ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION (REFER PARAGRAPH 7, 9, 38, 41, 43, 44, 58, 71 & 80)

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2013] NZERA Wellington 101
5385000

BETWEEN	ALAN ROBINSON Applicant
A N D	PACIFIC SEALS (NZ) LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Tania Kennedy, Counsel for Applicant John Tannahill, Counsel for Respondent
Investigation Meeting:	4 April and 30 April 2013 at Wellington
Submissions received	30 April 2013
Date of Determination:	19 August 2013

DETERMINATION OF THE AUTHORITY

Prohibition on publication

[1] Evidence heard in this investigation meeting included confidential medical information about the applicant Mr Alan Robinson. It is not necessary for these details to be published.

[2] I am satisfied that it is appropriate in the circumstances of this matter to exercise the power in clause 10(1) of Schedule 2 to the Employment Relations Act 2000 and prohibit publication of all information about Mr Robinson's health status.

Employment Relationship Problem

[3] Mr Alan Robinson was employed as a Sales Engineer with Pacific Seals (NZ) Limited (Pacific Seals) for almost two years until his employment was terminated on 30 June 2012 due to medical incapacity.

[4] Pacific Seals is a small enterprise specializing in the importation and distribution of premium quality sealing products for the hydraulic and pneumatic industries. Its offices and warehouse are located at 71 Cuba Street, Petone.

[5] Pacific Seals' office frontage is predominantly made of large glass panes spanning from the footpath to the joinery where the roof begins. The building is situated 8.2 metres from the road with a car parking area immediately in front of the entrance.

[6] On 22 June 2011 a driver of a Volkswagen car had a serious medical seizure while travelling on High Street, Petone. The vehicle crossed the intersection opposite Pacific Seals' premises, mounted the kerb and was travelling at high speed as it traversed through Pacific Seals' parking area. The car smashed through the office glass frontage, demolished a built-in reception counter, and entered the office area before it coming to a rest when it hit a concrete wall separating the office area from the warehouse behind.

[7] Mr Robinson was sitting approximately 8 metres back from the building's entrance at his desk when he was hit by the vehicle.

[8] Mr Robinson remained conscious while he was attended by emergency services and was admitted to hospital soon after. Since that time he has had eleven operations and other various medical treatments and interventions. Mr Robinson was discharged from hospital just over 4 weeks later and required the use of a wheel chair for the following 5-6 months.

[9] Mr Robinson suffered a personal injury for which he had cover under the Accident Compensation Act 2001, and he did not return to work.

[10] Some eleven months after the accident, on 25 May 2012 Mr Robinson met with Mr Graham Wilton, Chief Executive of Pacific Seals. There is a dispute about

the content of their conversation however it is accepted that towards the end of the meeting Mr Robinson was provided with a letter which advised the following:

> Dear AJ
>
> I have recently spoken with your ACC Case Manager,[…] who informs me that there is no end in sight to your re-habilitation and indeed there are planned operations on your legs that are still looming.
> It seems clear that you will not be able to work at full capacity for at least another 3 months.
>
> I have not had contact from you for quite some time now, in spite of my continued support and my attempts to contact you. I get snippets of information about your progress via others whom you have contact with. I am now at a stage where I can no longer keep your job open. I will need to employ a new staff member permanently to replace your position, which means your employment will need to end.
>
> I am still terribly upset about the situation that occurred on 22 June last year, and wish to continue support for your unfortunate predicament that was such a freak accident, but nothing can go on forever. As you are not able to work and have had all your entitlements paid out, there is no notice and no final pay calculation. We will of course continue to top up your ACC benefit by 20% until termination, which will be 30 June 2012.
>
> Yours sincerely
> Graham Wilton
> PACIFIC SEALS (NZ) Ltd
>
> PS Once you are fully recovered and able to carry out full duties, then I can promise you a job, should I have a suitable vacancy.

[11] By letter dated 6 June 2012 Mr Robinson advised that he considered the work place was unsafe and raised personal grievances as regards his dismissal and sought financial compensation. On 20 September 2012 he lodged a statement of problem alleging;

- "breaches of good faith;
- "personal grievances of unjustified actions to his disadvantage in relation to the letter issued in a procedurally and substantially unfair manner on 25 May 2012 and unjustified dismissal procedurally and substantively unfair manner on 30 June 2012;
- "breaches of an implied obligation to provide a safe and healthy workplace"

[12] Mr Robinson seeks $25,000 in compensation for hurt and humiliation associated with his grievances, reimbursement of three months' wages and the difference between ACC entitlements and his contractual wages for the period following his dismissal until the Authority's investigation. He also claims $20,000 in

general damages against Pacific Seals for breach of an implied term to maintain a safe workplace, and penalties for breach of good faith.

