

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 1
3002193

BETWEEN LEFIU MATTHEW NAOUPU
Applicant

AND WALLBOARD AND
INSULATION SUPPLIES NZ
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Philippa Tucker, Counsel for the Applicant
Andrew Riches, Counsel for the Respondent

Investigation meeting: 22 June 2017

Submissions and further At the investigation meeting, and on 13 September 2017,
evidence received: 10 and 30 October 2017

Determination: 10 January 2018

FIRST SUBSTANTIVE DETERMINATION OF THE AUTHORITY

A. Wallboard and Insulation Supplies NZ Limited unjustifiably dismissed Lefiu Matthew Naoupu.

B. Wallboard and Insulation Supplies NZ Limited must pay Lefiu Matthew Naoupu \$9,600 compensation for humiliation, loss of dignity and injury to his feelings.

C. Wallboard and Insulation Supplies NZ Limited will also owe Lefiu Matthew Naoupu lost wages for the three month period, less 20%, after his dismissal once the correct rate of wages that should have been paid during his employment has been determined.

Employment relationship problem

[1] Lefiu Matthew Naoupu (known as Matty) worked for Wallboard and Insulation Supplies NZ Limited (WIS) as an insulation installer from 8 December 2014 until he was dismissed on 22 September 2016 for knowingly working without adequate personal protection equipment on three occasions.

[2] Mr Naoupu considers his dismissal was unjustified. By way of remedy, he claims lost wages and compensation for humiliation, loss of dignity and injury to his feelings.

[3] He also claims that WIS owes him wages, as he should have been paid for 40 hours of work per week. Mr Naoupu says that WIS breached ss 67C and 67D of the Employment Relations Act 2000 (the Act) by not adhering to agreed hours of work and failing to provide reasonable compensation for cancelled shifts. He also claims that WIS wrongly used his annual leave to pay him for cancelled shifts without his agreement. This is a potential minimum wage claim. This determination does not resolve this issue, which will be determined separately.

[4] As part of the proceedings, Mr Naoupu asked WIS to supply his wages and time records to him. He says that they did not do so in a timely manner and seeks a penalty for that failure.

[5] WIS denies all the claims.

Procedural history

[6] I held an investigation meeting and heard evidence on the unjustified dismissal claim on 22 June 2017. I have heard sworn or affirmed written and oral evidence from Mr Naoupu and his partner, Rachel Seumanutafa, and from Tracey Cook, WIS's office manager.

[7] Counsel asked for my view of what determination I was likely to make on those claims. I gave them my views and they asked for an opportunity to go away and negotiate an agreed settlement of all the claims. I allowed them time to do that. Failing an agreement, I said that I would make a written determination.

[8] The first contact from counsel to the Authority after the investigation meeting was on 13 September 2017 at which time Ms Tucker notified the Authority that the parties had been unable to come to any agreement. She enclosed an IRD Summary of Earnings for Mr Naoupu. She proposed that the parties make written submissions on the issue of the wages claim. She that I should proceed to determine all matters, without having any further meeting in relation to the wages claim. Ms Tucker proposed a timetable. I agreed to Ms Tucker's proposal.

[9] I received Ms Tucker's submissions on 10 October 2017. I received Mr Riches submissions and a spreadsheet relating to Mr Naoupu's wages on 30 October 2017. The Authority officer arranged a case management conference to discuss my desire to have an in person meeting with counsel to ask further questions in relation to wages owed because of the significant amount of disagreement between the parties and new evidence included with the submissions. That was set down for 13 December 2017, however, Mr Riches was unable to attend due to a family emergency.

[10] I have arranged a continuation of the investigation meeting on 19 February 2018 and have agreed to determine Mr Naoupu's personal grievance claim first, in recognition of the disadvantage suffered by Mr Naoupu in having to wait so long for resolution of his claims.

[11] As permitted under s 174 of the Act, I have not set out all evidence and submissions received but have stated my findings of facts and law and conclusions on matters requiring determination.

Why was Mr Naoupu dismissed?

[12] The dismissal letter, dated 22 September 2016, states the reason for Mr Naoupu's dismissal was:

... breaches in Health and Safety on 3 consecutive occasions ...

The three breaches are:

- 1) 24.08.2016 Not wearing Hi-Viz or safety capped boots whilst working on a construction Site.
- 2) 29.08.2016 Not wearing safety capped boots whilst working on a construction site
- 3) 30.08.2016 Not wearing safety capped boots whilst working on a construction site

You are dismissed because you knowingly continued to work on construction sites, installing insulation without adequate Personal Protective Equipment (PPE). You have received extensive Health and Safety training through (WIS's) ... in house training, which has been documented.

You have participated in numerous toolbox meetings, discussing PPE and informed on the mandatory requirements and your responsibilities of Health and Safety, which has been documented.

You have undermined the relationship of trust and confidence between yourself and (WIS) ... Without this trust and confidence, the employment relationship cannot continue.

The issues

[13] The issues I need to determine are:

- (i) Whether WIS's decision to dismiss, and the way that decision was reached, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.
- (ii) In particular, I need to assess whether the substantive reason for dismissal was one that could fairly end in dismissal, and whether the procedure used to make the decision was fair.

- (iii) In assessing procedural fairness requirements I need to consider the requirements set out in s 103A(3) of the Employment Relations Act 2000 (the Act), specifically:
 - (a) Did WIS sufficiently investigate the allegation against Mr Naoupu?
 - (b) Did WIS raise its concerns with Mr Naoupu before dismissing him?
 - (c) Did WIS give Mr Naoupu a reasonable opportunity to respond to its concerns before dismissing him?
 - (d) Did WIS genuinely consider Mr Naoupu's explanation before dismissing him?
- (iv) If Mr Naoupu has a personal grievance, I will need to assess what remedies he is entitled to.
- (v) As part of that assessment, I need to assess whether to reduce remedies because Mr Naoupu contributed, in a blameworthy way, to the situation leading to his personal grievance.

What happened?

[14] Mr Naoupu was an insulation installer. WIS provided him with personal protective equipment being a high-visibility vest, a hard hat, breathing masks and ear-plugs. Mr Naoupu was also required to wear steel-capped shoes or boots. He already had some steel-capped boots when he began work in 2014. During 2016 Mr Naoupu's boots were very worn and not as safe as they once were.

[15] WIS allows employees to purchase steel-capped safety shoes, for up to \$70 from NZ Safety and charge them to its account. The cheapest safety shoes NZ Safety stocks costs \$67 plus GST.

[16] There is no dispute that Mr Naoupu told WIS that he needed new boots. WIS told Mr Naoupu to go to NZ Safety and purchase some safety boots. That is demonstrated, for

example, by the notes of a toolbox meeting held on 21 March 2016. The notes show that “Matty”¹ was to “go to NZ Safety & get boots”.

[17] However, the parties do not agree on how many times Mr Naoupu was told to get new boots. Mr Naoupu’s evidence is that he did go to NZ Safety on at least one occasion, probably twice, but that they did not have suitable boots within WIS’s price limit and he could not afford to pay more to get suitable boots.

[18] There is also disagreement about what footwear was suitable. WIS’s evidence is that the safety shoes available at NZ Safety were all that installers needed. Mr Naoupu’s evidence is that because of prior injuries to his ankle, two of which were workplace accidents in April and June 2016, he needed safety boots not safety shoes. The reason for needing boots was to give more support to his ankles.

[19] I accept Mr Naoupu’s evidence that his physiotherapist rang and spoke to someone at WIS after his second accident, and while his injury was being managed by ACC, and conveyed that he needed safety boots, not safety shoes.

[20] Mr Naoupu says that only twice during his employment was he told to go and get new safety boots. WIS says that he was told several times.

[21] As written evidence supporting that view, Ms Cook provided notes of three toolbox meetings and diary notes for days in April, May and June 2016.

[22] On 22 March 2016, the toolbox meeting notes show that Mr Naoupu was present at the meeting, although he has not signed to indicate his presence and is the only employee noted as being present who did not sign. It may be that Mr Naoupu had to leave before the meeting finished. It is possible that he did not hear the instruction “all colleagues to look at light weight safety boots at NZ Safety as we have an account there”.

