

**Attention is drawn to the order
prohibiting publication of
certain information in this
Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 259
3170544

BETWEEN TYI
Applicant

AND MILNE CONSTRUCTION
LIMITED
Respondents

Member of Authority: Philip Cheyne

Representatives: Nick McKessar, counsel for the Applicant
John Shingleton & Rachael Creagh, counsel for the
Respondent

Investigation Meeting: 16 February 2023 in Christchurch

Submissions Received: 16 February and 7 March 2023 from the Applicant
16 February 2023 from the Respondent

Date of Determination: 23 May 2023

DETERMINATION OF THE AUTHORITY

Non publication

[1] Both sides made submissions about permanent non-publication. The applicant sought to continue the interim non-publication order, based on the reasons advanced originally. The respondent opposed a permanent non-publication order and referred me to *HWE v Kenneth Karunanayake* as an example of the relevant principles.¹ To

¹ *HWE v Kenneth Karunanayake* [2022] NZERA 209.

paraphrase, open justice is a fundamental common law legal principle.² The principle can be displaced for sound reasons in a particular case.

[2] The Authority's power to prohibit publication is expressed at clause 10 of Schedule 2 to the Employment Relations Act 2000. The Authority's discretion includes ordering that the name of a party not be published. The discretion must be exercised in accordance with principle.

[3] I accept that there is mention of TYI's diagnosis in the evidence. It was appropriate to discuss that in this determination, given it was relevant to assessing remedies. However, TYI's situation is similar to other applicants who need to bring evidence of and prove harm to support a claim for compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. The evidence involves disclosure of otherwise confidential information. The grounds advanced here are not sufficient to displace the principle of open justice. I decline the application for permanent non-publication.

[4] However, I will continue the interim non-publication order for 28 days to allow the applicant the opportunity to challenge the decision regarding permanent non-publication. I will refer to the applicant as TYI for current purposes.

Employment relationship problem

[5] James Milne is the director of and a shareholder in Milne Construction Limited. I will refer to the respondent as MCL or the company. TYI was employed by MCL as an apprentice builder from November 2020 until January 2022. There was an incident between Mr Milne and TYI on Friday 14 January 2022 during a work-related social function. Over the weekend, TYI messaged Mr Milne to say he was terminating his employment relationship as a result of the incident.

[6] On 22 February 2022, in correspondence from his lawyer to MCL, TYI raised a personal grievance claim of constructive dismissal as a result of the 14 January 2022 incident. Reference was also made to earlier issues.

[7] TYI by his amended statement of problem asks the Authority to resolve his personal grievance claim regarding the 14 January 2022 incident. TYI also says that MCL breached his employment agreement by breaching its implied health and safety

² *Erceg v Erceg* [2016] NZSC 135.

obligations resulting in him being exposed to asbestos at work. Compensation for lost wages and benefits and for humiliation and injured feelings is sought. There was also a claim for unpaid holiday pay.

[8] MCL acknowledges that there was an incident on 14 January 2022, says it was very brief, that those involved were intoxicated and that Mr Milne contacted TYI the next day to “clear the air” before work would resume on Monday, but TYI’s response was to resign. TYI did not engage with Mr Milne’s requests to meet to discuss matters. MCL says that TYI is not entitled to any remedies.

[9] Despite mediation, matters were not resolved.

The Authority’s investigation

[10] TYI and MCL each discontinued penalty claims following discussion during the case management conference.

[11] Later, TYI withdrew his claim regarding holiday pay if his grievance claim was upheld.

[12] I heard evidence from TYI and his mother. A statement from TYI’s clinical psychologist was provided but due to an intervening event she was not able to appear and answer questions. MCL sought an adjournment as it would not be able to cross-examine her. TYI opposed an adjournment, as the Authority could take the clinical psychologist’s statement into account as appropriate.

[13] I declined the adjournment application. Substantial delay would have resulted otherwise.

