

Reference No. HRRT 031/2014

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN BENJAMIN RAYMOND MCCLELLAND

PLAINTIFF

AND SCHINDLER LIFTS NZ LIMITED

DEFENDANT

AT CHRISTCHURCH

BEFORE:

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Ms ST Scott, Member

REPRESENTATION:

Mr V Corbett, agent for plaintiff

Mr CA Andrews (South Island Manager) and Ms M Pabustan (HR National Manager) for defendant

DATE OF HEARING: 3, 4 and 5 August 2015

DATE OF LAST SUBMISSIONS: 21 August 2015 (plaintiff) and 28 August 2015 (defendant)

DATE OF DECISION: 9 October 2015

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## DECISION OF TRIBUNAL

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### Introduction

[1] On 26 May 2014 Mr McClelland commenced employment with Schindler Lifts NZ Ltd (Schindler) as a Service Technician based in the company's Christchurch Branch office. By written agreement dated 12 May 2014 it had been agreed his employment was subject to a trial period of 90 days duration. Two months later, on Tuesday 29 July 2014 Mr McClelland was given seven days notice of termination of the agreement.

[2] In these proceedings Mr McClelland says the termination of his employment was unlawful because it was based on one of the prohibited grounds of discrimination, being a physical disability or impairment which either existed or was suspected or assumed or believed by Schindler to have existed. Schindler's case is that the reason for the termination was a serious breach of safety rules and that the disability or suspected disability played no part in its decision.

[3] The primary issue in these proceedings is which of the competing accounts is to be believed.

### **Preliminary matters**

[4] There are three preliminary matters to be noted.

[5] First, Schindler was jointly represented at the hearing by Mr CA Andrews, South Island Manager and by Ms M Pabustan who is the Human Resources and Health and Safety Manager based in Auckland. Mr Andrews was the person who dealt directly with Mr McClelland in relation to the matters addressed in these proceedings but did so in consultation with and under the direction of Ms Pabustan. It was she who drafted most, if not all of the correspondence to which reference will be made. While Schindler is entitled to appoint whomsoever it wishes to appear as its representative in proceedings before the Tribunal, the choice in the present case was unfortunate owing to the fact that both Mr Andrews and Ms Pabustan were the two primary witnesses to give evidence for Schindler. The undesirable but inevitable consequence was a noticeable lack of objectivity on their part.

[6] Second, while these proceedings arose out of an employment relationship and while the jurisdiction of the Tribunal is confined to the Human Rights Act 1993, the Tribunal is not thereby disabled from making findings relevant to the process by which Mr McClelland was dismissed and to question whether the reason for the termination of his employment breached the non-discrimination provisions of s 22 of the Act.

[7] Third, in the closing stages of the hearing the Tribunal, mindful of the fact both parties were represented by lay persons, drew attention to various matters on which the submissions of the parties were sought. Relevant decisions of the Tribunal were also referred to. While neither party sought time to consider the material to which reference was made and while both parties then presented closing submissions, the Tribunal by *Minute* dated 7 August 2015 again offered opportunity for submissions to be filed. Both parties took advantage of this opportunity. All post-hearing submissions have been taken into account in the preparation of this decision.

[8] The evidence heard by the Tribunal is now addressed.

### **Mr McClelland's work experience before joining Schindler**

[9] It is not intended to recite at length Mr McClelland's work history. It is sufficient to note he is presently 31 years of age (DOB 13 March 1984). He was a seaman of the Royal New Zealand Naval Volunteer Reserve from 2003 to 2006 before joining the Royal New Zealand Navy where he served from 29 September 2006 to 6 April 2012, a period of five years and six months, achieving the rank of Able Marine Technician (Electrical) (MT(L)). His responsibilities included fault finding, maintenance and repair of equipment, assistance in breakdown maintenance and the operation of ships systems (mechanical, hydraulics, pneumatic and electrical). He was described by his

Commanding Officer as a quiet person who works well on his own, polite and respectful to his superiors and peers alike. His Service Testimonial is in the following terms:

Benjamin Raymond McClelland transferred to the Regular Force of the Royal New Zealand Navy (RNZN) from the Volunteer Reserves on 29 September 2006 as an Able Seaman Combat Specialist and served for a period of five years and six months. During his Service career Benjamin has served at sea aboard Her Majesty's New Zealand Ships (HMNZS Kahu, HMNZS Canterbury, HMNZS Te Mana and HMNZS Te Kaha) and ashore in the Naval Shore Establishment HMNZS Philomel.

Benjamin joined as an ASCS (the equivalent rank and trade from the RNZNVR) and commenced his professional training to become a Marine Technician (Electrical) (MT(L)). After successfully completing the relevant courses he became an MT(L) and as such he was responsible for performing routine tasks and checks in his work space, this ensured that the correct amount of onboard spares were available. He completed the initial investigation during fault finding, operator level maintenance, and did the application of corrosion prevention materials. Benjamin was also required to repair, align and adjust equipment, interpret and use technical drawings and publications, as well as take part in watch-keeping tasks for ships plants and systems. Benjamin was required to assist in breakdown maintenance, the operation of ships systems (mechanical, hydraulics, pneumatic and electrical), collect and record data from engineering trials, and comply with regulations and policy.

As an Able Rate, Benjamin was required to complete all delegated tasks while maintaining the correct work-place standards. In addition he was relied on to provide effective communication with his supervisors and other team members throughout the work-place. Benjamin was expected to manage his own learning and development while displaying initiative, adaptability, time and stress management skills.

Benjamin is a quiet person and works well on his own, he is polite and respectful to his superiors and peers alike. Benjamin focused on what he needed to achieve and volunteered himself for additional duties.

Benjamin is leaving the Royal New Zealand Navy at his own request.

**[10]** After leaving the Navy Mr McClelland worked as a boat park operator for a short time before joining Auckland Water Taxis in 2013 as a sole charge skipper of a 7.3m boat. His interest in working for Schindler lay in the opportunity to work in an engineering and technical field and in re-locating to Christchurch where his mother lives. When Schindler contacted his employer on 22 April 2014 for a verbal reference the following favourable comments were recorded:

Bill [the referee] has Benjamin working now part time following full time due to down turn in work. Operates three boats and they do all maintenance. Ben very confident on gear he knows. Likes precise description of work to be done, always sees jobs to the end, very strong work ethic, quick to learn, very honest. Handles a lot of cash in role, good on high and low voltage gear. Excellent on PCs. Gets involved with job [indecipherable] to do work on local tug.

Negatives. Not overly social but OK with customers. Needs reminding to keep to allocated hours as Navy they have unlimited hours and materials to complete job and is aware of this and is improving. Feels he will do well in lifts provided we train and give guidance. Know he wants to get qualified and move to Chch.

### **Safety a core value for Schindler**

**[11]** Understandably, safety of its customers and employees is the first and foremost "value" adopted by Schindler and it has a formal policy of "Zero Tolerance of Safety Violations" which includes (relevantly) zero toleration of any violation concerning the prescribed safe hoistway access process (car top and pit), the hoistway being the shaft that allows the elevator car to move from floor to floor. In the words of one of the Schindler witnesses, mandatory observance of safety protocols determines whether a service technician lives to see the end of his or her shift.

### **Mr McClelland's training by Schindler**

[12] On commencing employment with Schindler, Mr McClelland received five weeks safety and maintenance training. To this end he was paired with senior, experienced technicians. On 19 June 2014, some four weeks into his training, Mr McClelland was tested "on site" by his Team Leader for safe hoistway access. The test was completed satisfactorily. He was also found to be compliant with (inter alia) the need to wear and use personal protection equipment (PPE).

### **The disability – actual or perceived**

[13] For some years Mr McClelland has experienced a slight shake or tremor in his hands, particularly the left hand.

[14] His mother, Ms VJ Elliott, is a Registered Nurse. She testified at the hearing that she has a hereditary condition known as Benign Essential Tremor or Familial Tremor, a condition she inherited from her parents. She had first noticed a slight tremor in her hands when 20 years of age. While over the years the tremor had become more noticeable, she has no difficulty carrying out her role as a Registered Nurse and in no way feels disabled by it. She sought medical advice some years after first noticing the tremor and has also seen a neurologist to confirm the condition.

[15] In her opinion she believes her son has inherited this condition from her. Over the past two or three years she has observed a very, very slight tremor in his hands noticeable only when he is doing very fine, exacting work. She added he has carried out electrical work on her home in Christchurch, work which he has always successfully and safely completed without difficulty.

[16] Ms Elliott went on to explain that Benign Essential Tremor is caused by abnormal communication between certain areas of the brain, including the cerebellum, thalamus and brain stem. In the majority of people with this condition it is inherited as an autosomal dominant trait. This means that a child or grandchild of a person with it has a chance of inheriting the gene that causes the tremor. Essential Tremor is a very common but complex neurological movement disorder. It has no known cause and most commonly affects the hands. In some people tremors may only ever present themselves in one hand. There is great individuality as to the severity of the condition. Some tremors can be very mild and noticed only periodically, never progressing past this stage although it is possible for them to worsen with age. Symptoms will often plateau with the condition remaining stable without worsening for many years.

[17] Mr McClelland testified that the degree of tremor in his hands during the time he was employed by Schindler was slight and exactly the same as when he was in service with the Navy. Although he worked on a wide range of ship equipment he had never experienced difficulty in carrying out fine maintenance and repair tasks on often live equipment, even while at sea with the vessel pitching in the waves. His immediate superior was aware of the tremor and never made adverse comment or expressed safety concerns. In none of his frequent (mandatory) health checks was the tremor ever mentioned.

### **The disability – whether disclosed to Schindler**

[18] In his employment application dated 15 April 2014 Mr McClelland was asked the following two questions. To each he answered "No":

- Do you have a medical or physical problem that may affect your work performance or attendance?
- Do you suffer from any injury or ailment or other disability which may adversely affect your regular attendance at work or adversely affect your work performance or adversely affect the safety of yourself or others?

**[19]** It is to be noted each question requires the applicant to make a self-assessment. The questions are not phrased more directly as in:

- Do you have a medical or physical problem? If “Yes”, please provide details.

**[20]** In the same form Mr McClelland gave his consent to attending a nominated medical doctor if requested. Schindler never required him to undergo an examination even though the tremor in his hand was cited at the termination meeting as a safety issue.

**[21]** These points are mentioned because Mr Andrews and Ms Pabustan were at pains to allege that because Mr McClelland answered “No” to both questions he had “misrepresented himself and suppressed relevant health information by not disclosing his disability that could essentially risk his and other people’s safety”. See the email dated 26 August 2014 sent by Mr Andrews to the Mediator at the Human Rights Commission.

**[22]** Given the wording of the application form (for which Schindler alone is responsible) and the evidence of Mr McClelland that the tremor has never affected his work performance, we see no justification for this allegation. Mr McClelland does not accept he has a disability and in our view answered the questions honestly. Again, Schindler never asked him to undergo a medical examination. The allegations made by Mr Andrews and Ms Pabustan are unfounded.

**[23]** It is also to be noted that at no time during the five weeks of closely supervised one on one training by Schindler’s most experienced staff was mention made of any tremor in Mr McClelland’s hands. The “Safety Walk” of 19 June 2014 conducted by a senior technician of 25 years experience noted no concerns of any kind about Mr McClelland personally or his performance, methods and procedures.

### **The incident at the ESR**

**[24]** On or about Thursday 24 July 2014 Mr McClelland and Mr R Huiswaard (a long serving service technician) attended the Institute of Environmental Science and Research (ESR) to carry out maintenance on a lift. On his version of events, Mr Huiswaard alleges he observed Mr McClelland fail to observe the safety procedures for safe access to the hoistway. He remarked to Mr McClelland that if Mr McClelland’s work had been audited he (Mr McClelland) would have been failed straight away for not following those procedures. He accordingly explained to Mr McClelland the correct procedures to be followed. Mr Huiswaard also observed that Mr McClelland’s left hand shook and asked Mr McClelland how he would be able to do soldering work. Mr McClelland replied that his right hand did not shake as much as the left.

**[25]** At 9am the following day, Friday 25 July 2014, Mr Huiswaard reported in person to Mr Andrews that there had been a serious safety breach the previous day at the ESR and that he (Mr Huiswaard) felt unsafe working with Mr McClelland and would not take him to Timaru on the following Monday as scheduled. He told Mr Andrews he (Mr Huiswaard) had also observed that one or both of Mr McClelland’s hands shook.

**[26]** Mr Huiswaard acknowledged he made no written record of the ESR incident until he prepared his witness statement on 22 April 2015, some nine months later. He was

certain the note made by Mr Andrews of their conversation on 25 July 2014 was inaccurate in recording that Mr Huiswaard's complaint was made at 3.30pm on Friday 25 July 2014, not 9am and in recording Mr Huiswaard reporting Mr McClelland had not worn correct personal protection equipment. It should also be observed that a third inaccuracy in Mr Andrews' notes is that they do not record that Mr Huiswaard reported observing the tremor in Mr McClelland's hands.

[27] Mr McClelland's response to the above account of the ESR incident is that Mr Huiswaard did not tell him that he (Mr McClelland) was doing anything wrong. Rather he had talked him (Mr McClelland) through the procedures, but not in disciplinary terms. He (Mr McClelland) had followed the instructions given by Mr Huiswaard which were almost identical to those given to Mr McClelland by his trainer.

[28] As to the shaking hand observation, Mr McClelland said that as he was tightening a bolt on top of the lift car Mr Huiswaard had made a comment about the shaking in Mr McClelland's hands. Mr McClelland had responded to Mr Huiswaard by saying that the shaking was mainly in his left hand. He did not feel it necessary to go into detail as he believed his ability to do the job was not affected.

[29] On the Friday afternoon Mr McClelland attended a team meeting and was there told by Mr Andrews that he would not be going to Timaru the following week. No reason was given.

#### **The events of Monday 28 July 2014**

[30] Mr McClelland said that at approximately 7am on Monday 28 July 2014, one hour before his usual start time of 8am, he received a telephone call from Mr Andrews instructing him to attend a meeting in the Schindler boardroom at 9am. When asked the reason, Mr Andrews replied it was about "safety concerns". Those concerns were not specified. Mr McClelland then telephoned his union (the New Zealand Engineering, Printing and Manufacturing Union (EPMU)) and was advised not to comment until he had been given opportunity to seek representation which would be organised by the EPMU.

[31] Mr McClelland attended the meeting as directed and informed Mr Andrews that he (Mr McClelland) would not say anything until his representative was present. He was then left alone in the boardroom for well over an hour. When Mr Andrews returned he again endeavoured to get Mr McClelland to talk but was met with the response that the meeting could not take place without Mr McClelland's representative being present. Mr McClelland was again left alone in the boardroom for between 10 to 15 minutes after which time Mr Andrews returned with a letter dated 28 July 2014 instructing him to attend another meeting at 9am the following morning, Tuesday 29 July 2014. The letter (drafted by Ms Pabustan) was in the following terms:

Re Discussion regarding issues during trial period

Dear Benjamin

You are requested to attend a meeting on 29 July 2014, 9am at the Boardroom, Christchurch office.

The purpose of the meeting is to discuss your employment as required under the terms of the trial period agreement. You are welcome to invite any person to this meeting for support and guidance. Prior to the meeting, you are asked to take a time off from work and this time off will be with pay.

[32] It is to be noted the stated purpose of the Tuesday meeting was, at best, obscure. The reference to the trial period agreement was in the broadest terms possible. No specific provision of the agreement was referred to.

[33] Later on Monday 28 July 2014 Mr Andrews sent an email to Ms JH McLean, an Organiser at the EPMU advising the purpose of the meeting scheduled for the following day. Again the purpose was couched in language which can only be described as uninformative and unhelpful:

Hi Jo

We have given a Benjamin a letter to attend a meeting to discuss his employment under the terms of the trial period agreement. He is free to invite any person to the meeting for support and guidance.

[34] Mr Andrews concedes he did not, in advance of the Tuesday meeting, advise Ms McLean that the reason for the meeting was to discuss safety concerns held by Schindler.

### **The meeting held on Tuesday 29 July 2014 – plaintiff’s account**

[35] Ms McLean told the Tribunal that at the 9am commencement of the meeting held on Tuesday 29 July 2014 she pointed out to Mr Andrews she had not received any information regarding the purpose of the meeting. Mr Andrews asked everyone to wait until Ms Pabustan joined the meeting by audio-link from Auckland. The meeting eventually got under way at 9.15am.

[36] On the account given by Ms McLean, Mr Andrews then said the meeting was in relation to the trial agreement and that this was his official seven days notice to terminate the trial agreement. When Ms McLean asked why the agreement was being terminated, Mr Andrews said it was because of concerns about safety. Staff did not see that Mr McClelland could perform duties safely because his hands shook while working and as a result staff did not feel safe around him. Ms McLean asked if these issues had been raised before with Mr McClelland and added that nothing had ever been said to Mr McClelland apart from what had just been said by Mr Andrews. Ms McLean queried Schindler’s approach and said it was wrong and unreasonable.

[37] In support of her account Ms McLean produced notes she took during the meeting. Given the conflict in evidence between Ms McLean and Mr McClelland on the one hand and Mr Andrews and Ms Pabustan on the other, it is necessary to set out the relevant passages of Ms McLean’s notes:

[Ms McLean] Information regarding purpose not received.  
[Mr Andrews] Will wait for HR Manager.

Meeting commenced @ 9.15am

[Mr Andrews] Called a meeting to discuss trial period  
Giving 7 days notice terminating trial agreement.  
Concerns about safety –  
On garden leave will be paid for the 7 days.  
Staff don’t see you can perform duties – hand shakes –  
concerns when working.  
Staff don’t feel safe.

[38] When questioned about her evidence Ms McLean said:

[38.1] Prior to the meeting, all she knew was what Mr McClelland had told her namely the purpose of the meeting was to discuss safety concerns. When at the meeting she had asked Mr Andrews to clarify what those safety concerns were she was told that it was Mr McClelland's shaking hands. This was the first she had heard of the allegation.

[38.2] The reason given for terminating the employment agreement was the shaking of hands and the company's belief this was a safety concern.

[38.3] The safety concerns were only particularised when Mr Andrews was pressed.

[38.4] The first time she learnt that Mr Huiswaard alleged Mr McClelland had breached safety procedures for the hoistway was at the Tribunal hearing itself on Monday 3 August 2015. At the meeting on Tuesday 29 July 2014 there had been no reference to the incident at the ESR the previous week or to an allegation that Mr McClelland had breached one or more of Schindler's "golden" rules on safety.

[38.5] The reason given at the meeting for the staff feeling unsafe was the shaking of hands.

[39] The account given by Mr McClelland was the same. He said that at the meeting Mr Andrews advised Schindler had decided to terminate Mr McClelland's employment under the 90 day trial agreement because of safety concerns. When pressed by Mr McClelland and Ms McLean as to what those safety concerns were, the only thing mentioned by Mr Andrews was that Mr McClelland's hands shook occasionally. Mr McClelland questioned Mr Andrews as to whether Mr Andrews had safety concerns about his trainer, Alex who had done all of Mr McClelland's training. Mr Andrews answered "No" to which Mr McClelland replied that he had been working exactly as taught by Alex. At around this time Ms Pabustan told Mr Andrews to make no further comment and the meeting concluded. Cross-examined by Mr Andrews, Mr McClelland added:

[39.1] Prior to the meeting Mr McClelland had not been told what the safety concerns were. At the meeting it was said the concerns related to the shaking in his hands. At no time during the Tuesday meeting was reference made to concerns held by the company in relation to the ESR servicing on the preceding Thursday. The first time Mr McClelland heard any reference to the ESR incident was after these proceedings had been issued and when both sides were preparing for the Tribunal hearing.

[39.2] At the Tuesday meeting Mr McClelland did not himself bring up the shaking of his hands and he was not asked about the subject.

### **The meeting held on Tuesday 29 July 2014 – Schindler's account**

[40] Mr Andrews explained by way of background that he had never seen Mr Huiswaard so worked up as he was when on Friday 25 July 2014 he had reported the hoistway incident at the ESR the previous day and Mr McClelland's failure to wear personal protection equipment. Mr Andrews stressed that failure to follow the safe hoistway access process is considered the most serious breach of safety which can be committed. When he communicated this information to Ms Pabustan on the Friday she had told him the reported breach was a disciplinary matter.



**[41]** When questioned at the hearing, Mr Andrews admitted his letter of Monday 28 July 2014 addressed to Mr McClelland and his email of the same date to Ms McLean had described the purpose of the Tuesday meeting as to discuss Mr McClelland's employment under the terms of the trial period agreement and that no further explanation had been given. No mention had been made of the ESR incident, particularly the allegation of unsafe entry into the hoistway.

**[42]** The account given by Mr Andrews of the Tuesday meeting is substantially different to that given by Ms McLean and Mr McClelland. He said Mr McClelland was advised his trial period would be terminated with seven days notice due to safety concerns. For the EPMU, Ms McLean accepted the decision to terminate after a short debate around the legality of the 90 day trial period. After the meeting closed Mr McClelland had "insinuated" if his hand shaking was a reason for termination. Mr Andrews replied that although there was an occasion that this had been noticed it was not a concern but his unsafe action had compromised one of Schindler's fundamental corporate values.

**[43]** Mr Andrews added that throughout the meeting Ms McLean had been rude and disruptive and had been looking for an argument. Mr Andrews had had to calm her down and to ask her to allow the discussion to proceed. He described her as abusive, lacking in respect and interested only in picking an argument, not discussing the facts.

**[44]** Mr Andrews also said the safety issue had been discussed before the dismissal. He had told Ms McLean and Mr McClelland there had been a breach of safe access to the lift shaft, putting lives at risk. The location of the incident had not, however, been mentioned. He acknowledged the meeting had been very short and attributed this to Ms McLean's disruptive behaviour. This forced Mr Andrews to come quickly to the point of the meeting which was to terminate the agreement. Ms McLean wanted to argue every point and Mr Andrews was not going to let her do so.

**[45]** It is necessary to observe that none of the allegations made against Ms McLean as to her alleged conduct at the meeting were put to her or to Mr McClelland when they gave evidence.

**[46]** It is also necessary to point out that Mr Andrews did not make notes during the meeting and Ms Pabustan did not make her notes (made one or two days later) available to Mr McClelland and the Tribunal.

**[47]** Questioned at the hearing about the sharp conflict between his evidence and that given by Ms McLean, Mr Andrews eventually accepted that Ms McLean's notes were a reasonably accurate record of what was said at the meeting. The significance of this concession will be returned to.

**[48]** As to the hand tremor, Mr Andrews said at first that prior to the Tuesday meeting he had never heard Mr Huiswaard or anyone else say that Mr McClelland had trembling or shaking hands and added that the shaking had not been a factor in the decision to terminate Mr McClelland's employment. On Mr Andrews' account the shaking of hands had been raised by Mr McClelland himself at a point when, in Mr Andrews' opinion, the meeting had already been concluded. When Mr McClelland raised the issue Mr Andrews had replied the tremor had been noticed but was not a concern. However, later in his evidence Mr Andrews accepted he had been told by Mr Huiswaard on the preceding Friday that Mr Huiswaard had observed a shake in Mr McClelland's hands. Nevertheless Mr Andrews did not consider the shaking to be significant or a problem affecting safety.

[49] The termination letter dated 29 July 2014 handed by Mr Andrews to Mr McClelland at the Tuesday meeting makes no reference to any safety issue:

This letter confirms that you will be ceasing employment with Schindler Lifts NZ Ltd on Tuesday 5<sup>th</sup> August 2014 which is seven days' notice from our discussion as required under the terms of the trial period agreement. You are deemed to be on garden leave until end of your notice period for which you will be paid in lieu of. Payment will be within 14 days from date of this notice.

Prior to your final workday please ensure that all documentation, keys and other assets of the company are available to be handed over prior to your departure.

Please accept our sincere regret in making this decision and wish you all the very best for the future.

[50] The account given by Ms Pabustan adds a new element in that she (alone) asserts Ms McLean and Mr McClelland were told at the meeting that Schindler relied on the provision of the trial agreement regarding immediate dismissal for serious misconduct. Her statement of evidence relevantly reads:

In the meeting, it was confirmed by the Schindler representatives that Safety is the core corporate value which will not be compromised and that Benjamin was found to be in serious breach of our safety fundamentals. The Union Representative was persistent in pre-empting the discussion that resulted with the meeting coming to a close with Craig informing Jo and Benjamin that Schindler is citing the provision of the trial period agreement with regards to immediate dismissal for serious misconduct.

Mr Andrews did not mention in his evidence making reference to the trial agreement and its provision regarding immediate dismissal for serious misconduct.

[51] In her oral evidence Ms Pabustan added the following:

[51.1] It had been intended that on the Monday Mr McClelland be provided with full details of the alleged unsafe work practices. However, as he had wanted a lawyer or Union representative to be present, the meeting had been postponed to the following day. The reason why details were not given on the Tuesday was because of Ms McLean's "very aggressive stance". She had been "very feisty" and kept interrupting Mr Andrews. She seemed angry and agitated.

[51.2] When Mr Andrews said that Mr McClelland's employment would be terminated under the 90 day provision, Mr McClelland had responded that he had been trained but Mr Andrews replied that staff did not feel safe working with him. Mr McClelland asked if this was because of the shake in his hands. Mr Andrews replied that it was a concern because of the need to work with live wires.

[51.3] Ms Pabustan does not remember whether there was debate of the legality around 90 day trial periods (as deposed to by Mr Andrews). Ms Pabustan did not hear Ms McLean challenge the legality of the termination and does not remember if this led to a debate. She claimed that although Ms McLean was difficult and obstructive, she nevertheless agreed the dismissal was fair. Challenged on this point she agreed that she did not hear Ms McLean say that the dismissal was fair. It was simply Ms Pabustan's **opinion** that Ms McLean had agreed the dismissal was fair.

[51.4] The meeting lasted no more than five or ten minutes.

[51.5] Ms Pabustan concedes that while Mr McClelland was told that his dismissal was due to unsafe work practices, no details were ever provided to him.

[51.6] Ms Pabustan further conceded that at no time during the meeting was the term “misconduct” used.

### **The correspondence with Mr Corbett**

[52] Two days after the meeting, by letter dated 31 July 2014 and sent by email, Mr Corbett wrote to Mr Andrews alleging breach of the good faith principle and referring to the possibility of proceedings under the Employment Relations Act 2000. The relevance of this letter lies in the background circumstances recited namely that on Monday 28 July 2014 Mr McClelland had been told only that there was an allegation of unspecified unsafe work practices and that at the Tuesday meeting the reason given for the termination of employment was safety concerns, primarily Mr McClelland’s shaking hands. This is entirely consistent with the evidence given by Mr McClelland and Ms McLean.

[53] On one view this letter offered Schindler an opportunity to put forward the full circumstances it had intended to provide on the Monday and Tuesday, that intention being allegedly thwarted first by Mr McClelland’s insistence that a lawyer or Union representative attend the meeting and second, by Ms McLean’s alleged disruptive behaviour. Instead Mr Andrews replied on 7 August 2014 by an obscurely worded email:

Thank you for your email below.

As you will appreciate, we are disappointed that we need to make adjustments with the termination of Benjamin during the trial period, however we are confident that the provisions under his employment contract have been adhered to and we deny any allegations or insinuations that we did the contrary.

It is with regret that we have to come to the decision of termination for reasons conveyed to him. We wish Benjamin all the very best for the future.

[54] It is necessary to observe that the description of a dismissal for serious misconduct as a “need to make adjustments” was unhelpful, to say the least as was the assertion that the reasons for termination had been adequately conveyed to Mr McClelland.

[55] This reply, as with all the relevant correspondence, was drafted by Ms Pabustan. Asked why the reply did not respond to the letter by giving accurate information as to the alleged true reason for the dismissal, Ms Pabustan said that the email did provide information by denying the allegations. She added that she saw the letter from Mr Corbett as an attempt to bring a “baseless” personal grievance claim and therefore the short reply was a general denial.

[56] The Tribunal detected more than a hint of resentment, if not hostility on the part of Mr Andrews and Ms Pabustan in relation to Mr McClelland’s refusal to go on with the Monday meeting without a union representative and to Ms McLean’s participation in the Tuesday meeting. While Mr Andrews’ letter of 28 July 2014 told Mr McClelland that he was welcome to invite any person to the meeting for support and guidance, it was a formula of words which did not reflect the negativity of Mr Andrews and Ms Pabustan to “outside” interference. The same attitude was displayed to Mr Corbett.

### **The correspondence with the Human Rights Commission**

[57] Following a complaint by Mr McClelland to the Human Rights Commission the mediator and Schindler exchanged correspondence in August 2014. The only relevant point for present purposes is that in responding to the discrimination complaint by Mr

McClelland Schindler did not in an email dated 26 August 2014 mention the ESR incident and the alleged unsafe access to the hoistway. Rather Mr McClelland was blamed for “suppressing” relevant health information concerning his disability ie the tremor in his hands. The email from Mr Andrews to the mediator was in the following terms:

We refer to your letter of 18 August 2014 regarding the complaint of alleged disability discrimination from Benjamin McClelland.

We confirm that Benjamin was hired by Schindler as Service Technician on 26 May 2014 and was terminated on 5 August 2014 under the trial period provision of his employment agreement.

As you will appreciate, we are disappointed that we need to make adjustments with the termination of Benjamin for reasons conveyed to him however, we are confident that the provisions under his employment contract have been adhered to including the appropriate notice period. It is unfortunate that during the recruitment process, Benjamin had misrepresented himself and suppressed relevant health information by not disclosing his disability that could essentially risk his and other people’s safety. The lift industry is a high risk industry sector and as such Safety has always been the company’s fundamental core value which cannot be compromised. With the increasing demand and promotion on Safety by the government and under the honesty provision and the risk of harm exemption (Section 29) of the Human Rights Act on employment, we are confident that the Commission would concur that the complaint on alleged disability discrimination filed by Benjamin has no valid ground. It is in this premise that we believe mediation is unnecessary. Please feel free to contact the undersigned should you require further documentation or clarification to support our position.

It is with regrets that we have come to the decision of termination. We sincerely wish Benjamin all the very best for the future.

**[58]** This email was drafted by Ms Pabustan. She agreed in evidence the reasons for the dismissal are not given in this letter. Contradicting her earlier testimony she said the reasons had not been given on the Monday or on the Tuesday. Asked when they were given she said that she did not know. She accepted that all Mr McClelland was told was that there were unsafe work practices.

### **THE EVIDENCE – DISCUSSION AND FINDINGS**

**[59]** There is a direct conflict in evidence as to the reasons for the termination of Mr McClelland’s employment. In essence Mr McClelland and Ms McLean say the only reason given was safety concerns relating to the shaking of Mr McClelland’s hands. On the other hand Mr Andrews and Ms Pabustan say the reason was safety concerns arising out of the ESR incident when Mr McClelland allegedly failed to follow mandatory safety procedures before accessing the hoistway.

