

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 240
3124383

BETWEEN

DARREN PYNE
Applicant

AND

INVACARE NEW ZEALAND
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Paul Pa'u, advocate for the Applicant
Emma Butcher, counsel for the Respondent

Investigation Meeting: 3 and 4 March 2022

Submissions: 10 March 2022 from the Applicant and 11 March 2022
from the Respondent

Determination: 7 June 2022

DETERMINATION OF THE AUTHORITY

- A. Invacare New Zealand Limited acted unjustifiably in making its decision to dismiss Darren Pyne on the grounds of redundancy.**
- B. In settlement of his personal grievance for unjustified dismissal, Invacare must pay Mr Pyne the following sums within 28 days of the date of this determination:**
- (i) \$27,500 in reimbursement of lost remuneration; and**
 - (ii) \$8,500 as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Costs are reserved with a timetable for memoranda if an Authority determination is needed.**

Employment Relationship Problem

[1] On 2 April 2020 Invacare New Zealand Limited (Invacare) gave Darren Pyne notice of dismissal from his role as its Rentals Operations Manager. He was dismissed on the grounds of redundancy. His employment ended on 1 May 2020.

[2] Mr Pyne raised a personal grievance about Invacare's decision and how it was made. He said a consultation process about restructuring of some positions, begun in late February 2020, was not conducted fairly and Invacare had also later failed to fairly consider his application to be redeployed to a new position of Service Manager. Instead another employee, whose previous role was also disestablished in the restructuring, was appointed to that new position.

[3] In his application to the Authority about his grievance Mr Pyne said Invacare's decisions were made for ulterior motives, resulting from personality differences between him and his line manager. He sought findings that Invacare had acted unjustifiably and had breached its good faith obligations to him. If those findings were made he asked the Authority to order Invacare to pay him remedies of lost wages and distress compensation along with a penalty for a breach of good faith.

[4] Invacare denied Mr Pyne's allegations. The company said the decision conveyed to Mr Pyne on 2 April by its Vice President and General Manager Asia Pacific, Geoff Purtill, was made for genuine business reasons, without predetermination or ulterior purpose, after a fair process in which Mr Pyne's input was sought and considered.

The Authority's investigation

[5] Because of Covid-19 response restrictions in place at the time witnesses and representatives attended the Authority investigation meeting by audio-visual link. The following witnesses joined the meeting by Zoom connection to answer questions, under affirmation, from me and the parties' representatives:

- Mr Pyne;
- Mr Purtill;
- Invacare's Project Leader Sharelle Lincoln, whose role as the company's General Manager - Rentals (and Mr Pyne's line manager) was also disestablished in the restructuring process;
- Invacare's Customer Experience Manager Nicolette Steele;

- Invacare’s planning and fulfilment manager Muhammed Dar, who was warehouse team leader at the time of Mr Pyne’s dismissal; and
- Invacare’s former human resources manager David Cotter.

[6] Mr Pyne, Mr Purtill, Ms Lincoln, Ms Steele and Mr Dar had each provided a written witness statement. Mr Cotter appeared in answer to a witness summons and gave oral evidence only. His employment with Invacare ended in April 2020 under the terms of a negotiated exit agreed in March. His evidence related to discussions between managers about the restructuring proposal and earlier concerns about Mr Pyne’s conduct or performance.

[7] At the conclusion of the investigation meeting the representatives gave brief oral submissions on the issues for resolution and lodged fuller written submissions shortly afterwards.

[8] This determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. As permitted under s 174E of the Employment Relations Act 2000 (the Act) it does not set out an account of all evidence or submissions received. Rather, conclusions reached are explained by reference to the key facts and in light of the parties’ submissions. Those conclusions are reached on the civil standard of proof, that is the balance of probabilities. It is an assessment, from the evidence, of what was more likely than not to have happened.

