IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 86
5635611

	BETWEEN	ARTHUR REID Applicant
	AND	WELLINGTON CITY TRANSPORT LIMITED trading as GO WELLINGTON Respondent

Member of Authority:	Michele Ryan
Representatives:	Graeme Ogilvie, Advocate for Applicant Emma Peterson, Counsel for Respondent
Investigation Meeting:	31 January 2017 at Wellington
Submissions Received:	15 February 2017, from Applicant 22 February 2017, from Respondent 24 February 2017 "in reply" from Applicant
Determination:	15 September 2017

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Mr Arthur Reid was employed as a bus driver for almost 13 months by Wellington City Transport Limited trading as Go Wellington ("Go Wellington"). His employment came to an end on 16 June 2016.

[2] Mr Reid subsequently raised two personal grievances. The first involves a final written warning received on 16 May 2016 while he was engaged in a performance improvement plan to address absenteeism. He says the warning was unjustified. He alleges he was then unjustifiably dismissed on 10 June 2016.

[3] During the course of the Authority's investigation meeting Mr Reid withdrew his application for reinstatement. He now seeks financial remedies corresponding to both personal grievances.

[4] Go Wellington denies Mr Reid was unjustifiably disadvantaged or unjustifiably dismissed. It says Mr Reid freely tendered notice of his resignation during a disciplinary meeting.

The issues

[5] The Authority is required to determine;

(a) whether Mr Reid was unjustifiably disadvantaged when he received the final written warning;

(b) whether Mr Reid constructively dismissed or was his resignation freely given without duress;

(c) if Mr Reid was constructively dismissed was that action justifiable;

(d) if one or both of Mr Reid's claims are established, what remedies should be awarded.

The Authority's investigation

[6] I have not recorded all the information received by the Authority concerning this employment relationship problem but have stated findings of fact and law necessary to dispose of the matter.[1] This determination has been issued outside the timeframe set out at s 174C(b) where the Chief of the Authority has decided exceptional circumstances exist.[2]

Discussion and determination of the issues

Terms of employment

[7] Mr Reid's employment was governed by two consecutive collective employment agreements (CEAs).[3] The first commenced in 2013. The second was executed on 6 May 2016 with retrospective effect beginning 17 January 2016.

[1] As permitted by s 174E Employment Relations Act
[2] Pursuant to s 174C(4)
[3] Between Go Wellington and the New Zealand Tramways and Public Passenger Transport Authorities Employee's Industrial Union of Workers (Wellington Branch)

Separate to provisions concerning serious misconduct, the process regarding 'Warnings' for misconduct were altered in the latter CEA. I shall return to this matter.

[8] Sick leave provisions across both CEAs were, however, identical. Mr Reid was entitled to six paid sick leave days per year if he, or his spouse, or a person who depends on him for care, was sick or injured.

The events leading to the final written warning

[9] Between starting his employment on 18 May 2015 and the end of February 2016 Mr Reid was intermittently absent from work for a total of 31 days.[4] The absences were for a variety of reasons and were taken as paid or unpaid sick leave.

[10] Mr Reid's supervisor, Mr Grant Beattie, had a number of low key conversations with Mr Reid about his absenteeism but no formal steps were taken until 28 February 2016 when he made arrangements to discuss "*concerns with your level of unplanned absence"*.[5]

[11] The parties met on 3 March 2016. Mr Reid's union delegate explained that Mr Reid's absences were largely a consequence of his partner's illness; Mr Reid had been attending medical and WINZ appointments with her but these had coincided with his hours of work. Mr Reid proposed that if he worked the night shift the problem would be resolved. The meeting concluded with an agreement that Mr Reid would apply for a night shift roster and provide *"paperwork"* regarding his partner's medical visits.

[12] On 14 March 2016 Mr Beattie wrote to Mr Reid again. He observed that Mr Reid had since taken a further 8 days off work but had not applied for night shifts.[6] He sought to meet formally to discuss the matter but advised it was not an investigation or disciplinary meeting.