[14] MCL had intended to attempt to adduce expert opinion evidence helpful to its case through cross-examination. Such evidence might have been relevant to resolving the different recollections of the 14 January 2022 incident. Even without such evidence, I am still able to have regard to MCL’s submissions based on information it provided on that point.

[15] I heard evidence from three current or former MCL employees who were present on 14 January 2022 and from Mr Milne. A summons on TYI’s application had been issued for one of them (Allen). Allen gave his evidence by way of a sworn affidavit lodged by MCL: and he appeared by AVL to answer questions. Both

counsel sought to cross-examine him. Based on Allen's evidence that he did not receive the summons, I considered he should be regarded as a witness for MCL so the company was not entitled to cross-examine him.

[16] I have been assisted by counsel's thorough submissions.

[17] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

Issues

[18] There is a dispute about what happened on 14 January 2022. I need to make findings about those events.

[19] TYI resigned but says he was constructively dismissed. Was the resignation caused by a breach of duty owed by MCL to TYI? If so, was a substantial risk of resignation reasonably foreseeable, having regard to the seriousness of the breach?

[20] If TYI was constructively dismissed and has a personal grievance, what remedies should be ordered to settle the personal grievance?

[21] There is a dispute about several previous workplace issues. TYI says that they were context for his resignation. I need to explain the context and resolve some disputed elements. It is convenient to turn to these points first.

Context for the events of 14 January 2022

[22] TYI started work for MCL as an apprentice builder in early November 2020.

[23] There was a written employment agreement. The agreement required MCL and TYI to comply with their obligations under the Health and Safety in Employment Act 1992.

[24] MCL had a comprehensive health and safety policy, incorporated into the employment agreement as Schedule Three. The policy was dated 1 February 2019 and refers to the Health and Safety at Work Act 2015. MCL's policy was to always comply with its statutory obligations. It committed to maintaining workplace practices to ensure that employees were not harmed due to its work activities. Its goal was to try to eliminate injuries and accidents from the workplace.

[25] Several issues need to be mentioned.

The fall from the ladder

[26] TYI returned to work on 6 January 2021 after Christmas. On 9 January 2021, he assisted several others to lift and place a heavy steel beam into the ceiling of an old house that was being renovated. There is a dispute about whether TYI had to lift the beam or just help position it.

[27] TYI says that the lifting job was at the end of the day despite the workers being tired, because Mr Milne wanted the beam installed. One of the other workers (Allen) gave evidence that they were not forced by Mr Milne to stay to do the job. There is no reason to doubt Allen's evidence.

[28] Ceiling height was 2.4 metres and the beam was above that. It is common ground that TYI was positioned up a ladder at the end of the beam which had already been lifted into place, while the three others were to lift the other end progressively from the floor to the required height. TYI's evidence is that he was instructed to push and pull the beam to ensure his end of the beam was in the right spot. Mr Milne's evidence is that TYI's job was to keep an eye on the beam and to "slightly lift" it if necessary. When questioned, Mr Milne said that TYI just needed to hold it steady, not taking any weight but with some lifting. Allen's evidence is that TYI's job was to take the weight of the beam, not to lift or move it. I conclude that, from the ladder, TYI was required to lift the beam from where it rested, as part of repositioning it while it was being lifted at the other end.

[29] It is common ground that the ladder fell, landed on the floor on its side, TYI fell and he landed on the side of the ladder. Mr Milne took TYI to hospital where he was assessed, treated and later discharged. Injuries included concussion and dental damage. TYI was off work for six days. Some damage to TYI's teeth remains.

[30] There is a dispute about whether the fall was caused by TYI not following instructions and/or trying to do more than he had been instructed to (MCL's position) or by inadequate planning and arrangements for the job (TYI's position). It is not necessary to canvass the specifics.

[31] The incident was not reported to WorkSafe. Contrary to MCL's health and safety policy, it was not recorded or documented. In the absence of an objective or

contemporaneous account, I treat the respective versions given now with some caution. However, TYI, an inexperienced worker, fell from a ladder and sustained significant injuries while working under Mr Milne's supervision. MCL's health and safety practices were not sufficient to ensure that TYI was not harmed due to its work activities.