The issues

[9] The issues for resolution were:

- (a) Was Invacare’s decision to dismiss Mr Pyne on the grounds of redundancy, and how that decision was made, what a fair and reasonable employer could have done in all the circumstances at the time, including consideration of:
 - whether those decisions were predominantly motivated by genuine business reasons, not an ulterior purpose concerning Mr Pyne’s performance; and
 - whether he was fairly consulted about the proposal for change and his feedback fairly considered;
 - alternatives to redundancy and for redeployment to other positions were fairly considered; and

- (b) If Invacare's actions were found to have unjustifiably disadvantaged and/or dismissed Mr Pyne, what remedies should he be awarded, considering:
- Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
 - Compensation under s123(1)(c)(i) of the Act?
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Pyne that contributed to the situation giving rise to his grievance?
- (d) Did actions by Invacare breach its good faith obligations and, if so, should a penalty be imposed under s4 of Act?
- (e) Should either party contribute to the costs of representation of the other party?

The test of justification

[10] The Authority does not substitute its own judgement for that of the employer when called upon to assess decisions by an employer that a position has become superfluous to its business needs and that the worker holding that position had to be dismissed because there were no suitable alternative roles for that person in the business. Rather, when considering whether such decisions were justified, the Authority must determine whether the employer's actions, and how the employer acted, met the objective statutory standard of being what a fair and reasonable employer could have done in all the circumstances at the time.¹

[11] Where questions are raised about the commercial rationale for the employer's decision, or ulterior motives are alleged for the selection of a position and a worker for redundancy, the Authority's evaluation may consider whether the employer's decisions were made for genuine business reasons and "not used as a pretext for dismissing a disliked employee".²

[12] The Authority must also consider whether the employer's process for making and carrying out that decision was fairly conducted. Fairness, in this context, includes meeting the statutory good faith obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's

¹ Employment Relations Act 2000, s 103A.

² *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made. How much must be done to meet those obligations of fairness and good faith will vary to some degree with regard to the resources available to the particular employer.³

[13] Where the evidence discloses the employer's motive for its decisions had mixed its business needs with underlying performance or personality concerns about the worker, the employer bears the burden of persuading the Authority that the predominant reason were the needs of the business. Any 'paper trail' generated at the time of making those changes may assist with identifying the motives for removing or changing job positions in the employer's workforce.⁴ If the predominant motive is found to be removal of what the Court of Appeal has described as "a disliked employee", the dismissal will be unjustified.

How Mr Pyne came to be dismissed

[14] Mr Pyne began working for Invacare in August 2019. He was initially employed on a fixed term employment agreement with the job title of Rentals Business Operations Manager. The role was created because the general manager of Invacare's rentals business in New Zealand, Ms Lincoln, had been seconded to work in an international team implementing an information technology project in the Asia Pacific region of Invacare's global business (of which the New Zealand company is a subsidiary).

[15] The rentals business involved delivery and collection of equipment Invacare hired out for use in a range of rehabilitation and support services in the health and aged care sectors, such as wheelchairs, adjustable beds, patient lifts and walking aids.

[16] Mr Pyne's role included managing staff at the warehouse where the equipment was stored and drivers who picked up and delivered the equipment to customers. These staff included Mr Dar who was the warehouse team leader.

[17] During the terms of his initial agreement Mr Pyne spoke with Mr Purtill about the prospect that his role might continue and also expand into work on developing the

³ Employment Relations Act 2000, s 4(1A) and s 103A(3)-(5).

⁴ See *Rillstone v Product Sourcing International 2000 Ltd* (ERA, Auckland AA167/07, 7 June 2007) at [34] and the cases cited there.

rentals business in Australia. Mr Pyne was interested in that possibility, partly because he had a small, unrelated business of his own based in Queensland which he continued to operate while he worked for Invacare. He understood from that discussion that he was likely to be offered employment on an ongoing basis. In late January he was given a further fixed-term employment agreement to consider but, on inquiry by him, this proved to be a misunderstanding. He was then provided with a “permanent employment agreement” in late January 2020 with the same position title. He signed the agreement on 13 February 2020.

[18] In late February 2020 Mr Purtill announced Invacare was considering a restructuring of a number of roles in its Australian and New Zealand businesses with the aim of improving its growth in the Asia Pacific region. The proposal included disestablishing four roles in New Zealand, a larger number of roles in Australia and relocating some roles to Thailand.