**[60]** There is a difference between reasons given at the time and those offered ex post facto. In our view it is unsafe to accept ex post facto reasons. It is not what Mr Andrews and Ms Pabustan would now wish to have said at the Tuesday meeting and in the correspondence leading up to that meeting. It is what was said at the meeting which is relevant to our inquiry into the discrimination allegation. Our conclusion is that the only reason given to Mr McClelland and Ms McLean for the termination of Mr McClelland’s employment was that the tremor in his hands was a safety issue. We base this conclusion on our findings of credibility and on our assessment of the evidence.

**[61]** We address first our assessment of the witnesses.

## **Credibility**

[62] We found Mr McClelland to be a quiet, humble person who did his best to give a frank and honest account of events. His evidence was given in measured terms, without embellishment or exaggeration.

[63] Our assessment of Ms McLean is that she too is an honest witness and that her evidence can be relied on. She displayed no rancour or ill-will. Her account was given in objective terms. She alone kept contemporaneous notes of the Tuesday meeting and Mr Andrews conceded those notes are a reasonably accurate record of what was said at the meeting. The allegation that Ms McLean was rude and disruptive is not found in any of the contemporary documents or in the witness statement filed by Mr Andrews. All that Ms Pabustan said in her written statement of evidence was that Ms McLean was “persistent in pre-empting the discussion”. The allegation of obstructive behaviour was not put to Ms McLean and Mr McClelland when they gave evidence. The allegations first surfaced when Mr Andrews and Ms Pabustan gave their oral evidence to the Tribunal. We find the allegations to be without foundation.

[64] By contrast both Mr Andrews and Ms Pabustan came across as dogmatic, inflexible individuals convinced of the self-evident correctness of their case. They chose to hear and see only that which reinforced their own rigidly held perception of events. They appeared incapable of understanding other points of view or accepting they might be mistaken or wrong. They also seemed unable to grasp how important it was at the Tuesday meeting for them to give a clear and direct answer to the simple request for the reason for the termination.

[65] It was Ms Pabustan who effectively directed and controlled Schindler’s reaction and response to the information provided orally by Mr Andrews. The tactic appeared to be to hold Schindler’s cards close to the chest, giving little away. The correspondence drafted by her was couched variously in vague generalisations (“the purpose of the meeting is to discuss your employment as required under the terms of the trial period agreement” – letter to Mr McClelland 28 July 2014) or in impenetrable “HR speak” (“we need to make adjustments with the termination of Benjamin during the trial period” – email to Mr Corbett 7 August 2014).

[66] An example of Ms Pabustan hearing only that which she wanted to hear is her assertion Ms McLean agreed the dismissal was fair. Only when challenged did Ms Pabustan concede Ms McLean did not say the dismissal was fair. It was just Ms Pabustan’s opinion that that was what Ms McLean thought. Given the alleged obstructive behaviour by Ms McLean and her alleged derailing of the meeting, it is inherently improbable that after her insisting on particulars of the alleged safety concerns she would turn around and either say, or give the impression, that she believed the dismissal was fair. The more so when the letter handed to Mr McClelland at the meeting gave no meaningful reason for the termination.

[67] For these briefly expressed reasons we prefer the evidence of Mr McClelland and Ms McLean to the evidence given by Mr Andrews and Ms Pabustan. We address next other aspects of the evidence.

## **Evidence – discussion**

[68] A question which arises is whether, by the time the Tuesday meeting commenced, Mr Andrews was aware of Mr McClelland’s hand tremor. If he was not so aware, an argument could be made that it was indeed Mr McClelland who first mentioned the

tremor at the meeting and therefore the actual or perceived disability was not given as a reason for his dismissal.

**[69]** The argument is not, however, open to Schindler because Mr Huiswaard clearly stated that he did mention the tremor to Mr Andrews when on Friday 25 July 2014 he personally reported the incident the preceding day at the ESR. While Mr Andrews initially told the Tribunal he had never heard through Mr Huiswaard or anyone else that Mr McClelland had shaking in his hands, he later conceded he had been given this information by Mr Huiswaard.

**[70]** That at the Tuesday meeting Mr Andrews articulated the safety concerns as Mr McClelland's inability to perform duties safely because of the hand tremor is established by the evidence given by both Mr McClelland and by Ms McLean. In this they are supported by Ms McLean's contemporaneous notes which record Mr Andrews saying:

[Mr Andrews]      Called a meeting to discuss trial period  
Giving 7 days notice terminating trial agreement.  
Concerns about safety –  
On garden leave will be paid for the 7 days.  
Staff don't see you can perform duties – hand shakes –  
concerns when working.  
Staff don't feel safe.

**[71]** According to the evidence of Mr McClelland and Ms McLean (which we accept), no other safety concern was ever articulated either before, or during the Tuesday meeting.

**[72]** If there were other safety concerns arising from Mr Huiswaard's allegations concerning unsafe access to the ESR hoistway, it would have been simple enough for this to be stated to Mr McClelland on at least three occasions. First, on Friday 25 July 2014 when he was told he was not to go to Timaru with Mr Huiswaard. Second, on Monday 28 July 2014 when he was told to attend a meeting with Mr Andrews to discuss safety concerns. In this we include the letter that day from Mr Andrews to Mr McClelland instructing him to attend the Tuesday meeting as well as the email from Mr Andrews to Ms McLean of the same date. Finally, the last opportunity was at the meeting itself in response to the repeated requests by Mr McClelland and Ms McLean that Mr Andrews specify what the alleged "safety concerns" were.

**[73]** It should be noted that the safety concerns relating to hoistway access were not mentioned in the letter of termination or in the response to Mr Corbett's letter of 31 July 2014 or in the email dated 26 August 2014 from Mr Andrews to the Human Rights Commission.

**[74]** In this context it cannot be overlooked that according to Mr Andrews he had never seen Mr Huiswaard so worked up as when he reported the alleged safety breach at the ESR. In addition Mr Andrews said as far as Schindler is concerned failure to follow the safe hoistway access process is considered the most serious breach of safety which can be committed. Ms Pabustan added that the alleged breach was a disciplinary matter. In these circumstances it is inexplicable the ESR incident was not offered at the Tuesday meeting as a response to the repeated requests for information.

**[75]** The claim that Ms McLean's alleged behaviour in asking for information somehow led to a failure by Mr Andrews and Ms Pabustan to mention what they claim were the "true" reasons for the dismissal is simply untenable.

**[76]** At one point in her evidence Ms Pabustan did suggest that Mr McClelland and Ms McLean were told at the meeting that Schindler relied on the provision of the trial

agreement regarding immediate dismissal for serious misconduct but in this she was not supported by Mr Andrews. He, for his part did at one point suggest that he told Ms McLean and Mr McClelland there had been a breach of safe access to the lift shaft, putting lives at risk. But this is not recorded in Ms McLean's notes, notes which Mr Andrews has accepted are a reasonably accurate record of what was said at the meeting. Given our credibility findings we do not accept that reference was made to the serious misconduct provisions in the trial agreement or to any breach of safe access to a lift shaft.

**[77]** In the result we find that only one reason was ever given to Mr McClelland and Ms McLean for the termination of Mr McClelland's employment. That reason was safety concerns based on Mr McClelland's hand tremor.

**[78]** We further find there is no evidence that Mr McClelland's hand tremor meant he could not perform his duties without a risk of harm to himself or others. All Schindler had to go on was a claim by Mr Huiswaard that he had observed that one or both of Mr McClelland's hands shook. As against this there is the unchallenged evidence that in the five year six month period from 29 September 2006 to 6 April 2012 Mr McClelland carried out maintenance and repairs on New Zealand navy vessels (including while at sea) without incident or concern and had in early 2014 been given a verbal reference that he carried out maintenance on boats for Auckland Water Taxis, including on high and low voltage gear, presumably without incident. His mother, a registered nurse, testified she had observed no difficulty or impairment in her son's ability to do electrical work. Significantly, at no time during the five week training period at Schindler had Mr McClelland's trainer remarked on the hand tremor or expressed any safety concern. Nor after the hand tremor was first reported by Mr Huiswaard did Schindler ask Mr McClelland to undergo a medical examination.

**[79]** The remaining issue is the claim (statement of reply para 6) that Schindler became aware of Mr McClelland's condition only when, post-dismissal, it had received the letter from Mr Corbett dated 31 July 2014 in which he stated Mr McClelland suffered from "a neurological disease known as Benign Essential Tremor". It may well be that Mr Andrews and Ms Pabustan were not, until receipt of Mr Corbett's letter, aware of the medical name of the condition or of its description. But they had been told by Mr Huiswaard a tremor had been observed and this was later given as the safety concern leading to dismissal. Knowledge of the medical name (provided by Mr Corbett) was not material but has been conveniently put forward as a basis for denying the tremor was the reason for dismissal.

## **Conclusion**

**[80]** There is little point attempting an exhaustive summary of the findings made. The following are possibly those which most justify repetition:

**[80.1]** The evidence of Mr McClelland and Ms McLean is preferred to that of Mr Andrews and Ms Pabustan.

**[80.2]** The only reason given for the termination of Mr McClelland's employment was safety concerns relating to his hand tremor.

**[80.3]** The hand tremor did not affect Mr McClelland's work performance but was suspected or assumed or believed by Schindler to exist and to be a safety issue.

**[80.4]** In terms of s 29(1)(b) of the Human Rights Act there is no evidence that, given the environment in which Mr McClelland's duties were to be performed, he could perform those duties only with a risk of harm to himself or to others and that it would not be reasonable for Schindler to take that risk.

## THE LEGAL ISSUES

### The legislation

**[81]** Disability is a prohibited ground of discrimination. See s 21(1)(h) of the Human Rights Act:

#### 21 Prohibited grounds of discrimination

- (1) For the purposes of this Act, the prohibited grounds of discrimination are—  
...  
(h) disability, which means—  
    (i) physical disability or impairment:  
    (ii) physical illness:  
    (iii) psychiatric illness:  
    (iv) intellectual or psychological disability or impairment:  
    (v) any other loss or abnormality of psychological, physiological, or anatomical structure or function:  
    (vi) reliance on a guide dog, wheelchair, or other remedial means:  
    (vii) the presence in the body of organisms capable of causing illness:  
...

**[82]** It is unlawful to discriminate on the grounds of a suspected or assumed disability or if the disability is believed to exist. See s 21(2):

- (2) Each of the grounds specified in subsection (1) is a prohibited ground of discrimination, for the purposes of this Act, if—  
(a) it pertains to a person or to a relative or associate of a person; and  
(b) it either—  
    (i) currently exists or has in the past existed; or  
    (ii) is suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated.

**[83]** It is unlawful to terminate a person's employment by reason of any one of the prohibited grounds of discrimination. See s 22:

#### 22 Employment

- (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—  
(a) to refuse or omit to employ the applicant on work of that description which is available; or  
(b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or  
(c) to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or  
(d) to retire the employee, or to require or cause the employee to retire or resign,—  
by reason of any of the prohibited grounds of discrimination.  
(2) It shall be unlawful for any person concerned with procuring employment for other persons or procuring employees for any employer to treat any person seeking employment



differently from other persons in the same or substantially similar circumstances by reason of any of the prohibited grounds of discrimination.

**[84]** Section 22 does not, however, prevent different treatment based on disability where the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others and it is not reasonable to take that risk. See s 29(1)(b) and (2):

**29 Further exceptions in relation to disability**

- (1) Nothing in section 22 shall prevent different treatment based on disability where—
    - (a) ...
    - (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.
  - (2) Nothing in subsection (1)(b) shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.
- ...

**[85]** While it is for the plaintiff to establish, on the balance of probabilities, that the defendant has committed a breach of Part 2 of the Act (see s 92I(3)), it is for the defendant to establish to the same standard that the conduct is excepted under any of the Part 2 provisions (such as s 29). See s 92F(2):

- (2) The onus of proving, in any proceedings under this Part, that conduct is, under any provision of Part 2, excepted from conduct that is unlawful under any provision of Part 2 lies on the defendant.

**[86]** In the present case the application of s 29(1)(b) falls away as a consequence of our finding there is no evidence that, given the environment in which Mr McClelland's duties were to be performed, he could perform those duties only with a risk of harm to himself or to others and that it would not be reasonable for Schindler to take that risk.

**Basic principles**

**[87]** The following principles are not in issue:

**[87.1]** There is no requirement to prove intention in the sense of motive or purpose to engage in prohibited discrimination. See *Fehling v Appleby* [2015] NZHC 75, [2015] NZAR 547 at [74] to [78]. As stated in Sylvia Bell (ed) *Brookers Human Rights Law* (looseleaf ed, Brookers) vol 1 at [HRIntro.05(2)] and [HR22.14] discrimination is about effect not intent. The fact that a person claims he or she did not intend to discriminate is considered irrelevant. The objective of human rights legislation is to eliminate discrimination and remedy the consequences of discriminatory conduct. Having to prove intent should not be a determining factor.

**[87.2]** Whether termination of employment is unlawful will depend on whether it was by reason of one of the prohibited grounds of discrimination. If it was, then it is academic whether the procedure was fair or reasonable. See Bell (ed) *Brookers Human Rights Law* at [HR22.09].

**[87.3]** There must be a causative link between the ground and the treatment complained of. The phrase "by reason of" requires the prohibited ground to be a material ingredient. Nothing stronger is required. See *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51 (14 October 2014) at [115] to [117]:

[115] As mentioned, Mr Meulenbroek has the responsibility of establishing, on the balance of probabilities, that in the circumstances described in s 22(1)(c) he was discriminated against by reason of his religious beliefs. The correct question raised by the phrase “by reason of” is whether the prohibited ground was a material ingredient in the making of the decision to treat Mr Meulenbroek in the way he was treated. See *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [49] per Tipping J. In so holding His Honour rejected the *Eric Sides Motors* interpretation (“a substantial and operative factor”) because such formulation is capable of being read as requiring too strong a link between the outcome and the prohibited ground. He pointed out that the policy of the legislation is that a prohibited ground of discrimination should play “no part” in the way people are treated.

[116] It follows that the submission by Vision that refusal to work on the Sabbath must be “the” material ingredient in the decision to terminate is unsupported by authority and wrong in principle as requiring too strong a link between the dismissal and the prohibited ground of discrimination.

[117] The more stringent test would also be inconsistent with the purpose of the Human Rights Act (better protection of human rights) and with the fact that the materiality test has been adopted in related contexts. See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [109] and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [53] to [64].

### **The comparator issue**

[88] Section 22(1)(c) requires a plaintiff to establish that the termination of employment occurred in circumstances in which the employment of other employees employed on work of the same description would not be terminated.

[89] The principles which guide the framing of the comparator group were recently summarised by the Tribunal in *Heads v Attorney-General* [2015] NZHRRT 12 at [120], albeit in the context of Part 1 of the Act. In the specific employment setting the principles were addressed first in *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 (24 February 2014) at [65] to [71] and then in *Meulenbroek v Vision Antenna Systems Ltd* at [121] to [131].

[90] It is not intended to add to what is said in these cases as the circumstances of the present case are clear. Mr McClelland was dismissed because of an actual or perceived disability namely a tremor in his hand. The appropriate comparator is therefore other service technicians employed by Schindler who did not have such tremor. See *Meulenbroek* at [129] and [131].