Asbestos

[32] In February 2021, TYI worked stripping an old rental property for MCL. The work involved removing roof tiles and soffit sheeting. The soffit sheets contained asbestos. Lead roofing was also removed and stored at another site. Later, TYI was demolishing brickwork and found that some soffit sheeting had been used as spacers. TYI's evidence is that he was issued with an asbestos suit and face mask which he used for removing the soffits, but the equipment had not been issued for the roof tile and brickwork demolition work. He later learnt that the roof tiles contained asbestos. TYI says he did not wear a mask during the brick demolition work before he saw the soffit sheeting used as spacers. He then used a mask.

[33] Mr Milne's evidence is that he assumed the soffits contained asbestos. He told TYI that the soffits were made from asbestos sheeting and that he would be supplied with a suit and face mask for that work. Mr Milne considered that the roof tiles could be removed without agitating the soffits. Some of that work was done. Mr Milne saw a nearby job where asbestos protocols were being used for similar roof tiles. He had the roof tiles on his job tested and changed methodology. Mr Milne's evidence is that the roof tile asbestos was non-friable.

[34] Mr Milne also says that he "vaguely recalls" the use of soffit sheeting for spacers being pointed out to him by TYI. This was not throughout the house. His evidence is that TYI wore a standard dust mask for the brick work, not asbestos gear.

[35] From this, I find that MCL identified and managed the asbestos risk and supplied appropriate tools, equipment and instructions for that work, except with respect to the possibility of the soffit sheeting being used as spacers for the brickwork. The work arrangements did not fully cover the risk of exposure to asbestos.

The nature of the work

[36] This point does not involve health and safety issues.

[37] TYI's evidence is that he spent the time before Christmas 2020 clearing up a property, rather than performing building work. Putting aside the work described above, TYI says that his work consisted of mainly gardening related activities, general labouring such as painting a fence and shingle tiles, mulching garden beds, laying ready lawn, washing down a garage, deck and driveway and similar tasks.

[38] TYI also says that he was realistic about starting in a new trade and that the building industry is hard work and often involves unpleasant tasks.

[39] Despite that evidence, it is likely that in January 2022 TYI felt he had not been assigned building work that would advance his skills.

The non-work injury

[40] In May 2021, TYI bought his first house. While doing some work there on 27 July 2021, he badly injured his hand. He went to the hospital A&E. The injury required extensive surgery to his hand. Despite that, TYI was told initially that the prospects of him recovering full use of his hand were not good.

[41] TYI was fully unfit for work from 27 July 2021.

[42] In December 2021, a graduated return to work plan was developed by TYI's medical advisors in conjunction with Mr Milne. A report noted that the work of an apprentice builder is usually "very heavy", but Mr Milne was "very supportive" of TYI returning to work on light duties and gradually building up work hours and tasks over time. The evidence generally supports that description of Mr Milne's attitude to TYI's proposed return to work.

[43] There were pre-Christmas work drinks in December. TYI learnt of the arrangement beforehand from another MCL employee, who he told he had not received an invitation. That exchange did not result in an invitation.

[44] MCL's explanation is that not all staff were present, it was an impromptu "get together" and no one thought about contacting TYI. However, the lack of an invitation played no role in later events.

[45] MCL stopped work for a Christmas close-down until 9 January 2022.

Medication

[46] TYI was prescribed Gabapentin after his July 2021 injury, for treatment of neuropathic pain. TYI's evidence is that he was on a heavy dose.

[47] I am referred to information available on the Medsafe website. A medicine called Neurontin includes gabapentin as its active ingredient. The Consumer Medicine Sheet (CMI) for Neurontin states "**Be careful when drinking alcohol while you are taking Neurontin**". It includes the advice to tell your doctor if you "notice ... seeing or hearing things that are not there, irrational thinking". The CMI also notes that patients should be alert for signs of depression. The point about drinking and the quoted advice are advanced as a possible explanation for TYI's evidence about events on 14 January 2022.