[19] This initial proposal did not include changes to any roles in the New Zealand rentals business but on the morning of 10 March 2020 Ms Lincoln arranged a meeting with Mr Pyne to advise him of a further proposal for change. The new proposal included disestablishing the GM Rentals role she held and Mr Pyne’s Rentals Operations Manager role. The reporting line for two other roles, including the one held by Mr Dar, was proposed to change to Ms Steele as customer experience manager.

[20] Other staff were told about the proposal in a staff meeting that afternoon, with a week allowed for feedback and comment about it.

[21] Before that staff meeting Mr Pyne had talked with Mr Dar about the proposal. During that discussion Mr Dar told Mr Pyne about a conversation he had with Mr Purtill the day before and which Mr Dar suggested might be a reason for the change proposed for Mr Pyne’s role. Mr Dar said Mr Purtill had asked about a complaint Mr Dar made about Mr Pyne in December 2019. Mr Dar had complained to Ms Lincoln about comments Mr Pyne made to him at work about Muslim girls wearing hijab. Mr Dar said he was offended by Mr Pyne’s comments. Ms Lincoln had referred the complaint to Mr Cotter who spoke to Mr Dar and to Mr Pyne about it in early January 2020. Mr Dar said he had heard nothing more about the complaint since then, until Mr Purtill’s query to him on 9 March.

The 10 March discussion between Mr Pyne and Mr Purtill

[22] Mr Pyne then asked to meet Mr Purtill urgently. They discussed the proposal and Mr Dar's complaint. A note Mr Purtill made that same day and sent to Mr Pyne by email recorded they had talked about the proposal for change and what Mr Purtill described as "racial vilification". His note recorded that Mr Purtill referred to Invacare not making the progress needed in its business with district health boards and that the present structure was not working well as Mr Pyne and Ms Lincoln had different views.

[23] Mr Purtill's note also said he had received a Workplace Culture Survey Report. The report included a statement from Mr Dar describing comments said to have been made by Mr Pyne. Mr Purtill said those comments, if they were correctly reported:

could be deemed as racial harassment due to the fact that it could be seen as offensive and unreasonable and relates to a prohibited ground of discrimination, i.e. discrimination on the basis of race.

[24] Mr Pyne told Mr Purtill that Mr Cotter had talked with him in January about Mr Dar's complaint. Mr Pyne said he had apologised to Mr Dar.

[25] Mr Purtill's note contained the following description of what he said to Mr Pyne about what he would do about that issue:

I have to decide how I am going to deal with this now, as it has potentially serious ramifications for the business and, if it occurred, could constitute serious misconduct.

As you know, we are part way through the restructure process and it is proposed your role be impacted. Rather than get into this process now, I would prefer to see how the restructure process unfolds for you and your role. If you do continue in your employment post this restructure process, then we will need to close this off.

I have made no conclusions about the allegation relating to the racist remarks, i.e. whether or not you did say them and if so, how that should be dealt with, and that will not impact how I view the restructure process and its outcomes but I do need to raise this with you now so that you know it is something I will have to address in the future if you remain with us.

[26] Mr Purtill also instructed Mr Pyne not to discuss the topic with anyone else at Invacare unless he got Mr Purtill's prior approval to do so. He said Mr Pyne could talk about it confidentially with an independent advisor or support person.

The workplace culture report

[27] Mr Purtill had received the report he was referring to in late February 2020. In early December 2019 he had arranged for an investigator to interview a range of staff because of issues identified when a complaint about Mr Cotter from an employee was being investigated. Seventeen current employees were interviewed. Those interviewees included Ms Lincoln, Mr Dar and Mr Cotter.

[28] The report included criticisms from some interviewees about Mr Cotter and how he carried out his human resources role. At one point the report described “the majority of the evidence obtained [as] directed towards Mr Cotter”. This included concerns expressed by Ms Lincoln about what she said were “underhand comments” Mr Cotter made about her and other people. Ms Lincoln also told the investigator that the drivers in the rentals team all knew Mr Cotter and Mr Pyne were “buddies and bullies”.

[29] The report included a section setting out criticisms Mr Dar made about Mr Pyne under the heading “Evidence – unreasonable working conditions”. These related to changes Mr Pyne had made after taking up his position in August 2019. This included a change to the arrangements for deliveries and collections. The change reduced the hours for which drivers were paid, consequently reducing their weekly pay, and requiring drivers to use their personal mobile phones for some work tasks.

