IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 428/10
5100303

	BETWEEN	MELVYN DAVIES Applicant
	AND	DOWNER EDI WORKS LIMITED (formerly Works Infrastructure Limited) Respondent

Member of Authority:	Dzintra King
Representatives:	Anne-Marie McInally, Counsel for Applicant Anthony Russell, Counsel for Respondent
Hearing:	1 July 2010
Submissions Received:	8 July and 29 July 2010 from Applicant 26 July 2010 from Respondent
Determination:	30 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Melvyn Davies, claims he was unjustifiably dismissed by the respondent, Downer EDI Works Limited, formerly Works Infrastructure Limited ("Works" or "the company").

[2] Mr Davies was employed at the Northland branch as a water serviceman of the respondent until his employment was terminated on 3 April 2007. The termination was for breaching the rehabilitation plan and policy. Mr Davies had injured himself at work and as part of his recovery plan had played golf despite what the respondent says was an instruction not to do so.

[3] Mr Davies suffered a work injury on 4 July 2006 although it was originally dealt with as a non-work injury.

[4] The respondent is an Accredited Employer under the Injury Prevention, Rehabilitation and Compensation Act 2001. The employer had a contractual relationship with ACC and a contract with a claim administrator, WorkAon, to deliver entitlements to injured employees and manage work injuries on its behalf.

[5] On 30 November 2006 a Workplace Rehabilitation Assessment for Mr Davies was completed by Dr Karalus. This specified that he should not carry out repetitive wrist movements with his left hand and that restriction included playing golf.

[6] On 13 December Mr Ryan asked Mr Davies to attend a disciplinary meeting. Works asserted that by playing golf Mr Davies had breached the Code of Conduct by failing to comply with the Health Rehabilitation Policy and Plan to restrict elbow movement; and that he had not complied with the company doctor's instructions not to play golf.

[7] Mr Davies was given a final employment warning on 18 December and informed he was expected to comply with the company's Health Rehabilitation Policy and Plan and that further breaches could result in dismissal. The Rehabilitation Policy provides that the employee is to take responsibility for and comply with the agreed rehabilitation plan.

[8] On 20 December he saw Dr Detjen who restricted him to light and medium duties.

[9] The next day he met with Ms Ann Sims, his WorkAon case manager. She noted that Mr Davies was not to push or pull with a flexed arm and that Works had asked him to refrain from playing golf so as to give the injury a chance to heal. On 21 December Mr Davies signed an Individual Rehabilitation Plan ("IRP") in which he agreed he would not play golf.

[10] A medical ACC certificate provided on 10 January 2007 stated there was to be no pushing and pulling with the left arm.

[11] A further IRP signed on 24 January 2007 made no reference to a prohibition on playing golf although Ms Sims made a file note on 25 January that he had avoided golf.

[12] An IRP dated 28 February states that Mr Davies has a clearance to go back to normal duties. A review date of 8 March was set and Ms Sims has written *"Cleared 8 March"*. Her file note of the same date noted that Mr Davies was going to try normal duties as from 8 March and that he was gradually to increase tasks that had caused him problems.

[13] On 8 March Ms Angela Burzig, the Senior Claims manager for WorkAon, emailed Ms Sims asking whether Mr Davies had been cleared. Ms Sims replied that she had taken the information she had as a clearance.

[14] On 8 March Mr Des Ryan, the Regional SQE Manager, Central, emailed Ms Sims saying that although the last medical certificate suggested Mr Davies would be fully fit on 8 March, Mr Ryan had arranged for him to go to the doctor on 21 March for a final sign off. He wrote*: "Please note that the company Rehab Plan still stands and that means no golf until full clearance i.e.: after 21/3"*. This email was sent to Ms Sims and not copied to Mr Davies.

[15] On 9 March Mr Ryan emailed three people at Works stating that Mr Davies had a medical certificate that enabled him to begin easing the pressure as from 8 March but his rehabilitation plan still held him to 8 hours a day and restrictions until the next medical review. This email was not copied to Mr Davies.

[16] Mr Davies was fully cleared for normal duties on 21 March and no further review date was set.

[17] On 30 March Mr Mike Huxtable, the Divisional Manager Utilities, sent Mr Davies a letter asking him to attend a disciplinary meeting. The allegations were that he had breached the company's Code of Conduct by failing to comply with the rehabilitation plan and that he had not complied with the plan by playing golf on 18 March 2007 when the Rehabilitation Plan stated he was wait until full clearance on 21 March 2007.

[18] The Rehabilitation Plan Mr Huxtable is referring to must be the Rehabilitation Plan that was drawn up on 4 July which states that no golf is allowed.

[19] The last IRP that included a specific reference to a prohibition on golf was the 21 December plan. There was reference to the fact that no golf had been played in the January IRP but there is no reference to a prohibition. The last IRP makes no reference to a prohibition either.

[20] The last written rehabilitation plan contains no reference to a prohibition on playing golf. However, Mr Ryan's notes indicate that he told Mr Davies on 21 February that golf was still prohibited. Mr Davies denies this.

[21] Mr Davies also denied that the words *"no golf allowed"* were originally written on the rehabilitation plan drawn up in October 2006 and must have added at some later date. It is likely that Mr Davies is mistaken in his recollection.

[22] Mr Davies maintained that at the dismissal meeting he did not say that he had attempted to seek permission to play golf. The company has contemporaneous notes and the company's witnesses were adamant that Mr Davies had said he knew of the restriction on playing golf and had gone to seek permission. This was a critical factor in making the decision to dismiss.

[23] The dismissal meeting took place more than three years ago. Although Mr Davies was represented at the meeting he could not recall whether the representative took any notes. No notes were produced.

[24] I accept the respondent's version of what took place at the meeting. I also find that Mr Davies was told on 21 February that he was not to play golf until he had a final clearance and that he would need to return for this on 21 March.

[25] I am satisfied that Mr Davies admitted, after an initial denial, that he knew there was a prohibition on his playing golf until he had full clearance and that full clearance was 21 March.

[26] While the written IRP did not contain an express reference to a prohibition on golf, Mr Davies had been given an instruction, which was lawful and reasonable, that he was not to play golf until he had full clearance on 31 March. Despite this he played golf.

[27] Mr Davies had a final written warning about this very matter.

[28] In all the circumstances, a fair and reasonable employer was entitled to make a decision to terminate Mr Davies' employment.

[29] Mr Davies does not have a personal grievance.

Costs

[30] If the parties are unable to resolve the matter of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority