1993?

[52] There is a further important issue that needs to be considered. The Authority cannot reach its determinations in a vacuum, totally ignoring the effect of other legislation that may be of relevance to the actions of the parties. Indeed, by virtue of the New Zealand Bill of Rights Act 1990, the Bill of Rights arguably applies to acts done by the Authority (as a judicial branch of the Government of New Zealand, pursuant to section 3) and the Authority must therefore be mindful of section 19 (*everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993*).

[53] Although Ms Mackie was not protected as an employee by s 104 of the Employment Relations Act 2000 when the respondent decided not to re-employ her, she would have been protected by the Human Rights Act 1993, which extends its protections to applicants for employment. The question is, must the Authority consider whether the respondent acted unlawfully pursuant to the Human Rights Act when the respondent decided not to re-employ Ms Mackie because of her injury and

because of her association with someone who cultivated cannabis, her partner? Furthermore, if the Authority did conduct such an enquiry, and did find that the respondent had acted in breach of the Human Rights Act, how would that finding affect the Authority's findings set out in this determination hitherto.

[54] It is my view that, despite the seemingly arguable case that the respondent acted in breach of the Human Rights Act in relying on the reasons it did, it is not appropriate for the Authority to enquire into such possible breaches, or to reach conclusions in respect thereof, as that would risk the appearance of usurping, ousting or interfering with the jurisdiction of the Human Rights Commission and the Human Rights Review Tribunal. The question of whether the respondent acted in an unlawfully discriminatory manner in relying on Ms Mackie's ACC record and her partner's conviction for cannabis requires proper, considered analysis that would, in practice, need to replicate the investigation that the Human Rights Commission or the Human Rights Review Tribunal should carry out.

[55] By way of example only, it may be that Ms Mackie does not satisfy the definition of *disability* as defined in section 21 of the Human Rights Act, taking into account the decision in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614, which held that the term *disability* in the Human Rights Act *contemplates some affliction of a permanent or at least long-term nature, a condition that ordinary people would regard as a handicap (which may be physical or mental or psychological) as opposed to a temporary induced state of unfitness or diminution of ability*. Similarly, it may be that Ms Mackie cannot show that she was not re-employed unlawfully by reason of her family status, given the evidence of Mr Hampton that he would have reached the same conclusion had Ms Mackie merely been sharing a flat with Mr Kingi as his lodger. Only after a thorough investigation of the facts and the law could any conclusions be reached on these matters. That is an investigation that the Authority cannot undertake in place of the Human Rights Commission or the Human Rights Review Tribunal.

[56] Whilst there is the risk that the Authority has reached a determination in this case which finds that the respondent did not breach the terms of a collective employment agreement even though that respondent took into account factors that could mean it acted in breach of the Human Rights Act, (although I express no opinion as to whether that is the case), I believe that the Authority can go no further

than it has. Ms Mackie could have chosen to have asked the Human Rights Commission to investigate possible breaches of the Human Rights Act, and may still be able to do so given that she had no standing to make a claim under section 104 of the Employment Relations Act.

Breach of an obligation to consult with plant representatives?

[57] The applicant has also asserted that the respondent has breached clause 3.7 by not consulting with plant representatives in respect to the decision not to re-employ Ms Mackie. It is quite clear that clause 3.7 does require selection to be made by the Plant Manager (Mr Hampton) *in consultation with the departmental supervisor and plant representatives*. It is also quite clear that this did not occur in respect of Ms Mackie. Mr Hampton's evidence was that no plant representatives were present on site when the short listing of candidates was in progress. However, that does not excuse the obligation on Mr Hampton to consult with the plant representatives in accordance with clause 3.7 and, in today's modern technologically enabled world, there are many methods by which such communication could have been effected.

[58] However, although I find that the respondent acted in breach of that obligation, I am not satisfied that that breach enables me to award damages to Ms Mackie. This is because the obligation is only to consult, with no obligation under 3.7 for the respondent to follow any representations made by plant representatives. Even if that aspect of clause 3.7 had been complied with, and representations had been made by plant representatives on behalf of Ms Mackie, there is no evidence whatsoever that those representations would have succeeded in persuading Mr Hampton to change his mind. Indeed, given that representations were made on behalf of Ms Mackie after the letter of 30 July 2010 had been sent to her, to no avail, this suggests that any representations that may have been made prior to the letter of 30 July would not have been successful. Therefore, as the obligation on the Company was to do no more than consult with the plant representatives, the breach of that obligation does not give rise to damages for Ms Mackie.

[59] Ms Mackie did not seek a penalty in respect of the alleged breaches of the collective employment agreement, and so, given its penal nature and the fact that the respondent has not been able to address that possibility, I will not impose one for the breach I have identified here.

Does the applicant have a valid disadvantage claim?

[60] Ms Mackie did not specifically bring a disadvantage claim in respect of her not having been re-employed at the start of the 2010/11 season. However, pursuant to section 160 (3) of the Employment Relations Act 2000, the Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described. Section 122 also provides that:

Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.

Therefore, I am able to consider whether Ms Mackie has a personal grievance disadvantage claim.

[61] Section 103(1) (b) of the Employment Relations Act 2000 provides that *personal grievance* means any grievance that an employee may have against the employee's employer or former employer because of a claim:

that the employee's employment, or 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.

[62] This section contemplates that a disadvantage grievance does not have to have occurred in an employee's employment but may arise where the grievance is based on the breach of a term or condition that survives the end of the period of employment. Clause 3.7, which is a clause that I have already found survived termination, sets out conditions for re-employment at the start of the 2010/2011 season.

[63] Although Ms Mackie was not an employee at the time of the action she complains about for the purposes of an unjustifiable dismissal claim or a claim under section 104, the definition of *employee* in section 6 of the Employment Relations Act

commences with the preamble: *in this Act, unless the context otherwise requires, employee means...* This recognises that the list that follows in sections 6(1)(a) to 6(1)(b)(ii) is not exhaustive. The context created by section 103 (1)(b) clearly contemplates individuals bringing a claim based on *any condition that survives termination of the employment*, which imports to that individual, for the purposes of section 103(1)(b) only, the status of *employee*.

[64] I therefore consider that the Authority has jurisdiction to consider a personal grievance claim by Ms Mackie, limited to whether the conditions in clause 3.7 governing her right to re-employment were affected to her disadvantage by an unjustifiable action by the respondent.

[65] The action complained of occurred before the April 2011 amendments to section 103A of the Employment Relations Act 2000 took effect, and so I must consider the justification test as it applied in July 2010. This provides that:

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.

[66] I have already found that Mr Hampton was not entitled to have failed to have employed Ms Mackie on the grounds of *staffing needs*. Although I have found that Mr Hampton's taking into account Ms Mackie's ACC history fell within the definition of *reliability* and *physical ability*, Mr Hampton used that reason to justify non employment without any reference to Ms Mackie, or any reference to medical specialists, which could have enabled him to have assessed on an informed basis whether there was a genuine risk of further injury or sickness absence impacting on her reliability.

[67] I have also found that, although Mr Hampton's concerns about Ms Mackie's possible cannabis use fell within the definition of *reliability*, he made no attempt to consult with Ms Mackie about his concerns.

[68] These failings to consult with Ms Mackie, and to attempt to gather together even basic information to enable Mr Hampton to make a considered view of whether his concerns about Ms Mackie's reliability and physical ability were reasonable,

amounted to fundamental failings and, I find, caused his actions to fall well short of what a *fair and reasonable employer would have done in all the circumstances at the time the action occurred*.

[69] In *Chief Executive of Department of Corrections v Harris* [2001] ERNZ 426 (CC 10/01), a case relating to a transfer, the Court considered what was needed to show an unjustified disadvantage:

43 ...To be disadvantageous, the transfer or other impugned action must be detrimental or harmful. No particular kind of harm is envisaged — it need not amount to a breach of contract and it may be enough if there is evidence that the effect of the change is distressing to the respondent on an objectively reasonable reaction to what has been done. Personal preferences and subjective perceptions are relevant but may be insufficient if unaccompanied by at least some harm, on an objective, balanced, view of the realities of the situation.

[70] In Ms Mackie's case, the conditions governing the right to re-employment set out in clause 3.7 were affected to her disadvantage by the respondent's unjustifiable actions in not consulting with her, and not obtaining relevant medical advice, because, if Mr Hampton had done so, he may not have concluded that Ms Mackie's ACC history would adversely affect her reliability and physical ability and that her living with a cultivator of cannabis would make her unreliable. The disadvantage Ms Mackie suffered was being deprived of the opportunity to put her point of view, and have an objective assessment made of her injury, which in turn deprived Mr Hampton of essential information in his decision making process. I therefore find that this personal grievance succeeds.

Remedies

[71] Having found that Ms Mackie has a personal grievance against the respondent, I must turn to the issue of the remedies available to Ms Mackie under the Act.

[72] Section 123 of the Employment Relations Act 2000 provides that:

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:

- (a) *reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;*
- (b) *the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;*
- (c) *the payment to the employee of compensation by the employee's employer, including compensation for—*
 - *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
 - *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen*

[73] The remedies set out in section 123 are not expressed to depend upon Ms Mackie having been unjustifiably dismissed, but upon her having a personal grievance. Therefore, the remedies of reinstatement and loss of wages are available to her.

Reinstatement

[74] With respect to the remedy of reinstatement, the personal grievance arose from actions that occurred prior to the April 2011 amendments to s 125. This held, prior to amendment, as follows;

- [75] *This section applies where—*
- (a) *the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(a)); and*
 - (b) *it is determined that the employee did have a personal grievance.*

(2) If this section applies the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement as described in section 123(a).

[76] There is an argument that, as reinstatement is a remedy with prospective effect, the post-amendment section should apply even when the personal grievance arose prior to the amendment. Post-amendment, s.125 no longer provides that reinstatement is to be the primary remedy, and s.101 was amended to remove as an object of Part 9 of the Act the recognition of the importance of reinstatement as a

remedy. Section 125 now also requires the Authority to take into account whether it is reasonable, as well as practicable to reinstate.

[77] Whether to apply the pre-amendment section 125, or the post-amendment section 125 requires an assessment of section 7 of the Interpretation Act 1999, which declares that an enactment does not have retrospective effect. However, that is subject to s.4, which allows a statute expressly or impliedly to have retrospective effect. There is, as a result, a presumption against retrospective application. The Employment Relations Amendment Act 2010 came into force on 1 April 2011, repealing the existing s.125 and enacting a new s.125. There is nothing in the amending statute to expressly or impliedly rebut the presumption in my view.

[78] Sections 17 and 18 of the Interpretation Act 1999 deal with the effect of any repeal. Section 17 provides that a repeal does not affect an existing right, and section 18(1) that a repeal does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right. Under s.18(2) a repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the proceedings that relate to the existing right.

[79] Ms Mackie's right to pursue a personal grievance claiming remedies under the Employment Relations Act 2000 arose in July 2010 when Mr Hampton wrote to her telling her she was not to be re-employed for the 2010/11 season. It is through a concatenation of various factors unrelated to her grievance that Ms Mackie's Authority investigation meeting did not take place until after 1 April 2011. In different circumstances, it could have taken place before 1 April 2011 and the pre-amended section 125 of the Employment Relations Act 2000 would have applied without question. For these reasons, the repealed s.125 continues to apply to the determination of her personal grievance.

[80] Counsel for the respondent submitted that Ms Mackie's knowledge that a co-worker (Mr Kingi, her partner) was a *heavy marijuana user* and had been attending work *under the influence* without raising the issue with the respondent was a factor that dictated against her reinstatement, as it meant that it was not practicable for the respondent to have trust and faith in her. However, no cogent evidence was given that Mr Kingi was a heavy marijuana user and that he attended work under the influence. I do not accept therefore that this was a sufficient reason not to reinstate Ms Mackie.

[81] Counsel for the respondent also submitted that Ms Mackie had been involved in certain conversations between Mr Kingi and her neighbour that also meant that it was not practicable for the respondent to have trust and faith in her. This submission was based on a witness statement prepared by the neighbour of Ms Mackie ostensibly for the private prosecution matter, and which made allegation against Mr Kingi and Ms Mackie. The neighbour did not give evidence before the Authority, and so the statement was hearsay. It appears that the neighbour did not give evidence in the hearing of the private prosecution claim either. In addition, the alleged involvement of Ms Mackie as set out in the statement of the neighbour was not sufficient in my view to justify the assertion that it was not practicable for the respondent to have trust and faith in her.

[82] In considering reinstatement I am also mindful that the respondent is a large employer with considerable resources. No argument was presented that the respondent could not operationally accommodate Ms Mackie back as a B Grade trimmer position in which she had worked in the 2009/10 season.