[30] Mr Purtill did not tell Mr Pyne about that section of the report when he spoke to him on 10 March. He referred only to the section which included the following passage under the heading “Evidence – possible racial discrimination”:

Racial comments – Mr Dah (sic) stated that Mr Payne (sic) made a racist remark regarding Muslims. Mr Dah (sic) informed Ms Lincoln and Mr Cotter at the time, but says no action has been taken to date. Mr Payne (sic) told Mr Dah (sic) “*If it’s in my hands I would ban that hijab thing for Muslims because that’s why we can’t recognise them. If it was in my hands, there would be no Muslims in schools here ‘cause they use our funds and stuff. Why can’t they get involved in the same culture?*”

Responding to the restructuring proposals

[31] In the following two weeks Mr Pyne provided two written responses to Invacare’s restructuring proposals – one on 13 March to the proposal circulated on 10 March and then again on 20 March to a further iteration of proposed change that Mr Purtill circulated on 19 March. The 19 March version proposed creating some new

roles, including a service manager and a business development manager for new business in the Asia-Pacific region.

[32] On 27 March Mr Purtill met with rental teams staff and advised them that changes would proceed along the lines of the last version of the proposal. This included disestablishing the general manager role held by Ms Lincoln, the rental operations manager role held by Mr Pyne, a team leader role held by Mr Dar and a project associate role held by another employee. The rentals team was effectively to come under the management of Ms Steele under an expansion of her role as customer experience manager.

[33] Mr Pyne met with Mr Purtill later on 27 March to discuss the outcome and what roles he could apply for. Mr Purtill told Mr Pyne he could apply for the service manager role. However, as explained in his written witness statement, Mr Purtill did not expect Mr Pyne would be successful in such an application:

Given the issues that had arisen in the short time he had been with us, I was not convinced that Mr Pyne would be a suitable candidate for the role. There were the concerns that others had raised with me during the consultation process about his skills and competencies and I had not seen an improvement in the key metrics for the Rental contract under his leadership. There was some disharmony between the Rental drivers, operations and Mr Pyne. I knew he shared a similar view to Mr Cotter, that the drivers were privileged and did not recognise the benefits we provided to them in their roles. This was not a view I shared.

[34] Mr Pyne's personal grievance, and the Authority's investigation of it, is not one where the answer lies in a closer examination of what Invacare did to meet the notice and consultation requirements in considering restructuring of positions. What was done, by providing information to employees about the options and giving time to ask questions and provide feedback met, at least, the surface requirements for a fair process. Mr Pyne's own evidence showed he took the opportunity to provide written feedback and met with Mr Purtill to ask questions and discuss what proposed changes might mean for him and the business. There were, however, more fundamental matters of concern about how the decisions about his employment was made, as discussed in the remainder of this determination.

No interview for Service Manager role

[35] Three employees asked to be considered for the Service Manager role. Whoever was appointed to the position would report to Ms Steele and she arranged the interviews

of those three employees, to be held on 1 April 2020. Mr Purtill attended the interview of the other two candidates but, at the time scheduled for Mr Pyne's interview, Mr Purtill was busy on a business call. After waiting for him for a short time Ms Steele adjourned the interview.

[36] There was contradictory evidence from Ms Steele, Mr Pyne and Mr Purtill about what happened next and how it came to be that Mr Pyne was not interviewed at all for the role.

[37] Ms Steele said she had suggested rescheduling the interview but Mr Pyne told her that he would talk to Mr Purtill himself. She said Mr Purtill later asked who her preferred candidate was and she had assumed he had already talked with Mr Pyne. She also said that she thought she had told Mr Purtill that she had not gone ahead with an interview of Mr Pyne on her own. When asked by Mr Purtill, Ms Steele told him that one of the other employees was her preference. That employee had worked for the company some years earlier in a similar role and had recently returned to work there. She described him as "a standout" from all the interviews of employees she had conducted for that and other roles.

[38] Mr Purtill's evidence was that he had intended to be involved in Mr Pyne's interview but was held up by another meeting on that day. He did not know Ms Steele had not gone ahead with the interview or that Mr Pyne said he would talk directly to Mr Purtill. Mr Pyne did not see him to arrange a new interview time.

[39] Mr Pyne denied he told Ms Steele he would see Mr Purtill about a new interview time but did confirm that Mr Purtill was on the phone when he walked past his office after leaving the interview with Ms Steele that did not go ahead.

[40] From Invacare's point of view Mr Purtill was at cross purposes with Ms Steele when he asked about her preferred candidate, believing she had interviewed all three.

Insight from managers' views

[41] Emails exchanged by managers within Invacare's senior leadership team during the March restructuring process included some candid comments on their views of Mr Pyne, his performance and whether he should stay in Invacare's employment.

[42] Those emails, and the evidence as a whole, also disclosed two other significant tensions between managers which were relevant to the outcome for Mr Pyne and the reasons for it.

[43] The first tension was between Ms Steele and Ms Lincoln, who initially had different views on what was needed in any restructuring. Ms Steele had only recently joined Invacare in late 2019 but had developed a firm view that the rentals business was not operating effectively. This was partly because Ms Lincoln was working on the international IT implementation project and not able to oversee management of the rental business as she otherwise would have done. In part it was because, as Ms Steele saw it, Mr Pyne was not performing the role well in his dealings with some customers and arranging deliveries.

[44] Ms Lincoln had worked for Invacare in various roles for more than 20 years. She did not want her role as general manager of rentals disestablished as she had expected, at that time, that her role in the international project would last only six months or so. She was however concerned about how both Mr Pyne and Mr Cotter performed their roles. This contributed to the second tension in discussions between managers about what should be done to restructure the roles.

[45] Ms Lincoln's concerns about Mr Cotter were identified in her comments reported in the workplace culture report, noted earlier in this determination. She said her concerns about Mr Pyne arose from around three to four weeks after he started the job. Members of the rentals team talked with her about their "gripes" over changes he made. She also talked with Mr Pyne about concerns that he arrived at the office after drivers left to do deliveries each day and was sometimes not easily contactable.

[46] However there were two other instances of concern to Ms Lincoln related to what she described as diversity issues and the psychological safety of Invacare employees.

[47] One concerned the complaint made to her in December 2019 by Mr Dar, as described earlier in this determination.

[48] The other instance concerned comments Ms Lincoln said Mr Pyne made during a conversation between Invacare employees attending after-work drinks at a local bar in December 2019. Britain's referendum decision to leave the European Union was

due to be implemented in the following month and the topic of Brexit arose. Mr Pyne is from England but had worked in New Zealand for around 20 years at that time.

[49] According to Ms Lincoln, Mr Pyne referred to immigrants, and then specifically “black people”, taking jobs in Britain and said Brexit would “sort that out”. Ms Lincoln said she was uncomfortable and embarrassed by a negative racial reference of that kind as three of the Invacare employees present were of Maori descent. She later spoke to those three people and apologised for what they had heard.

[50] In his evidence to the Authority Mr Pyne accepted there was a discussion about Brexit, in which Ms Lincoln disagreed with his opinion, but he emphatically denied there was any discussion about what he described in his oral evidence at the Authority investigation meeting as “coloured people coming into the UK and taking jobs”.

[51] Mr Cotter and Mr Purtill were in the Invacare staff group at the bar that evening. Mr Purtill agreed he heard the topic of Brexit discussed but was not involved in every conversation between the eight or so staff in the group and did not recall hearing any comment about “black people”. Mr Cotter said he recalled Mr Pyne “being pro-Brexit in that conversation” which included references to “flows of migration around Europe” but no reference to black people.

[52] Ms Lincoln raised her concerns with Mr Pyne about the conversation at that December event soon after they returned from the Christmas holiday period. A file note she made on 6 January 2020 referred to an email she sent Mr Darren after “a discussion regarding his office hours and inappropriate comments that he has made regarding his opinion about different cultures, once in front of myself and [another employee] and again to Muhammad Dar”.

[53] Her email referred to talking “about time keeping and sharing of opinions around cultural differences” and continued:

We have agreed that you will start your day in the office at 9am and if you are running late or attending meetings offsite, you will inform the teams so that they know your whereabouts.

Regarding our discussion about different cultures. Invacare employs a wide range of different ethnicities and gender groups. At no time is it acceptable to discuss a personal opinion regarding this in the workplace or in work related situations. This is covered in our harassment policy – 1990.

[54] Against that background regarding tensions between managers over operation of the business and concerns over Mr Pyne's performance or conduct, the following comments from emails exchanged between managers in March 2020 were relevant to his personal grievance claim.

[55] On 5 March Mr Purtill sent Mr Cotter an email after speaking to Ms Lincoln. He said they had "agreed that things have not been working out as well as it could". He wrote that Ms Lincoln was "adamant that [Mr Pyne] is not the right person for the role and I would have to agree". He said he believed Mr Cotter was "now coming to the realisation as well". He said Ms Lincoln had suggested that Ms Steele could do more "and following on from your suggestion the other day I suggested that we disestablish the Ops Manager role". He said that would allow for Ms Lincoln to remain in the "GM rentals" role doing special rental projects while other staff reported directly to Ms Steele in her Customer Experience role.

[56] In her oral evidence at the Authority investigation Ms Lincoln confirmed Mr Purtill had correctly described her as being "adamant" that Mr Pyne was not the right person for the role and she had suggested expanding Ms Steele's role to include managing the rental business. She said she held that adamant view of Mr Pyne because "he did not fit the business values" of Invacare.

[57] Mr Cotter had responded to Mr Purtill's 5 March email by saying one of either Ms Lincoln or Mr Pyne's roles "should be deleted from the structure" but that if Ms Lincoln left "a performance management process should commence with the current Operations Manager to effect either correction or exit if necessary as end of process".

[58] A further email from Mr Cotter, on 8 March, included this comment:

The next consideration is how to avoid the possible constructive dismissal claim from [Mr Pyne] if his job is removed from structure. He is not on notice as part of the current change proposal so the move you are suggesting cannot be announced to the business without further consultation.

[59] Mr Purtill responded that he took Mr Cotter's "point about the potential for a constructive dismissal regarding [Mr Pyne]" and said "we're now going to have a change process for Rentals".

[60] In an email to Ms Steele on 9 March Mr Purtill wrote that managing rentals was a challenging role but he thought she could be successful. He continued:

A viable alternative might be having the Ops manager role retained and having that report to you, and then managing [Mr Pyne]. Unfortunately that would mean you inherit a people problem that needs to be addressed immediately.

[61] Ms Steele responded within a few minutes:

In all honesty I don't want to manage [Mr Pyne] – having worked with him over the past three months I don't think he is the right person and we have way too much to get done to try and performance manage him.

[62] Mr Purtill replied that he thought he had “a path forward” which would leave Ms Steele in the proposed role but that he would need to review all proposals over the following week and talk with Mr Pyne, Ms Lincoln and Mr Cotter.

[63] The following day, 10 March, Mr Purtill announced the revised proposal which included disestablishing the roles held by Ms Lincoln and Mr Pyne and expanding Ms Steele's role to include the rentals business and some other work.

Assessing the “mixed motives” for Invacare's decision

[64] The weight of evidence clearly established that, among the changes to other positions, Mr Purtill's decision to disestablish the Rentals Operation Manager role held by Mr Pyne was made with mixed motives.

[65] There was a coherent rationale for consolidating management of the rental business under the control of Ms Steele in her Customer Experience manager role. However Mr Purtill could also have opted to maintain the Operations Manager role held by Mr Pyne and having him report to Ms Steele.

[66] The email exchange outlined above shows that prospect was discounted for reasons directly related to the views Mr Purtill and other managers held about Mr Pyne's performance and conduct. Ms Steele identified his performance as unsatisfactory. Ms Lincoln had clear views about whether he met the “business values” of Invacare because of his conduct in discussions with Mr Dar and Brexit and the dissatisfaction employees in the rentals business had expressed to her about changes Mr Pyne had made.

[67] On the balance of probabilities, Mr Purtill's decision to disestablish the rental operations manager role was not only to improve management of that part of Invacare's business but clearly also for the mixed motive of removing the holder of that position

who Mr Purtill knew was strongly disliked by other senior managers and employees and who had not improved “key metrics”. His description of those factors was candidly described in the excerpt from his written statement referred to earlier in this determination on why he considered Mr Pyne was not a suitable candidate for redeployment to a newly created service manager role.

[68] In oral submissions Invacare accepted this was “a kind of mixed motives type situation” but argued its business needs were the predominant reason for the decisions made, not dislike of Mr Pyne for reasons related to his performance or conduct. This submission could not, however, clear the hurdle of the evidence of the strongly expressed views of Ms Steele and Ms Lincoln in their communication to Mr Purtill and the likely effect that had in view of the final outcome. Other evidence indirectly supporting that conclusion was Mr Purtill’s deferral of any inquiry into the concerns raised by Mr Dar until after the outcome of the restructuring process and the failure to interview Mr Pyne for the service manager role. While the omission of an interview could have been an administrative oversight, the evidence of the views of Mr Purtill and Ms Steele established their views of his performance to date showed there was no realistic prospect of appointment to that role anyway.

[69] There were clearly issues regarding Mr Pyne’s performance and conduct that Invacare could reasonably have raised with him as a disciplinary matter. Mr Purtill indicated that was so when he advised Mr Pyne on 10 March that he would address one such issue if his employment survived the restructuring process. However Mr Purtill also assured Mr Pyne that the concern about his remarks to Mr Dar would not affect that process and its outcomes. For the reasons given, that particular concern, among others, clearly did affect the outcome. Mr Pyne did not have a fair opportunity to address those concerns before the relevant decisions about the future of his employment were made.

[70] Invacare’s consideration of the future of the role had become, predominantly, about the incumbent and his performance, not the position and its business needs for it. As a result, Invacare’s decision to disestablish the position held by Mr Pyne and its failure to complete a fair process in considering the prospect of his redeployment to a new position was not what a fair and reasonable employer could have done in all the circumstances at the time. Those were unjustified actions and Mr Pyne had established his personal grievance on those grounds.

[71] These were more than procedural flaws. They went to the substance of the decision to disestablish the position. This is apparent from the email exchanges Mr Purtill had with Mr Cotter and Ms Steele about the possibility that the operations manager position could continue under Ms Steele's direction. This was ruled out, not primarily for good business reasons but because of personality concerns about Mr Pyne's performance and conduct in his role which he had not had a fair opportunity to address before that conclusion was reached.

Remedies

Lost remuneration

[72] Mr Pyne's employment ended on 1 May 2020. He said he then went without gaining new employment for 20 months, only starting a new position in Brisbane in January 2022. In that time he said he had applied for more than 600 positions and got more than 50 interviews but only one job offer. However he was also involved over those months in developing his own business which markets wireless lighting products here and in Australia. He said he could not be exact about how he split time in working on the business and applying for new employment. He said he had drawn funds from the business to meet mortgage payments and got an income of around \$40,000 from it. He had also worked for about 12 weeks helping a friend in a plant nursery.

[73] His evidence was sufficient to establish that, under s 128(2) of the Act, Invacare should be ordered to pay Mr Pyne three months' ordinary time remuneration in reimbursement of income lost as a result of his personal grievance. Relying on the annual salary of \$110,000 stated in the employment agreement he signed on 13 February 2020, the amount to be ordered for three months' loss was \$27,500.

[74] Mr Pyne's evidence did not establish that a sum greater than that should be ordered as compensation for lost remuneration under s 128(3) of the Act. As Invacare submitted Mr Pyne had not provided sufficient evidence about his attempts to mitigate that loss or the extent of the time that he had spent on his own existing business. Some of his job search needed to be conducted in a period of Covid-19 restrictions here and in Australia, but his skill set and experience was in areas of the economy where demand for staff had remained high.

Compensation for humiliation, loss of dignity, and injury to feelings

[75] Mr Pyne gave limited evidence about the effects on him of Invacare's decision to dismiss him for redundancy and how it had gone about making that decision. He said he found it hard to get over how he had been treated and it had damaged his confidence and affected his sleep and appetite. He did not give evidence of any ongoing effects on him.

[76] An appropriate award to compensate for the effects on him, accepting his evidence, was \$10,000.