[13] Pacific Seals denies that it is liable for any of Mr Robinson's claims and that it acted as a fair and reasonable employer.

[14] Pacific Seals says that it kept Mr Robinson's position available for him for 11 months following the incident of 22 June 2011 and that it relied on advice given by ACC on 21 and again on 24 May 2012 that it would be some time before Mr Robinson would be fit to return to work. It says in these circumstances it was unable to hold his job open any longer.

[15] Pacific Seals further states that no health and safety concerns were ever brought to its attention by Mr Robinson until he raised claims almost 12 months after the accident and after his employment was terminated.

The Authority's investigation

[16] The parties were unable to resolve their differences in mediation and the issues are left now to be determined by the Authority.

[17] On 4 April 2013 Mr Graham Wilton and Mr Michael Wilkin, Office Manager, gave written and oral evidence on behalf of Pacific Seals. Mr Robinson gave written and oral evidence on his own behalf.

[18] The investigation was not concluded and arrangements were made for further hearing of evidence. On 30 April 2013 the investigation resumed. A site visit of Pacific Seals' premises was conducted with the parties' representatives. Health and safety consultant, Ms Helen Parkes, provided an opinion report and presented at the Authority's investigation. In compliance with a Witness Summons, Ms Trevana McLean, Store Manager, Pacific Seals attended the investigation and helpfully answered questions from the Authority and from the parties' representatives.

[19] Pursuant to s. 174 of the Employment Relations Act (the Act) I have not set out a record of all of the evidence or submissions provided by the parties, but have given careful consideration to all information provided.

Issues

[20] The issues that the Authority is required to determine are:

(a) Was Pacific Seals in breach of s. 4(1A) obligations of good faith to:

(i) be active and communicative and/or

(ii) provide access to and allow comment on information relevant to the continuation of Mr Robinson's employment?

(b) Was Mr Robinson unjustifiably disadvantaged and/or unjustifiably dismissed?

(c) Is Mr Robinson's claim for general damages barred by the Accident Compensation Act?

(d) Should penalties be awarded?

Was Pacific Seals in breach of its duty to act in good faith?

[21] Mr Robinson says Pacific Seals was in breach of its good faith obligations in two separate ways. Firstly, he alleges Pacific Seals breached s. 4(1A)(b) of the Act by failing to be responsive and communicative with him during his convalescence.

[22] Secondly, he says Pacific Seals was in breach of s. 4(1A)(c) and did not provide him with access to information relevant to the continuation of his employment at the time of his dismissal. He says he had no opportunity to comment on the information before it made its decision to terminate his employment.

[23] As to Mr Robinson's first allegation, the dispute appears to relate to the level of engagement each had with the other towards the end of 2011 onwards.

[24] It is apparent that in the 5 to 6 months or so following the accident there was on-going direct contact and communication between Mr Robinson and Pacific Seals' senior management. Mr Wilton assisted with some immediate financial concerns and visited Mr Robinson in hospital on at least 5 occasions and his residence on 3 occasions.

[25] Mr Wilton says in the months following the accident he left messages on Mr Robinson's mobile phone but says these were not returned. In or about early 2012 he became aware he was calling a mobile phone number no longer used by Mr Robinson. He says he left several messages on the updated number for Mr Robinson but says these too went unanswered. I note an ACC case manager's file note dated 24 February 2012 records Mr Wilton's expressed difficulty in contacting Mr Robinson.

[26] Mr Wilkin also reports that he left 3 or 4 messages on Mr Robinson's voice mail but that Mr Robinson did not respond.

[27] Mr Robinson agrees that he did not advise Mr Wilton of his new phone number but says Pacific Seals had details of his land line, email and physical addresses and could have contacted him by these means.

[28] From January 2012 onwards it appears communication between Mr Robinson and Mr Wilton was undertaken by using Ms McLean as an intermediary, whereby she passed messages between the two.

[29] The obligation to be responsive and communicative is reciprocal and applies to all parties in an employment relationship.