[13] The parties met again on 1 April 2016. Mr Kevin O'Sullivan, Secretary of the Public Passenger Transport Authorities Employee's Industrial Union of Workers (Wellington Branch), spoke on Mr Reid's behalf. Mr O'Sullivan assured Go Wellington that Mr Reid "*is giving a commitment that from now on he will come to*

[4] Not including annual or bereavement leave
[5] Letter dated 26 February 2016
[6] Having reviewed Go Wellington's record of absences it appears Mr Reid had taken three days absence at the time the letter was drafted, not eight. However, by the time the parties met again on 1 April 2016 that number was accurate.

work and manage what is happening better in his personal life". No explanation was given as to why Mr Reid had not applied for night shifts. Mr Beattie informed Mr Reid that he would be placed on a performance improvement plan to manage his absenteeism.

[14] The issue as whether Mr Reid applied for night shift was disputed at the Authority's meeting. Mr O'Sullivan's testimony is that night shifts are generally available. He said the arrangement between the union and Go Wellington is that it is up to an employee to apply for a night shift duty or roster.

[15] Mr Reid says he applied for night shifts after the meeting in March but none were available. Mr Beattie's disagrees. He says Mr Reid applied for one night shift but not for an ongoing night shift roster. Had Mr Beattie been mistaken I consider it likely that Mr Reid, either personally or through his representative, would have corrected Mr Beattie at the meeting of 1 April 2016. I do not accept Mr Reid's evidence on this matter.

[16] Between 1 and 28 April 2016 Mr Reid was away from work for a further 9 days, recorded as annual or unpaid leave. He says the absences were related to his partner's surgery in early to mid-April 2016. In contrast Mr Beattie says not all of Mr Reid's absences involved his partner. By way of example he met with Mr Reid on 26 April to discuss the content of the attendance plan. Mr Reid was away again the following day. When the parties met to sign the plan on 28 April Mr Beattie asked about the absence. He says Mr Reid responded by saying he had not signed the plan yet.

[17] The attendance plan became operative on 28 April 2016. The plan recorded that the parties would meet monthly to review progress and Mr Reid signed an acknowledgement that if his attendance was unsatisfactory formal disciplinary procedures may be taken. Mr Reid's obligations were recorded as follows:

- arrive on time and complete all rostered shifts - inform [the] depot or comms (sic) if after hours of your absence in advance;
- a medical certificate is required for all absences due to sickness;
- notify your duty supervisor … of any scheduled hospital appointments in advance and provide a copy of appointment letter;
- make an effort to schedule medical appointments outside of work hours.

[18] By 12 May 2016 (inclusive) Mr Reid had been absent from work on 3 additional occasions.[7] He did, however, provide medical certificates for each absence. Mr Beattie sent a letter to Mr Reid on the same date. He expressed concern that there had been no improvement [in attendance] over the previous two weeks. He asked Mr Reid to meet with him to explain. He advised that an outcome may include a final written warning.

[19] A meeting was held on 16 May 2016. Again, Mr Reid did not speak. Mr O'Sullivan reported that Mr Reid had basically complied with the plan. He advised he had been told by Mr Reid that his "*health is improving*" and he "*will double his efforts to show up as required*".

[20] Mr Beattie informed Mr Reid that he would receive a final written warning for absenteeism which was confirmed in writing later that day. The warning letter informed Mr Reid that he was expected to arrive at work as scheduled and that he needed to produce a medical certificate should he take sick leave.

The law concerning personal grievance claims

[21] Where a claim of an unjustified disadvantage (or an unjustified dismissal) is made, the onus rests with the employer to justify its actions associated with the claim.

[22] To determine whether Go Wellington's actions were justifiable, the Authority must examine whether there were reasonable grounds for the final written warning (and if Mr Reid was constructively dismissed, the dismissal), and whether the process taken to reach either of those outcomes was fair. Go Wellington's actions are assessed against what a fair and reasonable employer could have done in all the circumstances at the time the warning (or dismissal) occurred.[8]

Was Go Wellington's decision to issue the final written warning substantively and procedurally fair?

[23] The letter of 16 May 2016 did not refer specifically to Mr Reid's alleged failure to comply with the plan as the cause for the final written warning. But I am satisfied that Mr Reid's performance under the attendance plan prompted the disciplinary action Go Wellington took and needs to be examined.

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[7] 4, 10 and 11 May 2016
[8] Section 103A Employment Relations Act 2000

[24] Go Wellington contends it was reasonable to issue the final written warning when Mr Reid had failed to comply with the plan. It says the plan's stated primary objective was for Mr Reid to complete all rostered shifts, which he did not. This explanation does not provide a full account. It is evident that the parties contemplated the possibility that Mr Reid might be unable to attend work due to illness. This eventuality is reflected in the express requirement recorded in the plan that Mr Reid provide a medical certificate if absent.

[25] Go Wellington next points to the following condition and says the plan allowed it to take disciplinary action, as follows:

> If your attendance continues to be unsatisfactory in the future, disciplinary action may be taken. Ultimately if your attendance does not improve to the required standard your employment may be terminated.

[26] Separate to the three permitted absences supported by medical certificates Go Wellington did not provide any additional information to demonstrate there was some other basis for its view that Mr Reid's attendance was unsatisfactory.

[27] Go Wellington was unable to demonstrate a breach of the attendance plan by Mr Reid. It cannot then have been fair for it to issue a final written warning in these circumstances and that action was unjustified.

[28] I would note that even if Go Wellington had been able to substantively justify the warning, the process it followed is problematic. As noted, the 2016 CEA 'Warning' provisions varied from those contained the 2013 CEA. In both CEAs a first instance breach of expected behaviour involved a discussion with the employee and expectations were set. In the 2013 CEA a second instance misconduct breach was sanctioned by a verbal warning, but in the 2016 CEA it attracted "*a written warning, consisting of a clear statement of expected performance or behaviour, and the likely consequences of a further lapse*". Third and fourth breaches were met with a final written warning and then dismissal respectively.

[29] Go Wellington accepts Mr Reid did not receive a written warning prior to his receipt of the final written warning on 16 May 2016. It says it had already met with him on several occasions to discuss it concerns with Mr Reid and submits it had, in effect, complied with the spirit of the collective agreement. I do not accept this submission.

[30] Go Wellington's right to impose increasing disciplinary consequences for repeated misconduct under the 2016 CEA 'Warnings' procedure was accompanied by an obligation to be explicit about future expectations and the consequences of a further breach. To impose a final written warning without a precursor written warning was unfair. It breached the agreed corresponding sanction set out in the CEA in circumstances where Mr Reid was entitled to rely on the Warning procedures. Go Wellington's departure from the Warning procedures also deprived Mr Reid from an opportunity to fairly assess, before he engaged in the alleged misconduct (in this case 3 days sick leave), the sanction he might receive as a result.

[31] A fair and reasonable employer can be expected to comply with its collective agreements. Go Wellington's application of the contractual disciplinary process breached the provisions of the CEA and the final written warning was procedurally unjustifiable also.

The events leading to Mr Reid's resignation

[32] In the 3-4 weeks following the final written warning Mr Reid was absent on 25, 30 May and 7 June. Associated medical certificates were provided.

[33] Although Mr Tait was unable to specify an exact date, his unchallenged evidence is that he spoke to Mr O'Sullivan in or around the time of the written warning and asked whether there was some undisclosed reason for Mr Reid's continued absences. Mr O'Sullivan was not aware of anything relevant.

[34] Mr Beattie wrote to Mr Reid on 8 June 2016. He advised "*we have seen no improvement in your attendance over the last 4 weeks and the purpose of the meeting is to investigate this matter further"*. The letter noted that disciplinary action including termination of employment may be taken.

[35] The parties met again on Friday, 10 June 2016. Mr Reid was accompanied two supporters and Mr O'Sullivan. HR Manager, Mr Gordon Tait, and Mr Beattie were both present on behalf of Go Wellington. Mr Reid did not speak at the meeting. The content of the previous meetings was recounted. Mr Beattie advanced a concern that Mr Reid had been absent on 25 May 2017 purportedly to attend his partner's medical appointment but had not given Go Wellington prior notice of it as stipulated in the attendance plan. I note that issue had had not been identified in the letter of 8 June as an matter on which Mr Reid needed to respond but in any event the point was

not addressed. Mr Reid's supporters asked Go Wellington to give him another chance. The meeting notes record Mr Beattie then advising;

> We have considered all options and it is unfortunate that [Mr Reid's supporters] were not involved earlier but final is final. I therefore propose to terminate Arthur's employment.

[36] Mr O'Sullivan responded by asking *"can we propose medical retirement*?" Go Wellington took an adjournment to consider the proposal. On return, Go Wellington agreed medical retirement would be acceptable subject to Mr Reid obtaining a medical certificate specifying he could not drive buses.

