



[4] In final submissions, Mr Riach accepts on behalf of Eustruct that its dismissal of Mr Mitalas was unjustified. Mr Riach said in his final submissions that was accepted from an early stage, although that was disputed by Mr Elliott.

[5] I have considered that matter because of the relevance in terms of costs. Mr Riach wrote a letter dated 10 November 2006 after a personal grievance was raised on Mr Mitalas's behalf to Mr Elliott. Mr Riach, on behalf of his client, accepts in that letter some procedural error by Eustruct but still maintains that the dismissal was substantively justified.

[6] The statement in reply sets out the respondent's views that the dismissal was justified and that there are no grounds for a personal grievance. I find that it was clear that Eustruct accepted that the dismissal was unfair in terms of its procedure but the concession in final submission went further than that.

[7] Mr Riach accepts in final submissions that Mr Mitalas is entitled to lost remuneration but says that the level of compensation claimed for humiliation and loss of dignity by Mr Mitalas is excessive. In his submissions, Mr Riach does not accept that Eustruct's behaviour was as reprehensible as submitted on behalf of Mr Mitalas by Mr Elliott.

[8] This is not a matter where the Authority can simply issue a determination in respect of remedies. It is necessary for the Authority to make findings on disputed facts leading up to and including dismissal. Consideration can be given to the issue of remedies including contribution, if any.

### **Why was Mr Mitalas dismissed?**

#### ***Individual employment agreement***

[9] Mr Mitalas was party to an individual employment agreement with Eustruct.

[10] The agreement was expressed to be for a fixed term but Eustruct accept that Mr Mitalas was a permanent employee. Mr Mitalas was employed as a carpenter/hammer hand by Eustruct. The individual employment agreement commenced on 28 February 2006.

***The back injury***

[11] On 18 July 2006, Mr Mitalas developed some pain in his back while he was working in Kaikoura for Eustruct. He discussed his sore back with the leading hand on site, Radim Kurka. He was at some stage permitted to carry out some lighter duties. The discussions with Mr Kurka took place when the site manager and Mr Falcnik were not on site.

[12] Mr Mitalas did not fill out an incident report. Mr Kurka said in his evidence that it was not the sort of situation where he concluded that he should, as leading hand, fill out an incident report. My understanding of Mr Kurka's evidence was that the general back pain complained of was seen by him differently to the sort of situation where an injury required immediate medical attention.

[13] Mr Falcnik, Mr Reaich and Ms Currin said in their evidence that Mr Mitalas should still have ensured an incident report was filled out and that he would have known an incident report was required because of an on site induction that was given to the workers and from other information supplied to him.

[14] Mr Mitalas said that he was not advised about filling in incident reports. He thought it was enough to advise the lead hand. He said that on 25 July 2006 he complained about his back pain to Mr Falcnik and was given permission to travel to the Kaikoura pharmacy to purchase pain medication. Mr Falcnik denied in his evidence that Mr Mitalas had mentioned anything about back pain to him although could recall Mr Mitalas getting some pain medication.

[15] I find it less likely that Mr Mitalas knew about the requirement to fill in an incident report for any injury that occurred on the work site. I have concluded this because in circumstances where it is quite clear that Mr Mitalas advised Mr Kurka of his back pain there was no reason for him not to fill in such a report if he thought it was required. Filling in incident report is very important to document injuries that occur on a work site. There was some confusion even from the lead hand as to when they should be filled out.

***28 July 2006***

[16] On Friday 28 July 2006, Mr Falcnik advised Mr Mitalas that he was not required to work the following week as a result of a decline in the work available.

Under his employment agreement, Mr Mitalas was entitled to work a minimum of 40 hours per week. He said that had decided to see a doctor about his sore back and was not unduly concerned because he intended to take the time away from work to recuperate. Mr Mitalas advised Mr Falcnik that he was going to see the doctor about his back. He said there were no questions asked by Mr Falcnik about his back injury.

[17] Mr Falcnik said that when he was told by Mr Mitalas that he had a back injury he responded that it was *bull* because Mr Mitalas had played ice hockey the previous weekend. Mr Falcnik also said that Mr Mitalas told him he was going on ACC and that Eustruct would have to pay him during his absence.