[30] It is apparent that there was some genuine confusion by Mr Wilton as to Mr Robinson's current cell phone number. Mr Robinson's evidence is that he had assumed that his new cell phone number had been forwarded to Mr Wilton. I accept Mr Wilton made genuine attempts to regularly contact Mr Robinson but when messages were not returned and in circumstances where he was aware that Ms McLean and Mr Robinson were routinely in contact, a pattern developed whereby each of the parties communicated with Ms McLean and allowed her to pass information between them. I am satisfied that Pacific Seals met its obligation be responsive and communicative in these circumstances.

[31] I return to the issue of whether Pacific Seals complied with its duty of good faith in my analysis as to whether he was unjustifiably disadvantaged.

Was Mr Robinson unjustifiably disadvantaged and/or unjustifiably dismissed?

[32] It is accepted law that an employer is not required to keep a job open indefinitely for an employee who is unable to perform the role they were employed to

undertake because of sickness or incapacity[1]. This does not however entitle an employer to ignore its obligation to treat an employee fairly when determining whether to terminate his or her employment. Justification for terminating employment where an employee is ill or incapacitated is required as with any dismissal.

[33] There is no definitive length of time which allows an employer to justifiably dismiss an ill or incapacitated employee if the time frame is exceeded. Where an employer seeks to justify a decision to terminate an employee due to medical incapacity, the question is whether the employer *"can fairly cry halt"*[2]

[34] The duration for which incapacity should reasonably be accepted by an employer will vary according to the particular circumstances of the matter, including the nature of the employee's position and length of employment, the employee's illness and prospect for recovery, the nature and resources of the employer's business and its operational needs.

[35] The obligation of an employer is to be fair to an employee while balancing considerations of the economic impact on its business operations[3].

Were there substantive grounds to terminate Mr Robinson's employment?

[36] Mr Wilton agrees he told Mr Robinson in the aftermath of the accident on several occasion that he would hold his job open for him. He says he assumed Mr Wilton would be well enough to return to work in 6-9 months but acknowledges that he did not discuss this matter with Mr Robinson.

[37] ACC file notes reveal a moderate degree of contact between ACC and Pacific Seals.

[38] On 21 May and again on 23 May 2012, Mr Wilton was contacted by Mr Robinson's case manager. His evidence is that the information conveyed to him in these discussions triggered the decision to terminate Mr Robinson's employment.

[39] The file notes of these conversations record the following:

21/05/2012

[1] *Canterbury Clerical Workers IUW v Andrews & Beaven* Ltd [1983] ACJ 875
[2] *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124,
[3] *Barry v Wilson Parking New Zealand (1992) Ltd* [1998] 1 ERNZ 545

> …
> *Contacted manager Graham and confirmed we are now waiting for an elective surgery date. Alan is FUF4 until 31/07/12 as per ACC18 details and recovery post surgery not yet clear until surgery has been done. I agreed to contact manager Graham once a surgery date is confirmed and that Alan was more than happy for me to discuss his case with Graham. Graham was fine with this, thanked him for his time and call ended.*
>
> *23/05/2012*
>
> …
> *Contacted manager Graham and confirmed elective surgery date as 14/06/12 and contact after that time with a further PICBA[5] update for Alan. Graham was fine with this, thanked him for his time and call ended.*

[40] Mr Wilton says that the file note records do not disclose the full extent of his discussions with Mr Robinson's case manager. He says that on 21 May 2012 it was made very clear to him that it may be a further 6 to 8 months before Mr Robinson would be fit to return to work and that he was advised that Mr Robinson's rehabilitation would be back to *"square one"* following surgery.

[41] Mr Robinson's case manager did not provide evidence to the Authority and there is no certain way to independently establish what exactly was communicated to Mr Wilton on 21 and 24 May 2012 as regards Mr Robinson's prognosis. There was evidence before the Authority of communications held on 25 February 2012 between Mr Wilton and an HR consultant whereby Mr Wilton states he had been advised that it may be 8 months before Mr Robinson would return to work. I conclude that there is some doubt cast by the evidence as to when Mr Wilton formed a view about the length of time it would take before Mr Robinson could return to work.

[42] I accept that the file notes of 21 and 24 May 2012 establish at that point in time ACC estimated a further 3½ weeks before Mr Robinson underwent surgery[6], he remained fully unfit for work until 31 July 2012, and that his post-surgery recovery period was unknown.