[37] Mr Reid and Mr O'Sullivan both report (in written evidence) that during this portion of the meeting Go Wellington was informed that Mr Reid was unable to obtain a suitable medical certificate because he was well enough to drive. The meeting notes make no reference to that topic. I consider it more likely that this matter was discussed between them privately. The meeting notes record that the parties took another adjournment. When the meeting reconvened Mr Beattie said Mr Reid had until the following Wednesday [3 working days] "*to provide a medical certificate otherwise we will terminate"*. He stated Mr Reid needed to complete his scheduled shifts until then or his employment would terminate. Mr O'Sullivan then queried whether Mr Reid could resign the following Wednesday. That suggestion was rejected by Go Wellington. A final adjournment was held during which Mr O'Sullivan approached Mr Beattie and Mr Tait and informed them that Mr Reid intended to resign immediately on notice. Mr Reid handwrote a resignation letter.

The law concerning constructive dismissals

[38] The law on constructive dismissal is set out in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*[9]. In that case the Court of Appeal set out a non-exhaustive range of cases where a resignation may, in reality, be a dismissal. These include where an employer;

> (i) gives the employer a choice between resigning or being dismissed, or
> (ii) follows a course of conduct with the deliberate and dominant purpose of coercing the employee resign, or
> (iii) breaches a duty to the employee which causes him or her to resign.

[9] [1985] 2 NZLR 372 (CA) at 374-375

[39] Where the resignation is said to occur as a result of an employer's breach of duty, the breach must be sufficiently serious that it was reasonably foreseeable the employee would resign.[10]

[40] In assessing whether the resignation has been caused by a breach of duty by the employer the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial Local Authorities Officer Industrial Union of Workers* observed:[11]

> To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation.
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> Were Go Wellington's actions sufficiently serious to cause him to resign or was his resignation freely given without duress?

[41] The circumstances leading up to Mr Reid's resignation require me to examine what occurred in the disciplinary meeting prior to Mr Reid furnishing his resignation. In particular I need to assess whether Go Wellington's finding as to misconduct was a conclusion it reasonably reach and whether it was open to Go Wellington to propose the sanction of termination.

[42] It is clear from the evidence that by the time the parties met at the final meeting Go Wellington's view was that any absence from work by Mr Reid was a breach of its requirements. On this basis it regarded Mr Reid's recent absences amounted to misconduct.

[43] As with my finding regarding the substantive justification of the final written warning, Go Wellington was not able to disregard the agreed exception to its attendance requirements which allowed Mr Reid to be absent for sickness where certified by a medical practitioner. Mr Reid had provided medical certificates corresponding to the five days of absence over the material timeframe (noting also that two of these had already been dealt with by the final written warning). Go Wellington's finding of misconduct in these circumstances was unreasonable and a breach of Go Wellington's implied duty of fair dealing.

[44] Turning to Go Wellington's proposal to terminate employment, I note that the sanction of dismissal was not yet an available disciplinary option where the final

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[10] *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140
[11] (1985) 2 NZLR 372 (CA)

written warning had been given in breach of the four step warning provisions contained in the CEA. I find it was unreasonable to require Mr Reid to address the possibility of his employment terminating where that action could not, under the terms of the CEA, be imposed. Further, having unfairly concluded that Mr Reid had engaged in misconduct it cannot have been reasonable of Go Wellington to propose to terminate his employment as a consequence.

[45] On balance, when faced with Go Wellington's assertion that he had engaged in misconduct together with its proposal to terminate his employment, I find it was reasonable of Mr Reid to perceive he was about to be dismissed and had no other option than to resign if he wished to avoid that outcome. I have already concluded Go Wellington was in breach of its duty to deal fairly with Mr Reid and I consider the breaches were sufficiently serious. It follows that it was reasonably foreseeable that Mr Reid would resign. His resignation was a constructive dismissal. For the same reasons I must find his dismissal was not the action of a fair and reasonable employer in all the circumstances, and was unjustified.

Remedies

Wages

[46] Mr Reid seeks reimbursement of wages from the time of his dismissal to the Authority's investigation meeting. An employee has a duty to mitigate his or her loss if claiming lost remuneration. In practical terms this means an employee should attempt to find alternative employment rather that place reliance on a future order that their loss will be reimbursed.

[47] Mr Reid acknowledged under questioning that, with the exception of one application made in July, he made no further attempt to obtain work for 4-5 months' following his dismissal. He conceded he was not available to work because he wished to care for his partner.