### **Application of the law to the facts**

[91] Through Mr Andrews and Ms Pabustan, Schindler gave as the reason for terminating Mr McClelland’s employment “safety concerns” relating to his hand tremor. That tremor was either a physical disability or impairment or one that was suspected or assumed or believed to exist.

[92] Service technicians who did not have hand tremor were not dismissed. That is, Mr McClelland’s employment was terminated in circumstances in which the employment of other employees employed on work of the description required of Mr McClelland but who did not have hand tremor would not have been terminated.

[93] It follows we are satisfied Mr McClelland has established to the civil standard that his employment was terminated for reason of a prohibited ground of discrimination being a physical disability or impairment or one that was suspected or assumed or believed to exist.

**[94]** As Schindler has not established the exception in s 29(1)(b) of the Act we conclude that the termination of Mr McClelland's employment was unlawful and Schindler committed a breach of Part 2 of the Human Rights Act.

## **REMEDY**

**[95]** Section 92I(2) of the HRA provides that in proceedings under s 92B(1) of the Act (as here), the plaintiff may seek any of the remedies described in s 92I(3). That is, if the Tribunal is satisfied (as we are) on the balance of probabilities that the defendant has committed a breach of Part 2, the Tribunal may grant one or more of the following remedies:

- (a) a declaration that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint;
- (b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order;
- (c) damages in accordance with sections 92M to 92O;
- (d) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach;
- (e) a declaration that any contract entered into or performed in contravention of any provision of Part 1A or Part 2 is an illegal contract;
- (f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of this Act;
- (g) relief in accordance with the Illegal Contracts Act 1970 in respect of any such contract to which the defendant and the complainant or, as the case may be, the aggrieved person are parties;
- (h) any other relief the Tribunal thinks fit.

**[96]** It is no defence that the breach was unintentional or without negligence on the part of the party against whom the complaint is made but the Tribunal must take the conduct of the parties into account in deciding what, if any, remedy to grant. See s 92I(4).

**[97]** The heads of damages allowed by s 92M(1) are:

### **92M Damages**

- (1) In any proceedings under section 92B(1) or (4) or section 92E, the Tribunal may award damages against the defendant for a breach of Part 1A or Part 2 or the terms of a settlement of a complaint in respect of any 1 or more of the following:
  - (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the complainant or, as the case may be, the aggrieved person for the purpose of, the transaction or activity out of which the breach arose;
  - (b) loss of any benefit, whether or not of a monetary kind, that the complainant or, as the case may be, the aggrieved person might reasonably have been expected to obtain but for the breach;
  - (c) humiliation, loss of dignity, and injury to the feelings of the complainant or, as the case may be, the aggrieved person.
- (2) ...

**[98]** It is further provided in s 108B that before the Tribunal grants any remedy under Part 3, it must give the parties to the proceedings an opportunity to make submissions on the implications of granting that remedy and the appropriateness of that remedy. In the present case, oral submissions were heard on 5 August 2015 and in the circumstances earlier explained, the parties have since filed additional written submissions.

## A declaration

[99] We address first the question of a declaration. In the analogous jurisdiction under s 85(1)(a) of the Privacy Act 1993 it was held in *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, SL Ineson and PJ Davies) at [107] and [108] that while the grant of a declaration is discretionary, the grant of such declaratory relief should not ordinarily be denied and there is a “very high threshold for exception”. On the facts we see nothing to justify the withholding from Mr McClelland of a formal declaration that Schindler breached s 22 of the Human Rights Act. Indeed to withhold such declaration would be unfair.

[100] We now address the question of damages.

### Damages for pecuniary loss

[101] Mr McClelland says that following termination of his employment by Schindler he immediately sought work to keep his rent and debt payments up to date. Using a recruitment and out-sourcing firm the only employment he could find was working at Envirowaste as a “yard man” on a minimum wage. This involved washing rubbish bins and scraping solidified waste from the bottom of skip bins. He then returned to Auckland to find better opportunities but was forced to live in his car for a period of two months until he could secure accommodation. The information provided to the Tribunal is not entirely clear but it would seem that he was employed at Envirowaste for one month. The date on which he commenced work in Auckland is not stated but in the context would appear to be two months. In these circumstances we intend treating the claim for pecuniary loss of wages as covering the first three months following his dismissal. The lost earnings while he was employed at Envirowaste is said to be \$731 whereas the difference between his earnings at Schindler and his new position at Kawai Cruises Ltd is said to be \$1,491. The calculation for the three months we allow follows:

Month 1	\$731
Month 2	\$1,491
Month 3	<u>\$1,491</u>
Total	\$3,713

[102] Mr McClelland also seeks pecuniary loss of \$700 made up as follows:

\$400	Petrol for travelling from Auckland to Christchurch and Christchurch to Auckland by personal vehicle
\$300	Cook Strait Ferry Crossing (\$150 x 2)

[103] In the result we treat the claim for pecuniary loss as being a claim for \$4,413 in total.

[104] Schindler submits it was Mr McClelland’s decision to leave his “secure and full time” employment in Christchurch and to move to Auckland to seek new employment. This, however, fails to take into account the difficulties encountered by Mr McClelland finding skilled employment in Christchurch. A move to Auckland where he re-entered his previous field of employment (operating boats) proved to be the correct choice.

[105] We conclude the pecuniary loss claimed by Mr McClelland has been established and damages of \$4,413 are to be awarded for pecuniary loss comprising lost wages together with travel expenses relocating to Christchurch and then, following termination of his employment, relocating to Auckland.

## **DAMAGES FOR HUMILIATION, LOSS OF DIGNITY AND INJURY TO FEELINGS**

**[106]** Mr McClelland seeks an award of damages of \$50,000 under ss 92I(3)(c) and 92M(1)(c) for humiliation, loss of dignity and injury to feelings (emotional harm). Not each of these heads of damages need be established for there to be jurisdiction to make an award but we find all three (as discussed and defined in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [152] to [153] and [170]) have indeed been established. On the facts causation can hardly be in dispute.

**[107]** While it is to be noted the statement of claim originally sought \$2,000 Mr McClelland has not been represented by a lawyer and in any event the Tribunal is not bound by the amount of damages nominated by a plaintiff. See *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, [2013] NZAR 760 at [103] to [108].

**[108]** On the facts we have found, Mr McClelland was required by Schindler to attend a meeting on Tuesday 29 July 2014 without notice of what was alleged against him. All he was told was that there were unspecified “safety concerns”. The summary termination of his employment which followed within five or ten minutes of the commencement of the meeting was justified on the basis his hands shook and his work colleagues did not feel safe around him. Mr McClelland pointed out (in vain) his trainer had held no safety concerns. Mr Andrews would not allow discussion of the issue.

**[109]** The manner in which Mr Andrews and Ms Pabustan went about terminating Mr McClelland’s employment maximised the shock, dismay, hurt and humiliation of being told without supporting evidence that the safety of others had been put at risk. They compounded this when responding to the Human Rights Commission. In refusing to engage in mediation they asserted their fixed view that Schindler was the “victim”, not Mr McClelland because he had “misrepresented himself” in the recruitment process and “suppressed” health information by not disclosing a disability that could put at risk his and others’ safety. In our view there was simply no evidence to support this accusation and noticeably no pre-termination request was made for Mr McClelland to undergo a medical examination to test whether the proposed ground of termination was borne out in fact. Instead, the dismissal was based on Mr Huiswaard’s brief oral report to Mr Andrews of the ESR incident on Thursday 24 July 2014. In addition no evidence was led by Schindler at the Tribunal hearing to support the assertion that Mr McClelland’s hand tremor put at risk his safety and the safety of others. In his evidence Mr Andrews continued to accuse Mr McClelland of being dishonest. Displaying no objectivity and little judgment, Mr Andrews and Ms Pabustan in their closing submissions even demanded a letter of apology from Mr McClelland for “exposing Mr Huiswaard to unacceptable work place risks”.

**[110]** In these circumstances we see nothing to mitigate the emotional harm caused by the unlawful discrimination.

**[111]** In assessing quantum account must be taken not only of the circumstances in which the actual or perceived disability was used against Mr McClelland, but also of the consequences. Mr McClelland not only lost his job, he has been stigmatised before his work colleagues as someone who was so selfish and indifferent to their safety that he deceived Schindler into offering him employment. For an individual who has excellent references from the Royal New Zealand Navy and from his employer at Auckland Water Taxis, the circumstances of the dismissal and its outcome were understandably devastating.

[112] This was compounded by the fact that the only employment he could find was cleaning and scraping waste bins. The Tribunal was told he was so humiliated he was too embarrassed to tell any of his family or friends what he was doing for work. Upon his return to Auckland he was forced to live in his motor vehicle for two months until he could find accommodation. He experienced depression and loss of self-worth. His future in an engineering and technical environment appeared bleak.

[113] For Schindler it is submitted account must be taken of the fact Mr McClelland was “only employed by the Defendant for two months and was still subject to a 90 day trial period”.

[114] It is surprising the submission is made. The prohibition on discrimination in employment applies with equal force each and every day a person is employed. The prohibition is not of any less force during a trial period, including the statutory 90 day period. The protection of the Human Rights Act is not to be compromised or watered down.

[115] Schindler also submits the Tribunal should take into account the fact that it complied with the good faith requirements of the Employment Relations Act 2000. It claims to have followed proper process before terminating Mr McClelland’s employment. However, as observed earlier, whether termination of employment is unlawful under the Human Rights Act will depend on whether it was by reason of one of the prohibited grounds of discrimination. If it was, then it is academic whether the procedure was fair or reasonable.

[116] That having been said, while the Tribunal has no jurisdiction to make determinations under the Employment Relations Act, it may be required to examine process issues when deciding whether unlawful discrimination in the employment place has taken place. In the present case our finding is that the process followed by Schindler’s representatives was characterised by unfairness. We refer for example to the failure to give proper notice of the allegation and the failure to afford a proper opportunity to respond. In addition the reason for termination given on the day was not the reason given at the Tribunal hearing. Furthermore, the reason given on the day was not one justified on the facts. The fact that Mr McClelland has a hand tremor does not necessarily mean that it is “unsafe” for him to work with lifts and Schindler made no inquiry.

[117] However, as outlined in *Hammond v Credit Union Baywide* at [170.3], the award of damages is to compensate for emotional harm, not to punish the defendant. The conduct of the defendant may, however, exacerbate the humiliation, loss of dignity or injury to feelings and therefore be a relevant factor in the assessment of the quantum of damages.

[118] Recent emotional harm awards made under the Human Rights Act since 2012 follow in reverse date order:

<i>Meulenbroek v Vision Antenna Systems Ltd</i> [2014] NZHRRT 51	religious discrimination in the employment context	\$25,000 & training order
<i>Nakarawa v AFFCO New Zealand Ltd</i> [2014] NZHRRT 9	religious discrimination in the employment context	\$15,000 & training order
<i>DML v Montgomery</i> [2014] NZHRRT 6	sexual harassment in the employment context	\$25,000 & training order

[119] As observed in *Meulenbroek v Vision Antenna Systems Ltd* at [179], there is a substantial subjective element to the assessment of humiliation, loss of dignity and injury to feelings. Bearing in mind the findings earlier made we believe an appropriate response to what happened in the present case is an award of damages around the mid-point of the middle band discussed in *Hammond v Credit Union Baywide* at [176]. We award \$25,000.

### Training order

[120] On the facts found, the two senior managers (Mr Andrews and Ms Pabustan) who dealt with Mr McClelland demonstrated little awareness of the non-discrimination provisions of the Human Rights Act and the obligations of Schindler under s 22. This was compounded by a rigid and unwavering belief in the correctness of their actions. The interests of Schindler seemed to be elevated by them above everything else, including the need for careful attention to be given to the Human Rights Act. As is common in discrimination cases in the employment context, Schindler as the employer approached the case as one turning exclusively on the terms of the employment contract. This was a fundamental error borne of ignorance of the employer's obligations under the Human Rights Act. See further *Meulenbroek v Vision Antenna Systems Ltd* at [180].

[121] Against this background we conclude that a training order should be made under s 92I(3)(f). We refer in support to *Meulenbroek v Vision Antenna Systems Ltd* at [182] and [183]:

[182] ... As the Tribunal observed in *Nakarawa* at [104] remedies such as a declaration and damages are, in a sense, palliative. Their importance is not diminished on that account. But they are not on their own directed to preventing future breaches of the Act, especially in relation to others. The fact that s 92I(3)(f) HRA makes specific provision for training orders signifies that the Tribunal must in any particular case consider the need to prevent future breaches of the anti-discrimination provisions of the HRA. This is made explicit by the terms of the provision:

(f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, **in order to assist or enable the defendant to comply with the provisions of this Act:**  
[emphasis added]

[183] The failures by Vision must be remedied and not repeated. We are of the view that requiring Vision to implement a training programme focussed on its responsibilities under the Human Rights Act is the most effective means of achieving that end.

[122] These comments apply with equal force to Schindler.

[123] We accordingly order that Schindler, in conjunction with the Human Rights Commission (and at its own expense), provide training to its senior management staff in relation to their and Schindler's obligations under the Human Rights Act 1993 in order to ensure that they are aware of those obligations.

### Costs

[124] Mr McClelland was not represented by a lawyer. We accordingly intend applying the conventional rule that he is entitled to disbursements only. While the submissions for Schindler suggested Mr McClelland could have obtained Christchurch-based assistance, we see nothing in the point and allow reimbursement of Mr Corbett's airfare. All the disbursements claimed are modest:

\$29.64 Travel costs to the hearing (Mr McClelland)  
\$45.00 Parking costs for the three days of the Tribunal hearing (Mr McClelland)  
\$54.30 Photocopying and binding  
\$155.00 Airfare for Mr Corbett  
  
\$283.94 Total

[125] A plaintiff who has succeeded in establishing unlawful discrimination should not be left out of pocket for having brought his or her claim. We therefore award Mr McClelland disbursements of \$283.94.

### FORMAL ORDERS

[126] For the foregoing reasons the decision of the Tribunal is that:

[126.1] A declaration is made under s 92I(3)(a) that Schindler Lifts NZ Ltd committed a breach of s 22(1) of the Human Rights Act 1993 by discriminating against Mr McClelland for reason of a physical disability or impairment suspected or assumed or believed by Schindler to exist.

[126.2] Damages of \$3,713 are awarded against Schindler Lifts NZ Ltd under ss 92I(3)(c) and 92M(1)(a) of the Human Rights Act 1993 for pecuniary loss in the form of lost wages.

[126.3] Damages of \$700 are awarded against Schindler Lifts NZ Ltd under ss 92I(3)(c) and 92M(1)(a) of the Human Rights Act 1993 for pecuniary loss in the form of travel expenses.

[126.4] Damages of \$25,000.00 are awarded against Schindler Lifts NZ Ltd under ss 92I(3)(c) and 92M(1)(c) of the Human Rights Act 1993 for humiliation, loss of dignity and injury to the feelings of Mr McClelland.

[126.5] It is ordered pursuant to s 92I(3)(f) of the Human Rights Act 1993 that Schindler Lifts NZ Ltd, in conjunction with the Human Rights Commission and at its own expense, provide training to its senior management staff in relation to their and Schindler Lifts NZ Ltd's obligations under the Human Rights Act 1993 to ensure that they are aware of those obligations.

.....  
**Mr RPG Haines QC**  
Chairperson

.....  
**Ms WV Gilchrist**  
Member

.....  
**Ms ST Scott**  
Member