Reduction of remedies for contributory conduct

[77] The Authority is required, when deciding on the nature and extent of remedies awarded for a personal grievance, to consider the extent that Mr Pyne's actions contributed to the situation giving rise to his grievance and, if those actions require, reduce the remedies accordingly.⁵

[78] Two issues arose for consideration under this heading.

[79] Firstly, Mr Pyne's performance in managing operations of the rental business, and the strong views that managers formed of its adequacy, clearly contributed to the situation in which Invacare decided to disestablish his position.

[80] Secondly, Mr Purtill had put Mr Pyne on notice that his conduct in a discussion with Mr Dar would have to be addressed if his employment survived the restructuring. This contributed to the situation in which conclusions adverse to Mr Pyne were drawn by Invacare senior managers.

[81] While Ms Lincoln had talked to Mr Pyne about concerns over how he was carrying out his work and managing people in his team, including changes to drivers' work arrangements, none of those topics had been elevated to the level of a formal performance review or requiring a disciplinary inquiry during the eight months of his employment. Accordingly, it was not established that Mr Pyne's performance of his role was deficient to a blameworthy level that required a reduction of the remedies awarded to him.

⁵ Employment Relations Act 2000, s 124.

[82] The evidence regarding the complaint from Mr Dar was of a different degree. Mr Purtill accepted, in answer to questions at the investigation meeting, that Mr Dar's complaint was mislabelled in the workplace culture survey report as "racial comments" and "possible racial discrimination". What Mr Pyne was alleged to have said, causing offence to Mr Dar, related to practices associated with a religion followed by people of many ethnicities and cultures in many countries. Such comments could be an instance of religious and cultural intolerance but, as reported, was not what Mr Purtill had called "racial vilification" or "racial harassment" in his email to Mr Pyne on 10 March.

[83] There was also reason to be cautious about the extent of the comments made. According to an email Mr Purtill sent to Mr Dar on 10 March 2020, he had spoken with Mr Dar that day about the comments made by Mr Pyne in December 2019. Mr Dah had given an account of Mr Pyne's comments then when interviewed for the workplace culture survey in January 2020. Mr Dah said the survey report correctly reported what he told the investigator about the comments Mr Pyne made about Muslims. That extract from the report is set out earlier in this determination. It refers to the wearing of hijab, Muslims and schools.

[84] By the time a witness statement from Mr Dar for the Authority investigation was lodged in November 2021, along with the statements of other witnesses who also still worked for Invacare, his account said the comments made by Mr Pyne referred to Muslims and terrorists.

[85] Mr Pyne accepted he had talked with Mr Dar about schools and the wearing of hijab but said it was "taken out of context [and] there was nothing about terrorism or anything derogatory".

[86] However part of the context in which that discussion occurred in December 2019 was the then relatively-recent occurrence of the terrorist attack on two mosques in Christchurch on 15 March 2019.

[87] In those times of understandably heightened sensitivity to matters of personal belief and safety, Mr Pyne had caused offence to Mr Dar by pressing him on topics that were not related to work and which he was not required to explain to Mr Pyne or anyone else. Mr Pyne also, when the topic was raised with him by Ms Lincoln in January 2020 told her he would apologise to Mr Dar. Relying on Mr Dar's evidence, it appears Mr Pyne had not done so then.

[88] A manager acting responsibly in that situation would have taken more care not to cause offence to an employee reporting to him or, on learning some offence about a personal matter had been caused, have taken steps to address and resolve it with that employee. Mr Pyne's failure in that respect was blameworthy conduct contributing directly to the situation giving rise to his grievance. A 15 per cent reduction in the remedy awarded to Mr Pyne as compensation for humiliation, loss of dignity and injury to his feelings is an appropriate means of marking that contributory conduct. That compensation is to be reduced from \$10,000 to \$8,500.

No penalty in relation to good faith obligations

[89] The failure by Invacare to openly address with Mr Pyne its concerns about his performance and conduct were breaches of its good faith obligations to him. Those shortcomings have been addressed in the remedies awarded to him for his personal grievance. No further penalty is necessary.

Costs

[90] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[91] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Robin Arthur
Member of the Employment Relations Authority

⁶ www.era.govt.nz/determinations/awarding-costs-remedies.