[18] Mr Mitalas did not accept that he had played ice hockey the previous weekend. I think it likely, given Mr Falcnik's reaction on 6 August to the ACC form that I shall come to shortly, that Mr Falcnik either did not turn his mind to the cause of Mr Mitalas' sore back or simply concluded that it was not as a result of a work injury. I do not find, however, that Mr Falcnik made an issue about the back on 28 July 2006.

### ***30 July 2006***

[19] Mr Mitalas went to see his doctor on 30 July 2006. He advised his doctor that he had hurt his back on the job site at Kaikoura lifting gib for the majority of the day. Mr Mitalas completed an ACC injury claim form making it clear that it was a work injury.

[20] Mr Mitalas incorrectly wrote on the claim form the date of the injury as 18 June 2006 instead of 18 July 2006. He incorrectly signed and dated the form 30 June 2006 instead of 30 July 2006. I accept that he was completely unaware that he had made these errors.

### ***5 August 2006***

[21] On 5 August 2006 Mr Mitalas sent a text to Mr Falcnik to keep him updated. It appears there was also an earlier text message which I accept is likely, given the wording of the text on 5 August 2006. The text provided, in essence, that Mr Mitalas was to have a follow up appointment on 6 August with his doctor which would probably clear him as his back was much better. Mr Mitalas also advised in the text that he would show Mr Falcnik the ACC form on 6 August if Mr Falcnik was not busy.

[22] On the evening of 5 August 2006, Mr Falcnik telephoned Mr Mitalas and advised him that there would be no work for him at Eustruct for the next 2-3 months. Mr Mitalas also said that Mr Falcnik told him to *milk ACC* but Mr Falcnik did not accept that he said that.

[23] Mr Mitalas and Mr Falcnik were friends and it was on that basis that Mr Mitalas worked with the company. I accept that on this basis Mr Mitalas advised Mr Falcnik that he would be willing to seek relief teaching during the 2-3 month period to ease pressure on Eustruct. Mr Mitalas is a qualified teacher.

[24] It was agreed during the telephone conversation that Mr Mitalas would drop the ACC forms off. Mr Falcnik said in his evidence that it was at that time that he responded to Mr Mitalas that it was unfair that Mr Mitalas was trying to milk ACC.

### ***6 August 2006***

[25] Mr Mitalas took the original ACC certificate to Mr Falcnik's home. Mr Falcnik and his partner Katie were present at the house. I heard evidence from Katie. It is common ground that Mr Falcnik expressed some concern to Mr Mitalas that the ACC form recorded that the back injury had occurred on the work site. Mr Falcnik said something to the effect that *he could do not that*. Mr Mitalas maintained that the injury was a work injury. He said that Mr Falcnik advised him that he should have said in the form that he did it off site.

[26] It is common ground that Mr Mitalas expressed the concern that he was not able to work for the company for at least a two month period. Mr Falcnik advised that *he could not lay the other workers off* so Mr Mitalas could work.

[27] Mr Mitalas raised the issue of his employment agreement and said that his hours of work were 40 hours minimum per week.

[28] Mr Mitalas did not accept, as alleged by Mr Falcnik, that he threatened to use his employment agreement to bankrupt the company. Katie was not in the same room as Mr Falcnik and Mr Mitalas but she heard raised voices. She said that Mr Mitalas was clearly not happy about the situation and that she heard Mr Mitalas say that if he did not get what he wanted from Mr Falcnik, he would bankrupt the company. Katie confirmed that there were no physical threats made by Mr Mitalas to Mr Falcnik.

*7 August 2006*

[29] On 7 August 2006, Mr Mitalas was telephoned at his home by Mr Falcnik. Mr Mitalas said that he was asked to return Mr Falcnik's skis and the company work tools. Mr Mitalas was advised that there was a letter to be picked up. He asked if he had been fired and Mr Falcnik responded that he had been.

[30] There is no dispute that Mr Mitalas was dismissed during the telephone conversation on 7 August. Mr Falcnik, however, maintains that the conversation took about 10 minutes and that Mr Reaich and Ms Currin were in the room at the same time. Mr Falcnik said that he telephoned Mr Mitalas to come in to attend a meeting but that Mr Mitalas keep pushing as to why such a meeting was necessary and kept asking whether he was sacked. Mr Falcnik said that finally Mr Reaich told him *if that is what he wants, say yes*.

[31] I prefer Mr Mitalas' account of the conversation on 7 August 2006. Mr Reaich and Ms Currin may well have been in the room at the time that the call was made to Mr Mitalas but Mr Mitalas says he was not requested to attend a meeting. Mr Mitalas' account is more consistent with earlier accounts given about the exchange than Eustruct's. Eustruct's account, whilst initially consistent with Mr Mitalas, has changed somewhat. I find that the letter of 7 August 2006 was, in all likelihood, written before the telephone conversation took place. The directors of Eustruct had reached the view that Mr Mitalas should be dismissed and I find it likely the conversation with Mr Mitalas was short and to the point. There was no mention in the letter of Mr Mitalas refusing to attend a meeting.

[32] Mr Mitalas attended at Mr Falcnik's home, returned the property requested and collected a letter from a windowsill that confirmed that he was dismissed as from 6 August 2006. The letter provided:

*7 August 2006*

*Vincent Mitalas,*

*I am writing to you to advise that we have terminated your Employment with Eustruct Ltd as of 6<sup>th</sup> August 2006; We have done this for the following reasons. DISHONESTY. THREATENING BEHAVIOUR TO A CO-WORKER.*

- *Putting in an ACC claim while you were on stand down for a week for an accident that has never been reported to management or an incident report filled in for.*
- *Putting in a false claim to ACC for an accident 18<sup>th</sup> June 2006 which is a Sunday and you were neither in Kaikoura nor on any of the Eustruct work sites. We have been advised that this borders on fraud.*
- *For threatening one of the directors in the office on Sunday 6<sup>th</sup> August.*
- *Because we don't have any work, that you would be able to do with a Back injury, or any work that wouldn't aggravate this injury available now, or in the future.*

*Due to you aggressive behaviour to Director Jerry Falcnik please make an appointment to return your shirt hats and vest and to pick up a chg for your final pay.*

*Thank you*

*T N Currin  
General Manager.*

[33] There was evidence from Mr Reaich and Ms Currin that they had observed Mr Mitalas being verbally abusive to Mr Falcnik in the past. Ms Currin said that she tried to give Mr Mitalas a written warning dated 12 May 2006 but he would not take it from her. Mr Mitalas said that the first time he saw the warning was after the dismissal and he did not accept that he had been abusive and said that he was not a confrontational person.

[34] The letter terminating Mr Mitalas' employment does not provide that the earlier warning was taken into account in terms of the interaction between Mr Mitalas and Mr Falcnik on 6 August 2006. In those circumstances, the focus must be on that incident. I am not satisfied that, at the time of the decision to dismiss Mr Mitalas was made, the other matters were in the minds of the directors of Eustruct.

[35] Whilst earlier warnings are relevant to the decision to dismiss, it is accepted in this matter that the dismissal was unjustified and I find that the evidence from Eustruct supports that the primary concern at the time was the alleged dishonesty in terms of the ACC claim.

[36] Eustruct suggested a meeting with Mr Mitalas after his dismissal because it had received legal advice that it should have met with him before he was dismissed. That meeting did not take place.

[37] Emails sent by Mr Mitalas to Mr Falcnik shortly after the dismissal referred to matters concerning holiday pay and return of various items. Mr Riach says that these emails are significant in terms of the claim for compensation for humiliation and stress because there is no mention in the emails of the dismissal itself.

[38] Mr Mitalas, who is not from New Zealand was unsure of his rights and that he wanted to take some time to consider them. Mr Mitalas said in his written evidence that he did not have family support in New Zealand. He did within the 90 day period seek legal advice and a personal grievance was raised. In the circumstances I have not placed weight on those emails.

[39] Mr Mitalas gave evidence that he was very stressed and humiliated by the dismissal and that he withdrew socially. He said that since the dismissal he has suffered sleeplessness and headaches and was particularly concerned about the allegation of dishonesty/fraud in terms of his ACC claim and staying in New Zealand.

### **Determination**

[40] In this case, it was accepted that Mr Mitalas' dismissal was unjustified under s.103A of the Employment Relations Act 2000.

[41] In determining the nature and extent of remedies to be provided in terms of a personal grievance, the Authority is required to consider the extent, if any, to which Mr Mitalas' actions contributed towards the situation that gave rise to the personal grievance. This is notwithstanding that counsel may not have made any submissions in terms of contribution.

[42] The procedure in terms of the dismissal was unfair and not what a fair and reasonable employer would have undertaken. Dishonesty and threatening behaviour are serious allegations and there must be a proper investigation undertaken to reflect the seriousness of the allegation.

[43] I have found it less likely that Mr Mitalas knew about the requirement to fill in an incident report. There was no investigation or discussion with Mr Mitalas about this matter to enable him to give this explanation before dismissal. A fair and reasonable employer would have considered Mr Mitalas' explanation in terms of this matter and then further training. There was no reason for the directors of Eustruct to conclude that Mr Mitalas would simply make up that he was injured on site. In those

circumstances I do not consider that it can be said that Mr Mitalas contributed in a blameworthy way to the situation.

[44] The error in terms of the date of the accident and also in terms of the date the ACC claim form was signed were never put to Mr Mitalas. If the matter had been put to Mr Mitalas then he could completely explain it. A fair and reasonable employer having heard the explanation would be supported by the doctor's notes to conclude that there was no dishonesty but a simple mistake of confusing July with June when filling out a form.

[45] Mr Mitalas provided ACC with case notes from his doctor and a full explanation and ACC accepted the claim. Mr Mitalas cannot be said to have contributed in these circumstances to that matter.

[46] The heated discussion on 6 August 2006 needs to be considered in the following context. Mr Mitalas had been advised that he was to be without work for 2-3 months and it had been clear that Mr Falcnik did not believe he had suffered an injury at work. There may well have been some talk about how maintaining Mr Mitalas' employment provisions for a 40 hour week would/could hurt or bankrupt the company or Mr Falcnik. Standing back and considering the matter, I think it more likely that Mr Falcnik would have raised the possible impact on the company if Mr Mitalas stood firm in terms of his employment agreement. At worst, Mr Mitalas expressed an uncaring view as to the company's future but I am not satisfied that there was a stand-alone threat made about the company or Mr Falcnik that would have justified dismissal or in the circumstances as a whole could be seen as ultimately contributing to the dismissal. Mr Mitalas was entitled to be treated in accordance with the terms of his employment agreement.

[47] Mr Mitalas had been cleared to return to work as of 14 August 2006 having spent two weeks on ACC. Justification on medical grounds for dismissal could not be made out and it could not be said that Mr Mitalas contributed to that matter.

[48] Mr Mitalas was unjustifiably dismissed from his employment with Eustruct Limited because a fair and reasonable employer would not have dismissed him in all the circumstances that existed at the time of the dismissal. Mr Mitalas is entitled to remedies.

## **Remedies**

### ***Contribution***

[49] I do not find that Mr Mitalas contributed to his personal grievance under s.124 of the Employment Relations Act 2000 and therefore his remedies should not be reduced.

### ***First week on ACC***

[50] Eustruct has not paid Mr Mitalas for his first week on ACC. ACC accepted the claim by Mr Mitalas for a work-related injury and he is entitled to be paid for that first week by Eustruct.

[51] I order Eustruct Limited to pay Vincent Mitalas the sum of \$720 gross being wages for the first week Mr Mitalas was on ACC for a work-related injury.

### ***Reimbursement of lost wages***

[52] Mr Mitalas was on ACC for a further week after his dismissal on 6 August 2006. He has accepted payment for that week should come from ACC and he has not claimed that from Eustruct. Mr Mitalas applied for positions following his dismissal and told the Authority about the difficulties he had experienced in obtaining teaching positions. As it happened, Mr Mitalas was successful in his second application for a position and he commenced with the Red Cross on 21 September 2006. There were a few weeks between being advised of his success in his application and actually commencing work.