[48] There is other information to the effect that gabapentin and alcohol do not mix and that a patient should avoid the combination of gabapentin and alcohol at all times. This is because both cause central nervous system depression and respiratory depression and their combination might worsen either or both effects.

[49] TYI said in evidence that he had been advised against mixing alcohol and Gabapentin by the doctors at the hospital. I consider below the evidence about drinking on 14 January 2022. For present purposes it is enough to say that the quoted advice in the Medsafe CMI for Neurontin is not relevant to the assessment of TYI's account of events on 14 January 2022. There are differences in the accounts of what was said. TYI was not seeing or hearing things that were not there or being affected by irrational thinking.

What happened on 14 January 2022?

[50] Mr Milne organised a farewell get-together after work as one of MCL's employees (Allen) was moving to Australia. Allen told TYI about the event. Before attending the get-together, TYI stopped at his parent's house adjacent to MCL's worksite.

[51] TYI's mother did not hear or see what happened at the get-together.

[52] Other employees who were present gave evidence: Allen, Nathan and Romandeep. Mr Milne gave evidence.

[53] Romandeep's evidence is that he left about 6.30pm. He said he did not know about the incident until he was told about it later by Mr Milne. Romandeep said that he passed TYI two "Coronas" while he was there. There is no particular reason to doubt that evidence. Romandeep also says that between 4.00pm and 7.00pm, TYI probably had "3-4 alcoholic drinks". However, there was no reason for Romandeep to keep track of how many drinks TYI consumed, so that evidence on its own is not persuasive.

[54] Nathan's evidence is that it was quite obvious that TYI and Mr Milne were intoxicated and that Allen was "heavily intoxicated". Nathan says that he gave TYI a "couple of beers at least". There is no particular reason to doubt that evidence.

[55] Allen's evidence is that "we consumed a lot of alcohol" and smoked "a number of joints", in reference to himself, Mr Milne and TYI. He also said that he, Mr Milne and TYI were "pretty drunk and stoned".

[56] Mr Milne's evidence is that he, TYI and others drank a lot of alcohol (beer and a pre-mix 6% abv). He says that he, TYI and Allen smoked some cannabis, "at least one joint". Given Nathan's and Mr Milne's evidence, there is no reason to doubt Allen's evidence that he and Mr Milne were "pretty drunk and stoned".

[57] TYI says he drank two Coronas and one can of a pre-mix over about a six-hour period. He referred to the medical advice at the time of being prescribed Gabapentin, and his intention to see his mother later before driving home to support that evidence. TYI mother's evidence is that her son was not in a state to drive home later because of his emotional reaction to the incident that night, not due to alcohol.

[58] I accept Romandeep's and Nathan's evidence about the number of beers they each gave to TYI. TYI also consumed a can of a pre-mix and smoked some cannabis. I find he consumed more alcohol than he stated in his evidence. However, I do not accept that TYI was "pretty drunk and stoned". His level of intoxication was not such as to be a good reason to discount his evidence of the following incident.

[59] TYI says there was a discussion between him and Mr Milne about the graduated return to work (GRTW) Plan, soon after he arrived at the event. In his prepared statement, Mr Milne denied discussing the GRTW Plan at the get-together. However, when questioned he said he did not recall the discussion. I note that MCL's 1 March 2022 response to TYI's grievance disputed the substance of the alleged

discussion about the GRTW Plan at the get-together, but did not expressly deny that it had been discussed then. These circumstances lead me not to accept Mr Milne's denial in his prepared evidence. Given that, I accept there was a discussion and I accept TYI's evidence that Mr Milne characterised it as an agreement that he would work six hours a day straight away. I also accept TYI's evidence that he was told that he could be climbing on a roof to remove screws. The work duration and that task would be inconsistent with the GRTW Plan. That discussion went no further.

[60] Later in the night, others had left and only TYI, Mr Milne, Nathan and Allen remained. Mr Milne offered some cannabis. Allen's evidence is that he, Mr Milne and TYI smoked a number of joints. Mr Milne's evidence is that it was at least one joint of "very strong weed" while TYI's evidence is that the single shared joint was insufficient to get anyone high. TYI's evidence downplays the significance of the cannabis the three men consumed. I accept it would have contributed to TYI's level of intoxication.

[61] At some point after this, Mr Milne left the others to relieve himself. TYI's evidence is that in Mr Milne's absence, he was telling Allen and Nathan that his younger, unqualified brother had got his first job and was already on a higher hourly rate than him. TYI says that Mr Milne heard part of that exchange when he returned to the others. He says it was not a complaint about his hourly rate, but rather a discussion about different pay rates between different sized businesses.

[62] Nathan said when questioned that he heard TYI say that it was a "shit" hourly rate, compared to his brother. Allen could not recall that part of the discussion. Mr Milne's evidence is that "he started winging about his brother ... getting better paid". Mr Milne must mean whingeing, not "winging". His evidence is also that TYI said he should be much further ahead in his apprenticeship and he felt he was being underutilised for his level of skill. I accept the evidence of Nathan and Mr Milne as to what TYI said.

[63] Mr Milne reacted to TYI "winging" about his pay rate and underutilisation. Mr Milne also responded to comments made by TYI earlier in the night which he took as TYI "bragging" about working on his house while on ACC. Mr Milne's evidence is that he said something along the lines that TYI should feel lucky for the opportunity that was given to him. Mr Milne admits swearing when making his comments.

[64] There was a message exchange between Allen and TYI the following morning, as follows:³

A: Hey mate. That was pretty shit what James done last night to you. Are you all good?

R: Not really. I don't even know how we got on to the topics in the first place. I remember feeling like I was being attacked for my injury, my effort, and then he started talking about my dad which I found inappropriate too. Sorry you had to witness it all my dude. I'm still a little foggy on what went down but I know it wasn't kosha lol

A: Nah man it was really unprofessional and rude. It wasn't appropriate for him to be like that towards you

R: Cheers for having my back man. Was nice to know someone gave a shit ... I assume he kept talking about it after I left? Sorry for my walk off aye I just wanted to get out of there.

A: I totally understand man. It was really horrible and it really opened my eyes to James. I can't remember much after you left tbh ... What a cunt aye.

[65] Allen characterised Mr Milne's comments as "pretty shit", "unprofessional and rude" and "really horrible". MCL attempted to downplay the significance of these descriptions by saying that Allen was a "peace-maker", but I consider they help resolve the disputed evidence about what was said. The fact that Allen felt he needed to stop the exchange between Mr Milne and TYI also indicates the nature of Mr Milne's comments.

[66] TYI's evidence is that Mr Milne told him he did not know what real work was, that he came from a privileged background, that it was his father who secured his employment, that he was born with a silver spoon in his mouth and that he knew what he was signing up for. TYI says he responded to Mr Milne's comment about working under his guidance by referring to having to remove asbestos without proper equipment and his fall from the ladder. TYI says that Mr Milne continued his "drunken rant", Nathan joined in and they mocked him. Allen had attempted to intervene by telling Mr Milne to "stop" and to "lay off him". The incident ended when TYI left in a very distressed state. TYI's evidence reflects details of the incident set out in the message TYI sent to Mr Milne on Sunday 16 January 2022. It also reflects the details set out in his lawyer's 22 February 2022 letter.

³ Allen initiated the exchange. His messages are marked with "A" and TYI's messages are marked "R".

[67] I am satisfied that TYI's evidence about the tone and substance of what Mr Milne said to him is correct.

[68] Nathan "100%" agreed that TYI "had it good" with "lots of good work" from MCL. His evidence is that he supported that, before leaving to check locks. After locking-up some equipment and the house, he returned to what he describes as a "heated argument". He says that TYI and Mr Milne were swearing, but he could not recall if that was at each other. Nathan told me that he said to Mr Milne the next day that he "didn't catch most of it". Nathan's evidence is also that TYI was "bragging" about renovating his house while on ACC, comments he says he found "obnoxious". Nathan impressed as careful to support Mr Milne, so I am cautious about his evidence. I prefer TYI's evidence that Nathan joined in what he took as the "attack" on him.