[48] It was open to Mr Reid to decide not to pursue alternative employment over this period but the financial consequences of that decision should not rest with Go Wellington. Mr Reid's choice not to look for work broke the chain of causation. Any lost remuneration arose from his decision not to seek look for work and was not a consequence of his dismissal. It is not appropriate to order reimbursement of wages in these circumstances.

Compensation

[49] The evidence as to the effects the dismissal had on Mr Reid was very limited. He advised he was embarrassed when he told his partner of the dismissal and felt he had let her down. Subject to my findings on contribution, I consider a global award of $6,000 under s 123(1)(c)(i) of the Act is appropriate.

Contribution

[50] I must now assess the extent to which Mr Reid's actions contributed to the situation that gave rise to his personal grievances. Such actions must be causative of the outcome and equate to culpable or blameworthy conduct.

[51] Considerable evidence was produced by Go Wellington to demonstrate the difficulties it experienced obtaining accurate information from Mr Reid about the causes for his absences. It points to a range of instances where it says Mr Reid provided either inadequate, inconsistent or misleading explanations.

[52] On 25 May 2016 Mr Reid notified the depot counter that he was sick and unable to come to work. In contrast, the medical certificate (dated 30 May) advised Mr Reid had accompanied his wife to a medical appointment. Mr Reid's evidence it that he had been unable to get a medical appointment for himself but had attended a medical appointment with his partner that day which he had not planned. He was unable to explain why he had not told Mr Beattie of that situation on 26 May 2016 when Mr Beattie requested a medical certificate for the absence. I accept this action was a breach of the attendance plan and is blameworthy.

[53] For the absence on 30 May the depot report records Mr Reid "*Called Kilbirnie Control @ 11.25 is at hospital and is very stressed. Has a medical cert".* But the medical certificate Mr Reid produced was issued by his local medical practice. Mr Reid says he visited his GP sometime after he left the hospital. That explanation does not account for his statement to Go Wellington that he had a "medical cert" when he called from the hospital. He says that the depot operator misunderstood his call.

[54] I note Mr Reid offered up a similar explanation in response to Go Wellington's post-dismissal concerns about two leave applications he made during his employment. In November 2015 he obtained annual leave at short notice when he reported his "partner" had a life threatening illness and was to be operated on in 2

days' time. He later took paid bereavement leave when he informed Go Wellington his "wife" had died. It is Go Wellington's evidence that each leave application was approved on the basis that it was Mr Reid's current partner/wife that was ill or had passed away. Mr Reid's testimony is that on both occasions he had been referring to his ex-wife and Go Wellington has simply misunderstood him.

[55] I find Mr Reid's explanations in response to the questions put to him about his absences on 25 and 30 May not credible. His reporting to Go Wellington on those matters misrepresented the basis for his absence and contributed to the situation that led to his dismissal.

[56] I further find culpability in the way Mr Reid engaged with Go Wellington during its formal inquiries into his absences. With the exception of the first meeting, Mr Reid had his representative, Mr O'Sullivan, speak for him at all times. That was his right. But he must be taken to have consented to and approved all statements made on his behalf. From the second meeting onwards Go Wellington's queries as to why Mr Reid's continued to have such a high level of absenteeism were never directly answered. Mr Sullivan invariably pre-empted any meaningful discussion on those matters by providing assurances that Mr Reid's health had improved, he remained committed to the role, and his future attendance would improve. I have no doubt that no doubt that Mr Reid's ongoing failure to honour those undertakings ultimately prompted Go Wellington to take the disciplinary action it did. Mr Reid should bear some responsibility for that outcome.

[57] Finally, it remains unclear why Mr Reid did not apply for a night shift roster. By his own account in March 2016 his absenteeism would be resolved by the shift change. His failure to remedy the employment relationship problem in this way also contributed to the situation that gave rise to his dismissal.

[58] Balancing the substantive and procedural flaws which led to Mr Reid's unjustified disadvantage and his unjustified dismissal against the totality of his contribution to the personal grievances an appropriate reduction for contribution is 50%.

Costs

[59] Costs are reserved.

Orders

[60] Go Wellington is order to pay Arthur Reid $3,000 as compensation pursuant to s. 123(1)(c)(i).

Michele Ryan
Member of the Employment Relations Authority