[53] Mr Mitalas worked fewer hours with the Red Cross than he had with Eustruct. There was therefore a difference between the amount Mr Mitalas received from Red Cross and that which he would have received from Eustruct. Mr Mitalas' hours with the Red Cross did increase after he commenced working for the organisation.

[54] Mr Mitalas seeks the difference between the wages he received at Eustruct and the wages he received at the Red Cross until the date the parties attended mediation on 26 February 2007.

[55] Having heard the evidence, I accept that Mr Mitalas did attempt to mitigate his loss. He explained that it was unlikely that he would be entitled to a benefit and was

only without any employment at all for five weeks after dismissal, not including one week on ACC.

[56] I am satisfied that Mr Mitalas has lost wages in the sum of \$5,857.10 because of his personal grievance and that it is appropriate an order be made for reimbursement of that amount.

[57] I order Eustruct Limited to pay to Vincent Mitalas the sum of \$5,857.10 gross under s.123(1)(b) of the Employment Relations Act 2000 being reimbursement of lost wages from the date of Mr Mitalas' dismissal until 26 February 2006.

### ***Interest***

[58] There is a claim for interest. Under clause 11 of the Second Schedule of the Employment Relations Act 2000, the Authority has jurisdiction to order the payment of interest on sums awarded by way of reimbursement under s.123(1)(b) of the Employment Relations Act 2000 – *Salt v. Fell* [2006] ERNZ 449.

[59] Interest is sought from 11 February 2007 to the date of payment. I have decided that interest should run from separate dates for the unpaid wages for the first week of ACC in the sum of \$720 gross and the lost wages following dismissal.

[60] There should be interest on the amount of \$5,857.10 from the date the statement of problem was lodged with the Authority because a lost wages calculation was set out and quantified at that time. There should be interest on the unpaid wages for the first week of ACC from 1 October 2006 as that is an amount which should have been paid to Mr Mitalas much earlier.

[61] I order Eustruct Limited to pay to Vincent Mitalas interest on the sum of \$720 from 1 October 2006 to the date of payment at the rate of 9% per annum which does not exceed the 90 day bill rate at the time of making this order plus 2%.

[62] I order Eustruct Limited to pay to Vincent Mitalas interest on the sum of \$5,857.10 from 15 May 2007 when the statement of problem was lodged with the Authority until the date of payment at the rate of 9% which does not exceed the 90 day bill rate at the time of making this order plus 2%.

### *Compensation*

[63] Mr Mitalas gave considerable evidence about the effect the dismissal had on him. He withdrew socially because he was embarrassed about being dismissed. Mr Mitalas' ice hockey coach came to know of his dismissal and he was concerned about whether that would impact on his selection for the New Zealand team. Mr Mitalas drove down for the season after his dismissal to Queenstown to play ice hockey rather than attending at the local rink.

[64] I accept that the allegation that Mr Mitalas had been dishonest or in some way fraudulent was particularly hurtful for him. Mr Mitalas said that he attributed his headaches and difficulty sleeping to the dismissal and that this had put him off any positions in the building industry.

[65] Mr Elliott describes the \$20,000 sought for compensation as a minimum and says that Eustruct exacerbated the impact of the dismissal and stress by delays in terms of filing a statement in reply and the dragging out of settlement negotiations over an extended period.

[66] Mr Riach says that the amount of compensation sought is excessive. He submits that Mr Mitalas' position was not one of seniority and responsibility. He submits Mr Mitalas quickly obtained other employment and that there was no medical evidence of treatment required as a result of the dismissal. Mr Riach submits the dismissal did not take place in front of other staff and that the negotiations to resolve the matter took place in good faith. Eustruct were not to pay any settlement until the sale of buildings so the matter then proceeded to an investigation meeting.

[67] Mr Riach submits that any award for compensation should not be greater than \$10,000.