¹ Mr Naoupu is referred to as “Matty” in all the toolbox meeting and diary notes.

[23] Further toolbox meeting notes dated 4/11/2016 note Mr Naoupu as present. He signed the notes. That cannot have been on 4 November 2016, as the date would suggest because Mr Naoupu was dismissed in September 2016. Therefore, the notes must be of an 11 April meeting (11/4/2016). The notes read “check who needs boots – to be ordered this week Aaron, Matty, Pete”.

[24] In the diary notes on 27 April and 10 June, Aaron and Pete are noted as “grabbing boots today on the account”. There is no note of Mr Naoupu grabbing boots on the account. Certainly, Mr Naoupu did not have new safety boots by then.

[25] The 14 July diary notes read “Matty grabbing boots today on the account”. The diary of 23 August notes:

Matty knocked off early Monday, asked if he had gone in to get his boots. Not yet ran out of time.

[26] There is a further document that refers to steel capped shoes. It states:

PPE Equipment List – All equipment provided in property of WIS. Worn equipment will be replaced by WIS. Any equipment damaged through neglect or lost will be replaced by the employee, or replaced by WIS with deductions made against pay.

Steel capped shoes to be worn at all times when on construction site.

Example shoe:

[photograph]

Deek safety shoe (02 to 13) code: 402838 ...

Pete – supplied boots last year, if worn will replace 9

Tony Size 10

Aaron – supplied boots last year, if worn will replace 11

Dale Size 10

Matty Size 11

Tyron – supplied a pair of boots recently (11)

Ryan Size uk 7.5 ...

[emphasis added]

[27] That document is not dated. Ms Cook confirmed at the investigation meeting that the numbers beside the employee names are their shoe sizes. That shows that at some point WIS took Mr Naoupu’s shoe size from him. Mr Naoupu says at that stage, although he does not

remember when it was, he understood that WIS was going to purchase some safety footwear for him.

[28] On 5 August 2016, Ms Cook undertook health and safety induction training with Mr Naoupu², which was required before he could work on Mike Greer Homes' sites. The documentation states that high-viz vests and "steel capped footwear" are mandatory on site and puts the responsibility on WIS to ensure its workers wear them and other appropriate safety gear as required.

[29] The photograph of appropriate footwear for the Mike Greer sites is of safety boots, not safety shoes.

[30] Ms Cook's written statement states that Mr Naoupu worked on a Mike Greer site on 16 September and that one of Mike Greer's representatives, Dave Campbell, raised the issue of Mr Naoupu's lack of correct footwear with him. That is somewhat at odds with the letter of dismissal noting that the relevant dates were in August 2016.

[31] Whatever the dates were, it is likely that Mr Naoupu worked on Mike Greer sites on at least three occasions in August or September. On the first occasion Mr Naoupu says that he forgot to put his high-vis vest on and when that was drawn to his attention he went back to the van and got the vest and put it on.

[32] He says on the further two occasions, after he was reminded to put his hi-viz vest, on he was wearing his hi-viz vest. However, he says that on all three occasions he was wearing his worn safety shoes that were held together by tape and that one of the steel caps had come out. He denies telling anyone that he had safety boots in the car.

[33] Mr Naoupu says that Joe Andrews, his supervisor from WIS, was present on site on at least one of the three days. He says Mr Andrews did not talk to him about his footwear on site.

² Mr Naoupu had been due to attend a health and safety meeting early on 3 August but was late to work having dropped his children at school because his partner was due to have their baby.

[34] On 16 September 2016, WIS issued Mr Naoupu with a letter requiring him to attend a disciplinary meeting. The letter was issued by Matt Cook, WIS' General Manager, and Ms Cook's husband. No date was set for the meeting.

[35] The purpose of the meeting was to:

... determine [Mr Naoupu's] commitment to [WIS] ...
Specifically to be discussed:

Breaches in Health & Safety

Attendance

Communication/Contact with WIA Management

Failing to arrive at work without any communication

Failure to arrive at Health and Safety training without any communication

The above categories, warrants disciplinary action, up to and including dismissal.

I will conduct the Disciplinary Meeting.

...

Due to the nature of this meeting you are entitled to bring a support person to this meeting ...

[36] Mr Naoupu was encouraged to set a date for the meeting, and agreed to 21 September. However, having been unable to get any legal advice or representation or to obtain a support person, Mr Naoupu says he sought to defer the meeting until he could get either a representative or a support person. He says that Ms Cook told him the meeting had to go ahead and that his job was at risk if it did not.

[37] Ms Cook denies telling Mr Naoupu his job was at risk if they did not go ahead with the meeting on the 21st. She also denies he asked to defer the meeting.

[38] On 19 September, before the meeting but after the letter raising the allegations, Mr Campbell, a project manager from Mike Greer Homes, wrote an email to Mr Andrews:

As previously mentioned, had to speak to one of your guys on the site on 3 separate occasion.

No Hi-viz and steel cap boots each time, I asked him and she (sic) said they were in the car, but didn't bother getting them.

Goes without saying that these days it is compulsory to have these items on at all times.

It needs to be sorted ASAP it is not a good look for us or your company especially on Southern response jobs.

Thanks

The disciplinary meeting

[39] Mr Naoupu had neither a support person nor a representative at the meeting. Mr Cook did not conduct the meeting. Mr Andrews and Ms Cook attended instead. Ms Cook took notes.

[40] The notes show that Mr Naoupu was intending to “Record ... Meeting as Witness was unavailable”. As it happens, Mr Naoupu’s attempt to record the meeting failed. He disagrees with some aspects of Ms Cook’s notes.

[41] However, he agrees that at the meeting Mr Andrews told him that he had received an email from Mr Campbell stating he had:

... discussed with Matty H & S breaches on three occasions ... No Hi-Viz and inadequate footwear - no steel capped boots. Dave Campbell has stipulated that Matty Naoupu is no longer able to work on his projects.

[42] When asked for his view Mr Naoupu said he understood health and safety policies were required to keep workers safe. Mr Andrews also told him that companies were vigilant about health and safety to protect employees but also because there are “hefty fines for Health & Safety failures”.

[43] The notes reflect that it was discussed that Mr Naoupu had raised with Mr Andrews that his boots were worn and he needed a replacement pair. The notes also record that Mr Andrews had told Mr Naoupu that he could get a pair of boots up to the value of \$70 from NZ Safety on the “WIS account”.

[44] The notes record Mr Andrews saying that when Mr Campbell contacted him to tell him of Mr Naoupu’s safety breaches he raised them with Mr Naoupu. Mr Naoupu told him he had not had time to organise buying new boots due to family commitments. Mr Andrews said that he reiterated the importance of safety boots and told Mr Naoupu “to ensure he had new safety boots before his next job.”

[45] In the disciplinary meeting, Mr Andrews also told Mr Naoupu that he had looked at the calendar and that the workload was not:

great and there were many days when Matty was not at work and that there seemed to have been ample opportunities for Matty to have gone and purchased a pair of safety boots.

[46] Mr Naoupu explained that he was struggling for money and could not afford to pay the difference for the boots he needed that cost more than \$70. The notes reflect that Mr Andrews asked him if he had already told WIS about his problem with money. The notes say that Mr Naoupu said he had not. However, in the investigation meeting Mr Naoupu denied that and said he had already told Mr Andrews he could not afford new boots.

[47] Ms Cook told Mr Naoupu that he needed to communicate if he had problems with anything and not doing so and not doing anything about the safety boots was not acceptable.

[48] Mr Andrews said:

... Mike Greer Homes are 95% of our business and that Health and Safety breaches on Mike Greer projects reflected badly on WIS and that it was not good receiving an email from a project manager saying that Matty was no longer allowed on site.

The Health and Safety breaches have consequences that have impacted the company.

Joe stated to Matty that his decision to continue working, even though he knew that he was in breach of Health and Safety is not acceptable and that he should have refused to work and returned to speak with Joe. ...

Joe stated that there is never to be a [compromise] with Health and Safety, the reason WIS issues PPE to installers to protect them from high (sic) and it is of upmost (sic) importance that installer communicate and (sic) issues or problems with PPE and equipment so that WIS can action replacement and/or repairs.