[69] When questioned, Allen had limited specific recall of the details of the 14 January 2022 incident. However, he considered that a "snide" comment was made by Mr Milne and that "it erupted" from there. He agreed that Mr Milne did "rant", but did not agree that Mr Milne was "intimidating" as Mr Mine is "not like that". Overall, Allen did not resile from the description he gave of the incident in his 15 January 2022 message to TYI. He agreed that he had told TYI the next day that he could take a personal grievance against MCL, based on the incident. His evidence now that Mr Milne was not "intimidating" adds little to an understanding of the incident. The recipient's perception is a better aide to determining what happened, rather than this opinion considerably later offered by Allen as an observer.

[70] I am not persuaded by Mr Milne's evidence that TYI's evidence is wrong or overstated.

[71] When he left, TYI went directly to his mother's house. TYI's mother says that her son was crying and started to sob uncontrollably. It was about 20 minutes before that abated so he could tell her what had happened. There is no reason to doubt this evidence. I do not accept TYI's evidence that he was able to relay events accurately "with 1 minute". However, that exaggeration does not detract from the foregoing findings.

Was TYI constructively dismissed?

[72] I need to consider whether TYI's resignation was caused by a breach of duty by MCL. If so, I must assess whether the breach of duty was sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the prevailing conditions.

[73] It is helpful to set out TYI's resignation sent on Sunday 16 January 2022:

James,

It has taken me the whole weekend to come to terms with how you treated me on Friday night in front of my coworkers. The venom with which you spoke about my injury, my work ethic, and my family was unprofessional and cruel. You set out to humiliate me and continued to do so even after Allen insisted on multiple occasions that you stop.

The moment you claimed I was privileged and didn't know what hard work was" told me straight away that my effort and human capital is not valued in any way shape or form. Your comments about my injury and my low-hour work schedule also make it clear that you don't respect or intend to stick to my arrangement laid out by ACC. After being humiliated by you and Nathan there is no way I can return to work for you or alongside my coworkers - any chance at having a positive working environment and relationship with my colleagues has been destroyed by your actions on Friday.

My traumatic injury and the subsequent recovery period has and will still continue to be hard for me. I understand that it has been awkward for you as well however, after your continued verbal assault on me and my character on Friday night you definitely crossed a line. For this reason I am terminating my employment relationship with you - I guess this was what you were hoping for anyway. I believe that you have constructively dismissed me.

[74] Mr Milne had messaged TYI on Saturday afternoon to ask if he was "alright today", to "check in and talk over things if you wanted to clear the air ready for Monday". TYI resigned on the Sunday. Mr Milne responded. He said he was sorry that was how TYI felt, that he was looking forward to his return, that he had always told him how impressed he was with his work ethic and that he has the utmost respect for TYI's family. He said he had a list of suitable jobs and would support him back into work. He did not want TYI to leave, but had big plans for him with MCL. Mr Milne suggested they meet to discuss things further.

[75] TYI declined the offer to meet.

[76] I am satisfied that TYI resigned because of the incident on Friday 14 January 2022, as set out in his resignation.

[77] There is a submission that TYI resigned because of his view that MCL would in the future continue to disregard his safety and health, whereas the evidence shows it met its obligations. However, as the message makes clear, TYI resigned because of Mr Milne's "unprofessional and cruel" conduct towards him on the Friday night and the concern about future adherence to the GRTW Plan in light of Mr Milne's comments. Both concerns are supported by my earlier findings. The context included Mr Milne's expressed support for the GRTW Plan, but also a serious work-place accident and a gap in protocols concerning working with asbestos. In light of events on the Friday, TYI was entitled to be concerned about whether his employer would adhere to the Plan.

[78] I find that Mr Milne conducted himself in a manner likely to destroy or seriously damage the relationship of trust and confidence between MCL and TYI. MCL constructively dismissed TYI.

[79] There is no basis on which the dismissal could be justified. I find that TYI has a personal grievance of unjustified dismissal.

What remedies are established?

Compensation

[80] There is a claim for \$25,000.00 compensation for humiliation, loss of dignity and injury to feelings suffered by TYI.

[81] I accept TYI mother's evidence about TYI's state immediately after the incident. To summarise, TYI was in a very distressed state.

[82] There is a statement and a report from a clinical psychologist who saw TYI in May and June 2022. In her report, the clinical psychologist notes that TYI reported low mood, difficulties sleeping, low energy, low motivation, difficulties concentrating and feelings of guilt and worthlessness. In discussing these matters, TYI was extremely tearful. The clinical psychologist observed that the symptoms had been precipitated by the incident in January 2022 and had been pervasive since. She assessed TYI as meeting the criteria for a major depressive disorder. The clinical psychologist notes that information from TYI suggested that he did not develop the mental health symptoms following his non-work injury to his hand. She recommended continuing psychological support for those difficulties.

[83] There is a submission that any humiliation experienced by TYI is directly attributable to him consuming alcohol and marijuana when taking Gabapentin. However, the clinical psychologist reported her observations and opinion after seeing TYI several months after the incident. The humiliation suffered by TYI following the termination of his employment was not directly attributable to his consumption of alcohol and marijuana on 14 January 2022 while taking Gabapentin.

[84] There is no reason to doubt the clinical psychologist's opinion set out in her report. Based on that, TYI mother's evidence and TYI's evidence about the emotional effects (which I accept), I assess \$20,000.00 as the amount of compensation required to restore TYI.

[85] I was referred to *Stentiford v Marshall & Heaphy Limited*,⁴ a case where there was an award of \$15,000.00 compensation. The submission is that the harm in the present case falls short of the evidence of harm set out in the *Stentiford* case. I disagree. In the present case, there is expert medical evidence of a depressive disorder. The proven harm in the present case is greater than in *Stentiford*.

Mitigation

[86] TYI produced evidence of attempts to find alternative employment to mitigate his loss of remuneration. It is not necessary to set out the details, but I accept that TYI took reasonable steps to mitigate his loss.

Reimbursement

[87] There is a claim for reimbursement of lost remuneration. In settling a personal grievance, the Authority may provide for the reimbursement of a sum equal to the whole or any part of the wages lost as a result of the grievance.⁵ If I determine that TYI has lost remuneration as a result of the personal grievance, I must order MCL to pay the lesser of the sum equal to that lost remuneration or 3 months' ordinary time remuneration.⁶ By effect of s 128(3) of the Employment Relations Act 2000, I have a discretion to order MCL to pay a greater sum than the amount that I am required to order under s 128(2), to reimburse loss.

⁴ *Stentiford v Marshall & Heaphy Limited* [2022] NZERA 652.

⁵ Employment Relations Act 2000 s 123(1)(b).

⁶ Employment Relations Act 2000 s 128(2).

[88] TYI remained on ACC certified as fully unfit for work until 20 March 2022, despite the GRTW Plan under which he would have resumed some work from 17 January 2022, initially on an ACC funded work trial. After the ACC funded work trial, TYI would have worked up to 30 hours per week from 30 January 2022, up to 40 hours per week from 14 February 2022 and up to 50 hours per week from 28 February 2022. The work at these times remained subject to various restrictions. I am satisfied that he lost remuneration as a result of the personal grievance from 30 January 2022.

[89] The loss of remuneration as a result of the personal grievance continued from 30 January 2022 until late October 2022. After that date, TYI was assessed as having a disability. The loss of remuneration thereafter is properly attributable to the disability, rather than the personal grievance.

[90] In the period from 30 January 2022 to late October 2022, TYI received ACC until 20 March 2022, a WINZ benefit from 26 April 2022 and \$1,500.00 from the sale of some artwork he produced while off work. The WINZ benefit is not relevant for current purposes. Even treating the period with respect to the ACC payment as excluded and the art-work sale price as earnings to be accounted for, TYI's actual loss of remuneration as a result of the grievance exceeds three months' ordinary time remuneration.