[68] I have considered the submissions made carefully. I have had regard to the cases regard to, always bearing in mind, however, that compensation awarded for humiliation and loss of dignity is awarded on the basis of the evidence of distress suffered by the applicant in each particular case. Compensation is not awarded to punish but to compensate for the effects of distress.

[69] Mr Mitalas was accused of dishonesty and fraud when, had there been a proper investigation, there was a simple explanation for the incorrect dates in the

ACC claim form. He was treated particularly badly during the period leading up to and including dismissal and it had a significant impact on him. A young unqualified employee can suffer humiliation and loss of dignity in the same way as an older more experienced employee can. Often, younger employees are less aware of their rights in these sorts of situations.

[70] I do not, however, find that a claim for compensation in the sum of \$20,000 is made out. Mr Mitalas was able to look for and secure another position after dismissal which alleviated some of his financial concerns and provided some social contact.

[71] I accept that the delay in settling the matter and the need for an investigation meeting would have increased Mr Mitalas' stress, but not so as to have a major effect on a compensatory award.

[72] An award of \$10,000 is a significant award for compensation and I am satisfied that it is the award that should be made to Mr Mitalas in this case. I note in this respect that the majority of compensatory awards made by the Authority in personal grievance claims are less than \$10,000.

[73] I order Eustruct Limited to pay to Vincent Mitalas the sum of \$10,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 being compensation for humiliation, loss of dignity and injury to feelings.

### **The fines**

[74] Mr Mitalas was fined when he was driving a vehicle belonging to Eustruct. He was fined \$230 because the vehicle did not have a warrant of fitness, \$110 for exceeding the 80 kph speed limit and \$180 for failing to keep left. Mr Mitalas quite properly accepted he was responsible for the fine for failing to keep left in the company vehicle but says that Eustruct should reimburse him for the fine he incurred for not having a warrant of fitness and, because the speedometer was faulty, the speeding fine.

[75] This was not a vehicle which Mr Mitalas solely drove. It was driven by different employees at different times. Mr Mitalas' employment agreement with Eustruct contains an indemnity provision against third party claims provided his actions did not involve recklessness, wilful neglect or wilful failure to carry out a lawful instruction from Eustruct.

[76] I am satisfied that Mr Mitalas was driving the vehicle as part of his employment with Eustruct. Although, with the great benefit of hindsight, it would have been sensible to check whether the warrant of fitness on the company vehicle was current, there is no evidence that the failure to do so on this occasion was reckless, wilful or a breach of previous instructions. Mr Mitalas was not to know that the speedometer in the car was faulty.

[77] I consider that, in this situation, Mr Mitalas should be reimbursed for the fines incurred in terms of the failure to have a warrant of fitness and the speeding fine. I have received with the applicant's submissions a copy confirming the fines that Mr Mitalas incurred from the Court.

[78] I order Eustruct Limited to pay to Vincent Mitalas the sum of \$340 being reimbursement of fines for the reasons set out above.

### **Costs**

[79] I reserve the issue of costs in this matter.

### **Summary of findings and orders made**

- I have found that Vincent Mitalas was unjustifiably dismissed.
- I have not found that Vincent Mitalas contributed to his dismissal.
- I have ordered that Eustruct Limited pay to Vincent Mitalas the sum of \$720 gross being outstanding wages from his first week on ACC. I have ordered that interest is payable on that amount from 1 October 2006 at the rate of 9%.
- I have ordered that Eustruct Limited pay to Vincent Mitalas the sum of \$5,857.10 gross for reimbursement of lost wages. I have ordered that interest is payable on that sum from the date the statement of problem was lodged with the Authority on 15 May 2007 at the rate of 9%.
- I have ordered Eustruct Limited pay Vincent Mitalas the sum of \$10,000 being compensation for humiliation, loss of dignity and injury to feelings.
- I have ordered that Eustruct Limited reimburse Vincent Mitalas for fines he incurred for driving the company vehicle without a current warrant of fitness

and a faulty speedometer in terms of the indemnity clause in his employment agreement in the sum of \$340.

- I have reserved the issue of costs.

Helen Doyle  
Member of the Employment Relations Authority