Was there substantive justification for Mr Naoupu's dismissal?

[49] Health and safety breaches, particularly repeated ones, could amount to serious misconduct and be a sufficient reason to summarily dismiss an employee. The question is

whether in this case Mr Naoupu's initially not wearing his hi-viz vest and on three occasions "not wearing safety capped boots" were sufficient reason to dismiss him in all the circumstances.

[50] One of the matters apparently relied on to make the decision to dismiss was raised with Mr Naoupu for the first time in the disciplinary meeting by Mr Andrews. He said that Mr Campbell had banned Mr Naoupu from Mike Greer Homes' sites via email.

[51] If Mr Naoupu had been banned from the sites and Mike Greer Homes made up 95% of WIS work, as Mr Andrews said in the meeting, then WIS may have justified a decision to dismiss Mr Naoupu because of the health and safety breaches and the fact that WIS would not have enough work for him.

[52] However, the only email provided by WIS for the investigation meeting from Mr Campbell does not ban Mr Naoupu from Mike Greer Homes' sites. Instead, it says that the issue "needs to be sorted ASAP it is not a good look for [WIS]".

[53] I accept Mr Naoupu's evidence that he was wearing his safety shoes on those three occasions, albeit damaged and with one steel cap missing. I accept that meant that he was not wearing compliant and actually safe steel capped footwear. It is unclear to me whether that was the problematic issue or whether he was actually required to wear steel capped BOOTS on Mike Greer Homes' sites, as the induction material demonstrated.

[54] In addition, WIS had known since at least 22 March 2016 that Mr Naoupu needed a new pair of safety footwear. I accept that it repeatedly encouraged him to acquire some on its account to a maximum of \$70.

[55] There are two problems with WIS putting all the blame on Mr Naoupu for not getting new footwear. The first is that NZ Safety's cheapest boots once GST is factored in cost \$77.05³, which is \$7.05 more than the maximum WIS seems to have authorised its employees to put on its account. The second problem is that the shoes were not the kind of safety

³ \$67 plus 15% GST = \$77.05.

footwear Mr Naoupu required. He required steel capped boots as identified by his physiotherapist to him and to WIS.

[56] Also, it troubles me that WIS has put all of the blame for Mr Naoupu's lack of new safety footwear on Mr Naoupu when it also had health and safety obligations to provide adequate PPE for him.

[57] During the health and safety training specifically for Mike Greer Homes provided to Mr Naoupu by Ms Cook on 5 August 2016, she did not address the issue of Mr Naoupu's footwear. That is despite WIS knowing about him needing new footwear and ostensibly having been so concerned about that it dismissed him some weeks later.

[58] It is clear that workers under s 45 of the Health and Safety at Work Act 2015 (H & S Act) have duties towards their own health and safety. Mr Naoupu had a duty to:

- (a) take reasonable care for his or her own health and safety; and ...
- (c) comply, as far as the worker is reasonably able, with any reasonable instruction that is given by the PCBU⁴ to allow the PCBU to comply with this Act or regulations; and
- (d) co-operate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.

[59] However, WIS does not seem to have considered whether its own obligations, under the same legislation, required it not just to tell Mr Naoupu to obtain new footwear but to actually supply it to him when it was clear he had not obtained it himself. For example, s 36 of the H & S Act requires a PCBU, so far as is reasonably practicable, to ensure the health and safety of its workers while they are working.

[60] In addition, as set out in Ms Tucker's submissions, the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016, which came into force on 4 April 2016, make it the PCBU's obligation to provide personal protective equipment to their worker. The only exception is when a worker genuinely and voluntarily chooses to provide his own protective equipment for reasons of his own comfort and convenience. However, in

⁴ Person conducting a business or undertaking

that case the PCBU must be satisfied that the PPE provided by the worker is suitable and in good working order.

[61] In Mr Naoupu's case, WIS was aware from at least 4 April 2016 that Mr Naoupu's shoes had become inadequate. It knew his shoe size. However, it failed to provide him with suitable safety footwear as part of the PPE both it and Mike Greer Homes required him to wear.

[62] A fair and reasonable employer would always follow its legal obligations towards its employees. I do not consider an employer who fails in its own legal obligations to ensure a worker's safety could ignore its part in the health and safety breaches, and put the entire responsibility on the employee leading to his dismissal.

Was the process fair?

Did WIS sufficiently investigate its allegations against Mr Naoupu?

[63] This is unclear from the letter inviting Mr Naoupu to the disciplinary meeting. Nor do disciplinary meeting notes set out exactly what all the allegations were. However, the ones apparently relied on to decide to dismiss Mr Naoupu were the health and safety breaches of not wearing a hi-viz vest on one occasion and not wearing suitable footwear on three occasions.

[64] It is not clear that WIS knew exactly what three days/dates Mr Campbell's complaints related to when it undertook the disciplinary meeting. However, it did know by the time it issued the dismissal letter.

Did WIS raise its concerns with Mr Naoupu before dismissing him?

[65] Before the disciplinary meeting, WIS noted a number of its concerns generally in the notice to attend a disciplinary meeting. Three of the concerns included the word "communication" and the further concern was attendance. Overall, those concerns gave rise to WIS being concerned to ensure Mr Naoupu's "commitment to" WIS. However, there were

no specifics given about the concerns such as setting out what the “breaches in Health & Safety” were and on what dates these occurred.

[66] I am concerned that Mr Naoupu was not given an opportunity during, or directly after, the short period over which the three events of concern happened to discuss the problem with his employer. It is unclear why there was a delay of 20 days, or nearly three weeks during which Mr Naoupu continued to work for WIS with inadequate footwear, before he was notified of the problem and invited to discuss it.

Did WIS given Mr Naoupu a reasonable opportunity to respond to its concerns?

[67] WIS held a meeting with Mr Naoupu. However, he was not represented and did not have a support person. WIS did not alert Mr Naoupu to the fact he was entitled to have a representative at the disciplinary meeting. I prefer Mr Naoupu’s evidence that he asked to delay the meeting to seek representation or support, which was refused. That is because Ms Cook’s understanding, as recorded in her meeting notes, seems to be that because Mr Naoupu did not have a “witness” that was made up for by allowing him to record the meeting. There is no mention in the notes of Mr Andrews or Ms Cook asking Mr Naoupu if he was prepared to continue without a representative or a support person, and him confirming that he was.

[68] Mr Naoupu is not an articulate or verbally confident person. I am satisfied that he was not comfortable undergoing the disciplinary meeting unrepresented and unsupported and only agreed to do so because Ms Cook represented it as almost non-negotiable if he wanted to retain his job.

[69] For that reason, and the fact that he did not have the specifics of WIS’s concerns in advance of the meeting I do not consider WIS gave Mr Naoupu a *reasonable* opportunity to respond to its concerns.

Did WIS genuinely consider Mr Naoupu’s explanation before dismissing him?

[70] It is difficult to say whether WIS genuinely considered Mr Naoupu’s explanation that he could not afford to pay extra for the safety footwear he needed. WIS concluded that he had “knowingly continued to work ... without adequate PPE”. It seems to have concluded that

because Mr Naoupu did not communicate that reason to it before the disciplinary meeting, despite the fact that Mr Naoupu considered Mr Andrews was “approachable for discussions”, and Mr Naoupu considered the meeting had been “clear and fair” and “peaceful”, it was entitled to dismiss Mr Naoupu.

Conclusion on personal grievance

[71] The defects in WIS’s process, specifically not giving Mr Naoupu the details of its concerns before the meeting and not allowing him a reasonable opportunity to be represented or supported, were more than minor and resulted in Mr Naoupu being treated unfairly.

[72] That defective process coupled with WIS’s own shortcomings in not complying with its regulatory obligation to supply Mr Naoupu with PPE that was suitable and in good repair, mean that WIS did not act as a fair and reasonable employer could have acted in all the circumstances at the time. Therefore, WIS unjustifiably dismissed Mr Naoupu.

Remedies

Compensation

[73] Mr Naoupu claims that WIS should pay him compensation for his humiliation, loss of dignity and injury to his feelings caused by the dismissal. Mr Naoupu was dismissed mere weeks after his and Ms Seumanutafa’s youngest child was born and admitted to the neonatal intensive care unit in mid-August 2016.

[74] Mr Naoupu says that his dismissal made it “an extremely tense and stressful time”. Ms Seumanutafa was off work due to their new baby and so he was “under extreme pressure to find work”. He says he felt responsible for not being able to support his family and that in the initial stages they had to rely on a foodbank and defer paying their rent. Mr Naoupu also said he found it humiliating not being able to financially support his family over the time Ms Seumanutafa should have been able to stay on parental leave. Instead, she had to return to work early. He says his dismissal caused such stress in their relationship that they considered separating.

[75] Ms Seumanutafa's evidence was that Mr Naoupu's dismissal was a nasty, demoralising and negative experience for him and for their relationship.

[76] I gave the parties my initial view that I considered Mr Naoupu had suffered a moderate amount of loss or damage for which he should be compensated. I stand by that assessment. At the time, on 22 June 2017, I indicated that I would assess compensation as being in the \$8,000 to \$10,000 range.

[77] However, since then on 31 October 2017 Chief Judge Inglis issued her determination in *Archibald v Waikato District Health Board*, in which she observed⁵:

Assessing compensation is an inexact science. This can cause difficulties in terms of ensuring a degree of consistency across like cases, while reflecting the individual circumstances of the particular case before the Court. In arriving at an appropriate figure I have considered the extent of the injury suffered ... and where it sits in the spectrum of cases routinely coming before the Court. In this regard, I have found it helpful in this particular case to consider the challenging task of assessing compensation in terms of a broad analytical framework of three bands:

- band 1 involving low level loss/damage;
- band 2 involving mid-range loss/damage; and
- band 3 involving high level loss/damage.⁶

[78] The Chief Judge assessed Ms Archibald's loss as being around the middle of band two and awarded her compensation of \$20,000.

[79] Based on the evidence I have heard, I assess the injury suffered by Mr Naoupu as a result of WIS's unjustified dismissal to sit around the beginning of band 2. I consider compensation of \$13,000 is reasonable to compensate Mr Naoupu, subject to contribution.

Lost wages

[80] Section 123(1)(b) of the Act allows me to provide for the reimbursement by WIS of the whole or any part of wages Mr Naoupu lost as a result of his grievance. Section 128(2) of

⁵ [2017] NZEmpC 132.

⁶ *Archibald*, paragraph [62].

the Act provides that I must order WIS to pay Mr Naoupu the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration.

[81] WIS submitted at the investigation meeting that Mr Naoupu's behaviour after his dismissal meant that he had not adequately mitigated his loss.

[82] I consider Mr Naoupu adequately mitigated his loss by seeking alternative work as soon as possible. The fact that he did not get beyond a short job trial with one employer and was dismissed under the 90-day trial period by another subsequent employer cannot be held against him in his attempts to mitigate his loss.

[83] It is very difficult to assess accurately what Mr Naoupu's three months' ordinary time remuneration should have been without completing the investigation meeting on 19 February and establishing whether there was a guarantee of 40 hours work per week and whether Mr Naoupu should have been paid more than he was.

Contribution

[84] Section 124 of the Act requires me to consider what contribution Mr Naoupu made to the circumstances leading to his personal grievance. If I consider that his behaviour was blameworthy enough, the section requires me to reduce the amount of remedies for which he is eligible.

[85] I consider Mr Naoupu played a part in the circumstances leading to his dismissal. He bore some responsibility for ensuring WIS was aware of the reason for his inability to go and buy the boots. That is particularly so if he was spoken to three times about the issue when on the Mike Greer site. I consider his contribution was blameworthy and should be reflected in a 20% reduction in his remedies.

[86] Therefore, the amount of compensation payable is \$9,600 under section 123 (1)(c)(i) of the Act. There will be a 20% reduction in lost wages also.

Costs

[87] Costs are reserved until the determination has been made on the wage arrears claim and the amount of lost wages. I note that Mr Naoupu is legally aided.

Christine Hickey
Member of the Employment Relations Authority