[83] Taking all these considerations into account, I consider that it is practicable to reinstate Ms Mackie to her role as a B Grade Trimmer, subject to the conditions set out below.

Loss of wages

[84] The 2010/2011 season started on 4 August 2010, which is when Ms Mackie's wages loss commenced. Although counsel for the respondent argued that she would have started later in the season as one of Ms Mackie's co-workers (Moana) had started late in the 2010/2011 season, that person's original start date was later than Ms Mackie's, and so I am not persuaded that Moana's start date is an appropriate guide to when Ms Mackie would have started back. I therefore accept Ms Mackie's submission that she would have started back at the commencement of the 2010 season.

[85] According to pay data before the Authority, during the 2009/2010 season, Ms Mackie earned a gross sum of \$39,429, making on average, a gross weekly wage of \$821. She found seasonal work on 1 November 2010 at one employer, earning on average \$487 per month less than she earned at the respondent.

[86] I am satisfied that Ms Mackie took sufficient steps to find work and therefore to mitigate her loss. S 128 (2) of the Employment Relations Act provides that the Authority must order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[87] Ms Mackie lost the average gross sum of \$9,852 for the period from 4 August 2010 to 26 October 2010, which is the period of three months.

[88] Section 124 of the Employment Relations Act requires me to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I am satisfied that Ms Mackie did not contribute in any blameworthy way (or any direct way at all) to Mr Hampton not re-employing her.

[89] Therefore, I am satisfied that Ms Mackie is entitled to be awarded the gross sum of \$9,852 in respect of lost wages as a result of her disadvantage personal grievance.

Non payment of an incentive bonus

[90] Ms Mackie earned an incentive bonus of \$500 gross at the end of her 2009/2010 season, pursuant to clause 22.1 of the Collective Agreement. Ms Mackie told me that she had not suffered any illness that would have stopped her from having been employed throughout the 2010/2011 season. I therefore conclude that she would have been entitled to the incentive bonus of \$500 had she been re-employed, and award that gross sum to her pursuant to section 123(1)(c)(ii).

Compensation pursuant to s. 123(1)(c)(i)

[91] Ms Mackie's evidence was that the respondent unexpectedly failing to re-employ her caused her to apply for an urgent benefit food grant in order to feed her family. In addition, she says she suffered stress and embarrassment in not having been re-employed alongside her co-workers. I do not doubt this to be the case. In taking these factors into account, I consider that it is appropriate to award Ms Mackie the sum of \$10,000 in compensation for humiliation, loss of dignity, and injury to the feelings.

Conclusions

[92] I find that the Authority does not have jurisdiction to consider her personal grievances for unjustified dismissal and unlawful discrimination as she was not an employee for those purposes when the respondent decided not to re-employ her for the 2010/11 season.

[93] I further find that the Company did not breach clause 3.7 of the Collective Employment Agreement in taking into account two of the three factors that it did in deciding not to re-employ Ms Mackie for the 2010-2011 season. The breach of clause 3.7 arising out of Mr Hampton's decision not to re-employ Ms Mackie for staffing reasons does not give rise to an award of damages.

[94] I find that the respondent was in breach of clause 3.7 of the Collective Employment Agreement by not consulting with plant representatives in deciding not to re-employ Ms Mackie but that that breach does not give rise to any damages that I am able to award to Ms Mackie.

[95] I find that Ms Mackie has a personal grievance for disadvantage that gives her access to remedies under section 123 of the Employment Relations Act 2000.

Orders

[96] The respondent is ordered to:

- a. Reinstate Ms Mackie to the position of B Grade Trimmer on the day immediately after she returns a negative drug test result from New Zealand Drug Detection Agency (the NZDDA). The respondent is to make arrangements for the NZDDA to test Ms Mackie at its own cost immediately after it receives a copy of this determination;
- b. Pay Ms Mackie the gross sum of \$9,852 in respect of lost wages;
- c. Pay Ms Mackie the gross sum of \$500 in respect of a lost incentive bonus;
- d. Pay Ms Mackie the further sum of \$10,000 in respect of compensation for humiliation, loss of dignity, and injury to the feelings.

Costs

[97] Costs are reserved.

David Appleton
Member of the Employment Relations Authority