[43] Mr Wilton's evidence is that Mr Robinson's absence had led to increased pressure on staff, albeit that a long serving employee, Mr Stephens, who had planned to retire in mid-2011, agreed to perform Mr Robinson's role on a part time basis in the interim. Mr Wilton says that in or about April 2012 Mr Stephens could no longer keep working and retired in early May 2012. He says Mr Stephens' retirement left

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[4] An acronym used by ACC; "Fully unfit"
[5] An acronym used by ACC; "Personal injury caused by accident"
[6] Mr Robinson's surgery was performed 6-7 weeks later on 3 July 2012

Pacific Seals with a staffing shortage and that it was not reasonable or practicable to arrange for a temporary person to perform Mr Robinson's role as the position required technical knowledge of the products, which takes time to learn.

[44] I accept that following Mr Wilton's discussions with Mr Robinson's case manager he had legitimate concerns about the length of time Mr Robinson needed for recovery post-surgery and/or whether additional surgery would be required. He says *"there appeared to be no end in sight"* as to when Mr Robinson would likely be able to return to work.

[45] Having considered Pacific Seals' limited resources as a small business with respect to staffing, alongside the 11 month duration of Mr Robinson's incapacity at that date, the length of time before planned surgery, as well as on-going uncertainty about when Mr Robinson would be fit to return to work, I consider it was reasonable of Pacific Seals to conclude it could no longer continue to hold open Mr Robinson's position. I find there were substantive grounds to terminate Mr Robinson's employment.

Did Pacific Seals act in a procedurally fair way?

[46] On Wednesday 23 May 2011 Mr Wilton overheard Ms McLean conversing on the phone with Mr Robinson and asked her to confirm with Mr Robinson his availability to receive a visit on Friday 25 May 2012. He says he told Ms McLean to tell Mr Robinson that he wanted to discuss *"our predicament as a result of* [Mr Stephens'] *retirement".*

[47] No notes were taken during the meeting of 25 May 2012. Mr Wilton says the meeting lasted just short of an hour. He says he advised Mr Robinson that ACC had told him it would take 6 to 8 months before he would be able to return to work and says Mr Robinson agreed, stating he had a similar expectation. His evidence is that he discussed Pacific Seals' need to employ someone to replace Mr Stephens, and that he was not able to guarantee a position would be available for him once fully recovered but if a vacancy was available when the time came he would offer him a role. He reports Mr Robinson showed no surprise, that he said he realised it was going to come to this and that ACC had already initiated discussions with him about retraining in another field. He says Mr Robinson understood the situation and on this basis he gave Mr Robinson a letter of the same date advising that his employment would terminate

on 30 June 2012. Mr Wilton handwrote at the bottom of the letter "*AJ, Please keep in touch, I do care"* prior to leaving.

[48] Mr Robinson's evidence is in stark contrast to that of Mr Wilton. He says the meeting was brief, lasting no longer than 20 minutes. He says they talked about Mr Stephen's recent retirement. Mr Robinson says at no point in the conversation was he advised of the possibility of termination until he opened the envelope and read the letter following Mr Wilton's departure from the house.

[49] Not only must Pacific Seals' decision to dismiss be based on reasonable grounds but the way Pacific Seals undertook to make the decision must be fair.[7] An appraisal of how an employer acted requires the Authority to consider whether the employer observed minimum standards of procedural fairness as set out at s. 103A(3). These minimum standards involve an assessment of Pacific Seals' actions as follows:

(a) whether, having regard to it resources available, Pacific Seals sufficiently investigated its concerns as regards the continuation of Mr Robinson's employment; and

(b) whether Pacific Seals properly raised the concerns with Mr Robinson;

(c) whether Pacific Seals gave Mr Robinson a reasonable opportunity to respond to the concerns during the meeting of 25 May 2012;

(d) whether Pacific Seals genuinely considered Mr Robinson's explanations.

[50] In a recent case the recent case of *Angus and McLean v Ports of Auckland Ltd*[8], the full Court stated:

> "…in a case of medical incapacity, it is well established that an employer must investigate, as well as it is reasonably able to do so, the circumstances of an employee absent from work long-term and without apparent certainty of return. Included in this investigation must be the employer's concerns about that situation. Next, such concerns, and the issues generally, must be raised with the employee before any decision is taken to dismiss or disadvantage the employee. Then, it is well-established that in such circumstances the employer must give the employee a reasonable opportunity to respond to these matters. Finally, the employer's consideration of them before dismissing or disadvantaging an employee must be undertaken genuinely. "

[7] *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 33,
[8] *Angus and McLean v Ports of Auckland Ltd* [2011] NZEmpC 160 at [53]

[51] Mr Wilton accepted in evidence that prior to the commencement of the meeting Mr Robinson was not told directly of the purpose of the meeting, the subject matter that Mr Wilton wanted to discuss, or that it may result in his dismissal. He further agrees that during the meeting he did not use words or phrases such as "termination of employment" or "dismissal".

[52] Having questioned both Mr Robinson and Mr Wilton I think it is more likely that the meeting was a difficult one for Mr Wilton, and in these circumstances he spoke in euphemisms (similar to the use of the phrase *"our predicament"* when scheduling the meeting) to describe his intention to discuss Mr Robinson's employment. In this way I find it was not made clear, in a way that Mr Robinson could understand, that Pacific Seals was contemplating an end to his employment. This is not to say that I consider Mr Wilton sought to mislead or deceive Mr Robinson but rather the language used by Mr Wilton was insufficiently detailed and/or indirect.

[53] I have no doubt that Pacific Seals had genuine grounds for forming a view that it could no longer continue to hold Mr Robinson's job open for him and that its view was reasonable in the circumstances. It is apparent that Pacific Seals had considerable empathy for Mr Robinson following the accident. It sought to support both him and his family as evidenced by payment of the difference between ACC compensation and his actual earnings, and well as providing other practical assistance.

[54] The difficulty for Pacific Seals centres around the process it undertook to dismiss Mr Robinson. In this respect it would have been prudent for Mr Wilton to have conducted the meeting of 25 May 2012 as a platform to advise Mr Robinson of ACC's view, inform him of Pacific Seals' concerns for on-going employment and allow an opportunity for Mr Robinson to comment on ACC's information and/or provide additional medical information, before reaching a decision to terminate his employment.

[55] I am unable to conclude that the meeting process Pacific Seals undertook to dismiss Mr Robinson was in accordance with minimum standards of procedural fairness. Nor do I consider that the procedural defects were minor such that they did not result in Mr Robinson being treated unfairly.

[56] There may be an argument that there was nothing Mr Robinson could say, given his medical status, that was likely to change the outcome of Pacific Seals'

inquiry. However the failure to provide Mr Robinson with an opportunity to comment precluded the possibility that he may have had some information which would have persuaded Pacific Seals to an alternative outcome.

[57] I find the process undertaken to dismiss Mr Robinson was not in all the circumstances the actions of a fair and reasonable employer and I find Mr Robinson was unjustifiably dismissed.

Was Mr Robinson unjustifiably disadvantaged?

[58] Mr Wilton acknowledges that during the meeting of 25 May he did not supply Mr Robinson with the information he received from ACC on 21 or 24 May 2012.

[59] Mr Wilton states that obtaining information from Mr Robinson had been difficult. There is an inference that if Pacific Seals did not properly appraise itself of Mr Robinson's health status, then its failing was contributed to in part by Mr Robinson. Mr Wilton pointed to a discussion with Mr Robinson where he offered to pay the difference between ACC funded care and private health care. Both parties agree that Mr Wilton advised that he did not wish to speak to the surgeon about Mr Robinson's private health matters and asked Mr Robinson to make inquiry about how transfer to a private health provider could be advanced. It was unclear whether Mr Robinson followed up this line of inquiry with ACC.

[60] I accept that there were discussions between the parties about how Mr Robinson's recovery could be expedited and Mr Wilton's offer of financial assistance to achieve an earlier recovery for Mr Robinson is commendable. However it is clear that this discussion was most likely held in November 2011, six months before Mr Robinson's dismissal.

[61] The law obliges an employer to advise an employee of any relevant information on which it relies when forming a decision to terminate employment at the time the decision is being considered. I am unable to conclude that a failing by Mr Robinson to pursue an inquiry in November 2011 justifies Pacific Seals' omission in May 2012 to advise of information on which it has formed a view to dismiss. Mr Robinson was unjustifiably disadvantaged by Pacific Seals' failure in this respect and was in breach of its obligation to act in good faith under s. 4(1A)(c).

[62] Some evidence was given in respect to Pacific Seals' willingness or otherwise to consider whether it was appropriate for Mr Robinson to return to work on light duties during his convalescence. Despite questioning no clear dates were supplied as to when the issue was discussed although there is a suggestion that Mr Robinson was confined to his was wheelchair when the matter was first canvassed and therefore prior to 2012. However I accept that Mr Robinson was unjustifiably disadvantaged by Pacific Seals' on 25 May 2012 by its omission to address whether his dismissal could be avoided by a return to work on light duties.

Is Mr Robinson able to claim for general damages for breach of an implied duty to provide a safe workplace?

[63] Mr Robinson alleges Pacific Seals was in breach of an implied contractual obligation to provide a safe and healthy work place and seeks $20,000 in general damages. He gave evidence alleging generally that Pacific Seals did not have a satisfactory hazard management system and referred to a letter sent to his solicitor from the Ministry of Business, Innovation and Employment (MBIE)[9] which advised that Pacific Seals should have notified the accident under the Health and Safety in Employment Act. I note the correspondence reports that MBIE determined that the circumstances of the matter did not warrant enforcement action.

[64] Mr Robinson's evidence focused on his view that from *"day one"* of his employment he had concern about the level of protection Pacific Seals' glass frontage afforded staff from vehicle movement in the car parking area. He pointed to the erection of a metal railing in front of the offices by Pacific Seals in the aftermath of the accident as evidence of Pacific Seals' culpability.

[65] He says in December 2010 and again a few months later in Ms McLean's presence, he raised concerns with Mr Wilton that the glass frontage might become broken or smashed by customers' cars when parking, and that he requested safety protection. He says Mr Wilton was unresponsive to his concerns on both occasions. Mr Robinson accepts he did not pursue his concerns with his manager or colleagues or raise these during his convalescence until after he was dismissed.

[66] Mr Wilton absolutely denies that Mr Robinson ever raised concerns about the building's front glass panes. He says the first time he heard that Mr Robinson had

[9] Letter dated 15 April 2013

concerns of this type was when he received notice of a personal grievance. He reports that the building is the same as thousands of other buildings throughout New Zealand. He acknowledges that there was no formal hazard identification system at Pacific Seals but says that the business is small, with no in-house HR capability. He says Pacific Seals' staff are intelligent and responsible and common sense prevails. If there is a potential hazard, employees either fix it or report it.

[67] Ms McLean confirmed Mr Wilton's evidence that no incident had ever occurred with the glass frontage in the ten years that Pacific Seals had operated from the premises. She says that a brief conversation lasting a few minutes occurred between Mr Robinson, Mr Wilton and her when observing a customer reverse into a customer car park. She says there was casual speculation about what would happen if the car touched the window but does not recall Mr Robinson raising concerns about the car park or requesting safety protection.

[68] An employer's obligation under the Health and Safety in Employment Act is to do what is practicable to prevent and/or minimise known and unacceptable risks. Foreseeability of harm and its risk is important when considering whether an employer has failed to take all practical steps to overcome it.[10]

[69] Mr Robinson says that Pacific Seals should have provided protection such as placing bollards in front of the building and that it was practicable to do so. However I have no evidence to support a conclusion that safety rails or bollards would have prevented the accident and Mr Robinson's subsequent injuries from occurring. Nor am I able to accept that Pacific Seals could have reasonably foreseen the events that led to Mr Robinson's injuries.

[70] Even if I did accept that Pacific Seals had failed to maintain a safe workplace, and that Mr Robinson was injured as a result of that breach (which I do not), claims in respect of personal injury are limited by s. 317 of the Accident Compensation Act 2001 which states:

> *s.317(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of –*
>
> *(a) personal injury covered by this Act; or*
>
> *(b) personal injury covered by the former Acts.*

[10] *Attorney General v Gilbert* [2002] 2 NZLR 342

> *(2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from, -*
>
> *(a) any damage to property; or*
>
> *(b) any express term of any contract or agreement (other than an accident insurance contract under the Accident Insurance Act 1998); or*
>
> *(c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract of service.*
>
> *(3) However, no court, tribunal or other body may award compensation in any proceeding referred to in subsection (2) for personal injury of the kinds described in subsection (1).*
>
> *…*

[71] The Court of Appeal in *Brittain v Telecom Corporation of New Zealand Ltd*[11] found the effect of provisions equivalent to s. 317 (but not identical)[12] was that claims for compensatory damages were barred where the injury was covered by the then relevant personal injury compensation legislation.

[72] Medical information was provided to the Authority to evidence both physical and psychological affects Mr Robinson experienced following the accident. On questioning Mr Robinson testified he wants compensation for *"stress, pain and suffering, and the way its* [the accident] *made me feel".* He says Pacific Seals is to blame in this regard.

[73] Section 317(1) of the Accident Compensation Act 2001 prevents Mr Robinson from bringing any proceeding in respect of his unless s 317(2) applies, which is further subject to the provisions contained in s 317(3). Section 317(2) does not prohibit proceedings arising from any express term of an agreement, (such as an employment agreement) or a personal grievance.

[74] Mr Robinson's employment agreement does not contain an express term about what or how Pacific Seals will deal with health and safety matters and no reference to agreed compensation arising from a personal injury is made.

[75] Mr Robinson has been in receipt of earnings related compensation and for his rehabilitation. I regard Mr Robinson's claim, no matter how it has been framed, is in

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[11] [2002] 2 NZLR 201
[12] Section 14, Accident Rehabilitation and Compensation Insurance Act 1992

reality a claim for damages arise directly or indirectly out of his personal injury. Mr Robinson's claim for general damages is declined.

Remedies

The grievances

[76] Mr Robinson seeks $10,038.48 (gross) being the sum of the 3 months' lost wages. He also seeks the sum of $6,692.32 for the difference between his salary and the level of compensation he has received from ACC for the period following his dismissal until the date of the Authority's investigation.

[77] Pacific Seals paid Mr Robinson's salary in the week following the accident as it was obliged to do. Following on, Mr Robinson received ACC entitlements up to including the first day of the Authority's investigation. I understand from his evidence that he has recently commenced an ACC work trial programme.

[78] I do not accept Mr Robinson's claim for lost wages. The level of ACC entitlement is set according to legislation. Mr Robinson received earnings related compensation following the accident on the basis he was not able to work due to his personal injury. Mr Robinson has been compensated accordingly. Further, I regard his claim for the shortfall between compensation and salary is in effect a claim for damages arising directly or indirectly out of his personal injury and is barred. I decline to make an order in response to these aspects of his claims.

Compensation

[79] There is no evidence to support an argument that Mr Robinson contributed in a blameworthy way to the situation that led to his unjustified dismissal.

[80] I have taken a global approach to an assessment of compensation for humiliation, loss of dignity, and injury to the feelings associated with Mr Robinson's personal grievance claims. This is because the actions associated with findings that he was unjustifiably disadvantaged form an integral part of the factual matrix which leads to my finding that he was unjustifiably dismissed.

[81] Mr Robinson gave evidence about the distress on his family, the effects on his health and his anxiety. An award of compensation pursuant to s. 123(1)(c)(i) must be

related to the effect of the dismissal and/or disadvantage and not for distress caused by the injury which is subject to the accident compensation system.

[82] I accept that news of his dismissal *"came out of the blue"* for Mr Robinson and that he was shocked when he realised his job was gone particularly when he had relied on Mr Wilton's promises that his job would be held open for him. I accept he felt distressed by the suddenness of his dismissal in the circumstances and I award $5,000 as compensation for his distress associated with his unjustified dismissal.

Should penalties be awarded against Pacific Seals for breach of good faith?

[83] A high statutory threshold is required before a penalty will be awarded for breach of good faith. In the context of Mr Robinson's claims s. 4A provides that a failure to comply with the duty of good faith, must be deliberate, serious and sustained.

[84] I do not accept that Pacific Seals' failure to provide the information it had received from the ACC case manager as behaviour that can be regarded as deliberate, serious and sustained. It was apparent from Mr Wilton's evidence that he was unaware of his obligation to produce such information. I regard Pacific Seals' omission as inadvertent and I decline to order penalties in the circumstances.

Costs

[85] Costs are reserved.

Summary of findings and orders

[86] Mr Robinson was unjustifiably disadvantaged and unjustifiably dismissed. Pacific Seals is ordered to pay $5,000 pursuant to s. 123(1)(c)(i) as compensation for humiliation, loss of dignity, and injury to feelings associated with those actions. Mr Robinson has received earnings related compensation and is not entitled to reimbursement of wages. Mr Robinson's claim for general damages is declined. An order for penalties for breach of good faith is also declined.

Michele Ryan
Member of the Employment Relations Authority