[91] Under his employment agreement, three months' ordinary time remuneration for TYI was 40 hours per week at \$20.00 per hour between 17 January 2022 and 31 March 2022. TYI's ordinary time hourly rate would have increased to \$21.20 from 1 April 2022, given the increase in the statutory minimum rate. His three months' ordinary time loss amounts to 10.6 weeks at 40 hours at \$20.00 per hour, plus 2.4 weeks at 40 hours at \$21.20 per hour. This totals \$10,515.20. I am required under s 128(2) of the Employment Relations Act 2000 to order MCL to pay TYI that amount.

[92] In submissions for TYI, counsel did not argue that I should exercise discretion to order a sum greater than required by s 128(2) of the Act. In any event, I would not have done so. TYI continued to experience pain in his hand from May. There was a prospect that the pain might have caused TYI to leave the job at some point following the GRTW Plan and the end of the work restrictions set in the Plan. That possibility would have counted against the exercise of the discretion under s 128(3) of the Act.

Contribution

[93] I must consider the extent to which TYI contributed in a blameworthy manner to the situation that gave rise to the grievance and reduce remedies accordingly.⁷

[94] Three matters are advanced in support of the submission that remedies should be reduced by 75% to reflect TYI's blameworthy contribution.

[95] It is submitted that TYI acted provocatively on the night by acting obnoxiously and bragging about being better off on ACC and working on his own projects, rather than coming back early.

[96] I accept that TYI made some comment about being able to renovate his own home while off work. Witnesses for MCL describe this as "bragging". Whether or not that was intended by TYI, his comment came across in that fashion. However, I do not accept that TYI provoked Mr Milne's reaction. Mr Milne was entirely responsible for how he acted.

[97] The second matter is TYI's "reckless" behaviour in consuming alcohol and marijuana while on Gabapentin. I do not accept that these actions by TYI contributed to the situation giving rise to TYI's personal grievance. Again, Mr Milne was entirely responsible for how he acted.

[98] The third matter is that TYI refused to meet with Mr Milne. The submission is that TYI failed to engage constructively and in good faith.

[99] On Saturday afternoon, Mr Milne asked if TYI was alright and said he wanted to check in and talk things over if TYI wanted, before Monday. TYI responded on Sunday with his resignation. Thereafter, Mr Milne several times sought to meet but TYI did not take up the invitations.

[100] Good faith required the parties to be active and constructive in maintaining a productive employment relationship in which they were, amongst other things, responsive and communicative. Mr Milne's conduct on the Friday repudiated the employment agreement. TYI accepted that by resigning on Sunday. The situation that gave rise to the personal grievance occurred on and before Friday. I do not accept

⁷ Employment Relations Act 2000 s 124.

that TYI contributed to that situation by not wanting to “talk over things” and “clear the air” on Saturday, ahead of his resignation on Sunday.

[101] Consideration of s 124 of the Employment Relations Act 2000 does not require any reduction in the nature and extent of remedies to be provided in respect of the personal grievance.

Summary and orders

[102] TYI was unjustifiably dismissed and has a personal grievance against Milne Construction Limited. TYI did not contribute in a blameworthy manner to the situation that gave rise to the personal grievance.

[103] In settling the personal grievance, Milne Construction Limited is to pay TYI within 28 days of this determination the following sums:

- (a) \$20,000.00 compensation for humiliation, loss of dignity and injury to feelings suffered by TYI; and
- (b) \$10,515.20 reimbursement of lost wages suffered by TYI.

[104] Costs are reserved. If the parties do not resolve costs between themselves, a claim for costs can be made by lodging and serving supporting submissions, within 14 days of this determination. The other party may lodge and serve submissions in reply within a further 14 days. I will then determine costs having regard to those submissions and the Authority’s practice regarding costs.

Philip Cheyne
Member of the Employment Relations Authority