

had indicated to Mr Harris earlier that month that he had misgivings about whether it was safe for Mr Harris to be working even intermittently.

[3] Also during January 2009 Mr Jensen had become aware of problems between Mr Harris and another employee. Mr Harris wanted a closer relationship with this co-worker and was unable to accept the fact that she did not. He texted her constantly with requests that she see or talk to him but she decided to cease contact with him. The situation culminated in an incident in which he followed her in his car and attempted to get her to pull over and talk to him. A complaint was laid with the police with the consequence that Mr Harris's gun licence was revoked and a restraining order taken out against him. Mr Harris has given differing accounts of this incident however at the Authority investigation meeting he acknowledged that it happened as set out here.

[4] He also acknowledged that it was he who first told Mr Jensen about the incident, in January 2009. It was not until March 2009 (after Mr Harris had been on leave for some six weeks) that the co-worker formally complained to Mr Jensen that she had been harassed by Mr Harris. Mr Jensen gave Mr Harris written notification of the complaint and (because he already knew something of the situation from Mr Harris himself) immediately cautioned Mr Harris to stop trying to contact the co-worker. Mr Jensen then attempted, unsuccessfully, to set up a formal meeting with Mr Harris.

[5] Meanwhile, upon being advised of the complaint against him, Mr Harris made one of his own, alleging that the purported harassment victim had once assaulted him. During April he agreed to attend a meeting with Mr Harris (which was facilitated by Mr Harris's counsellor) and there was some discussion of the whole situation with the co-worker. After that there was no further follow through to any formal conclusion in respect of either complaint.

[6] Mr Jensen told me that there were several reasons why he did not proceed to consider disciplinary action in relation to the complaint against Mr Harris or at least address the matter more formally. Mr Harris did stop contacting the complainant and as far as Mr Jensen understood she was satisfied with that. There was no dispute about what Mr Harris had done, and therefore no need to make or report any factual

conclusions. The other employee worked in a different part of the business and it would be possible, when Mr Harris returned, to keep them apart during the working day. Finally, he said, Mr Harris was clearly very unwell (in Mr Jensen's words 'in a fragile state') and he felt it was best to let the matter lie rather than upset Mr Harris further by further discussion of the situation. For the same reasons he also decided to let the complaint by Mr Harris lie.

[7] Mr Harris now says he was disadvantaged by the fact that Mr Jensen did not follow through the processes in relation to the complaints. He also alleges that his privacy was breached when Mr Jensen passed on to the Police certain written material which Mr Harris had provided to him. Mr Jensen does not deny passing on the material but says that he was complying with a Police instruction.

[8] Despite repeated requests to do so, Mr Harris never supplied a medical clearance. He told the Authority that he did not ask his doctor to provide one because he did not want to, did not think he could be required to and did not trust the outcome. After his sick leave was used up he went on to annual leave and then onto a further three weeks discretionary paid leave. This took him to 20 March. In April Mr Harris went on to a sickness benefit. He has not worked since and told the Authority that he has ongoing mental health problems which he believes were triggered by the situation with his co-worker and compounded by the respondents' actions.

[9] On 20 May 2009 he was dismissed for failing to supply the respondents with either a medical clearance or other information about his health. In June 2009 an employment advocate wrote to Mr Jensen confirming that Mr Harris wished to raise a personal grievance.

Issues

[10] Mr Harris told me that he had already taken proceedings under the Privacy Act in relation to the material supplied to the police. As I advised him at the investigation meeting, that matter will be left to the appropriate forum and will not be addressed in this determination.

[11] Mr Harris claims disadvantage grievances in respect of what he believes was an unjustifiable suspension and in relation to what he says was the unfair handling of each of the complaints. He also asserts that the dismissal was unjustified. The issues to be determined here are therefore as follows:

- i. Whether Mr Harris was disadvantaged by an unfair and unreasonable suspension;
- ii. Whether Mr Jensen unjustifiably disadvantaged Mr Harris by failing to complete a proper process in relation to the harassment complaint against him;
- iii. Whether Mr Jensen unjustifiably disadvantaged Mr Harris by failing to address Mr Harris's complaint of assault, and
- iv. Whether Mr Jensen unjustifiably dismissed Mr Harris.

The alleged suspension

[12] Between November 2008 and the end of January 2009 Mr Harris was away from work more than he was present. At that time the cause of his illness was not known, either to Mr Jensen, or to Mr Harris. Mr Jensen said he, his co-director and Mr Harris's supervisor were all concerned about Mr Harris's ability to work safely in a mechanical workshop given that he was experiencing dizziness and blackouts. He says that this was the reason a medical clearance was requested.

[13] Mr Harris does not accept that this was the real reason. Although this was before the co-worker complained, he believes the request was made in response to his issues with her. Mr Harris told me that he felt that Mr Jensen suspended him in the interests of the co-worker who (by virtue of her administrative role) worked closely with the directors and was needed in the business.

[14] I am satisfied, given Mr Harris's ongoing and unexplained dizziness and blackouts, that it was reasonable and prudent for Mr Jensen to require a medical clearance before allowing Mr Harris back on the job. The existence of other problems

in the workplace does not detract from that. No disadvantage grievance arises out of the request for a medical clearance.

The sexual harassment complaint

[15] This complaint was in two parts. The first related to the incident described above, the essential facts of which are not in dispute and the seriousness of which needs no further explanation. The other related to text messages that Mr Harris had sent the complainant (some of which were provided in evidence and about which there is no dispute.) The volume of this text messaging was cause for concern in itself but more importantly some of the content was threatening.

[16] There can be no question that Mr Harris's undisputed conduct was sufficiently serious that disciplinary action could have been justified. Unfortunately, Mr Harris has difficulty in understanding just how grave his behaviour was. In his evidence to the Authority Mr Harris demonstrated that, even a year after the events, he still failed to grasp the seriousness of his behaviour. He attempted to explain, and even justify what he had done by the fact that his co-worker, for whom he had strong feelings, no longer wished to see or speak to him.

[17] Notwithstanding all this, the only outcome of the complaint was that Mr Jensen cautioned Mr Harris about any repetition of the behaviour. No formal disciplinary action was taken. Far from being unsympathetic to Mr Harris during this period, Mr Jensen showed a level of personal care and concern for him which went well beyond what he was obliged to do as an employer. This was demonstrated in the tone and content of the email communications between the two over the first half of 2009, and Mr Jensen's support for Mr Harris in addressing his health issues. These efforts included several meetings with Mr Harris's parents to discuss what he could do to help, and attending the meeting facilitated by Mr Harris's counsellor on 8 April (the purpose of which was not limited to a discussion of the complaints, but included a discussion of Mr Harris's problems and how these could be addressed.)

[18] Mr Harris's allegation of disadvantage is based on a view that the investigation into the complaint should have been brought to a formal close and that he should have been informed in writing of the outcome. In the normal course of

events this is indeed what would be expected of an employer. Mr Harris could have expected to be kept fully informed of whatever steps his employer had taken in relation to the complaint against him and to have the process conclude with some written communication of its outcome.

[19] That this did not occur here is a function of the circumstances which were outside the normal course. The seriousness of Mr Harris's conduct was sufficient to warrant disciplinary action, yet, as Mr Jensen rightly observed, he was clearly unwell and unable to cope with any stress including the stress of formal meetings. He also lacked any insight into and awareness of his own conduct and its effect on others. All this put Mr Jensen in a very difficult position. Given the context I am not persuaded that any other fair and reasonable employer would have acted differently. Nor am I satisfied that Mr Harris was, overall, disadvantaged, given that he was not subjected to the disciplinary action that could otherwise have been justified.

[20] No disadvantage grievance arises out of the handling of the complaint against Mr Harris.

Mr Harris's complaint

[21] On 17 March 2009, the day after he received advice of her complaint, Mr Harris formally complained that his co-worker had once struck him. Mr Jensen told me that he immediately asked the co-worker about this and she denied it. Mr Jensen understood from Mr Harris that the assault was alleged to have occurred at work but Mr Harris had not told him exactly when and how it happened. Mr Jensen told me he realised that he needed more information in order to be able to put the allegation in a way that could properly be answered. In the end, however, he did not make extensive efforts to elicit this information. His reasons were the same as his reasons for not following through with the other complaint process. He did not wish to distress Mr Harris or inflame the situation and so he let the matter lie.

[22] Once again I am not persuaded that Mr Jensen acted unfairly or unreasonably. Mr Harris did not provide specifics of the allegation which Mr Jensen needed to question Mr Harris's co-worker properly. In the circumstances, principally the fact

that Mr Harris was very unwell at this time, I am not prepared to say that Mr Jensen made the wrong judgement call when he decided to let matters lie.

[23] No disadvantage grievance arises out of the handling of the complaint from Mr Harris.

The dismissal

[24] On 16 March Mr Jensen wrote to Mr Harris to advise that after a period of extended (discretionary) sick leave the business could not carry on paying him. The letter went on:

“To enable us to make a decision on the best way forward with out employment relationship we request that you agree to Bruce Jensen discussing your health issues with your Doctor, so that we can be informed of the long term prognosis and make a decision on any possible return to work for you. Any cost involved would be borne by the company. For Health and Safety reasons we cannot agree to a return to work without your Doctor and other Health professionals working with you, providing us with a certificate stating your full fitness to return to work.”

[25] In the letter Mr Harris was referred to the following express provision of his employment agreement:

“The employer may terminate the Employee’s employment by giving not less than two (2) weeks notice in writing if the Employer considers on reasonable grounds that, due to disability or mental or physical illness, the Employee is incapable of properly performing their duties. This would be after a continuous period of 2 months or more or for periods cumulatively totalling 2 months in any 12 month period. Before terminating employment under this clause, the Employer may require the Employee to undergo a medical examination with a medical practitioner nominated and paid for by the Employer to ascertain whether or not the Employee is reasonably capable of performing their duties. If the Employee does not wish to undergo a medical

examination, the Employer may draw such inferences as are reasonable having regard to the information available to the Employer.”

[26] Mr Harris was not prepared to agree to this. He did agree to attend the meeting of 8 April 2009 (which was facilitated by his counsellor) and at this meeting Mr Jensen suggested to Mr Harris the possibility of employing a mechanic on a fixed term basis to cover for him. Mr Jensen said he did this because there had been no indication of Mr Harris being likely to return to work in the near future and he thought it could help Mr Harris to know he had a set time off work to get his health back.

[27] Mr Harris did not give a definite yes or no. Then on 15 April in an email to Mr Jensen he spoke of a suspicion that he was suffering from terminal cancer. On 27 April Mr Jensen emailed two of Mr Harris’s health professionals requesting an opinion on Mr Harris’s fitness to return to work. These emails went unanswered. Instead, Mr Harris replied himself, informing Mr Jensen that he was unwilling to give the company access to his medical professionals and expressing the view that he had never been at the point where he could not work. (Later Mr Harris’s psychiatrist wrote confirming that, to her regret, Mr Harris had withdrawn his consent for her to speak to him and thanking Mr Jensen for all his concern and help.)

[28] Mr Jensen told the Authority that the decision to dismiss was taken (in accordance with the employment agreement):

“after making no progress at all in trying to obtain medical information of any kind from Michael, either by way of a medical clearance or permission to speak with his medical professionals”

[29] Mr Harris believes he was dismissed because of the issues with his co-worker, and believes that she should have been dismissed too. In a joint statement, the directors of the respondents told the Authority:

“If we were conspiring to terminate the employment of Michael Harris, as he accuses us of doing, we would certainly have used the complaint...against him and after a full investigation was completed we could have disciplined him for the sexual nature of his messages ...we chose not to do this...”

[the complainant] *has not lost her job as Mike constantly requests. It is our belief that failing to respond to the feelings of another does not constitute mental abuse.*"

[30] The dismissal did not take place until May, long after the sexual harassment complaint had been made, after Mr Jensen had offered the option of a fixed period of leave and after repeated requests for medical information. Mr Harris was on notice of the need to provide information and sufficient time was given to him to do so. The dismissal arose because he did not. I also accept that he was not, in fact, well enough to work as evidenced by the fact that by the time he was dismissed, he had been on a sickness benefit for a month already.

[31] Mr Harris's claim of unjustified dismissal fails.

Costs

[32] This issue is reserved. Any claim for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority