

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION (REFER PARAGRAPH 4)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 50
3014852

BETWEEN	DANIEL O'FLAHERTY Applicant
AND	LANDSEER INVESTMENTS AUCKLAND LTD t/a ANDREW SIMMS NEWMARKET Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Barry Hayes, Counsel for Applicant Raewyn Gibson, Counsel for Respondent
Investigation Meeting:	7 & 8 February 2018 at Auckland
Submissions received:	2 & 8 February from Applicant 1 & 8 February from Respondent
Determination:	16 February 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Daniel O'Flaherty, claims that the Respondent, Landseer Motor Investments Limited trading as Andrew Simms Newmarket (Andrew Simms) breached its duty to provide him with a safe workplace after it assigned him on or about 14 August 2016 to train a new employee who suffered from Asperger's Syndrome (Asperger's). Mr O'Flaherty claims that the actions of the employee affected his employment to his disadvantage.

[2] Andrew Simms denies that it acted in breach of its obligations to provide Mr O'Flaherty with a healthy and safe workplace or that it acted in any manner towards Mr O'Flaherty which could cause him to suffer an unjustifiable disadvantage.

The issue

[3] The issue for determination is whether or not Mr O'Flaherty suffered an unjustifiable disadvantage in his employment arising from the failure by Andrew Simms to provide him with a safe and healthy workplace.

Prohibition on publication

[4] **I order that the name of the employee suffering from Asperger's involved in this case is not to be published. The employee is to be referred to as ADS a letter bearing no relationship to the employee's actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Background facts

[5] Andrew Simms operates a new and used car dealership in Auckland including in its operation a car grooming service.

[6] Steve's Grooming provided Andrew Simms with a car grooming service but in 2015 a decision was made by Andrew Simms to operate a grooming operation in house. At that time a number of the employees at Steve's Grooming were offered and accepted employment at Andrew Simms, including Mr O'Flaherty.

[7] Mr O'Flaherty was employed as a manager at Steve's Grooming and in that capacity he supervised a team of employees. Mr Lester Rogers was the Preparation Manager at Andrew Simms and he knew the Steve's Grooming employees as a result of his interface with that business prior to it being brought in-house. He had recommended Mr O'Flaherty be employed by Andrew Simms to Mr Gary Keatley, Service Manager.

[8] Mr Keatley said he had letters of offer and employment agreements prepared for those employees agreeing to transfer from Steve's Grooming to become employed by Andrew Simms.

[9] Mr O'Flaherty said before he was offered the position with Andrew Simms he was interviewed by Mr Keatley and Mr Rogers. During the course of that interview he had advised them about an experience he had suffered involving mental burnout in 2001 while he was operating his own car grooming business.

[10] Mr Rogers confirmed that Mr O'Flaherty had spoken about his previous work experience, including having had his own car grooming business which he had closed in 2001 as he had been tired and exhausted.

[11] Mr Keatley said that had he been made aware by Mr O'Flaherty that he was mentally vulnerable, he would have made further enquiries to gain a full understanding of any pre-

existing medical condition. Further, whilst it may not have been a deterrent to Andrew Simms employing Mr O'Flaherty, it would have been a factor in deciding in which position to place him to avoid any position of vulnerability

[12] In addition, as Andrew Simms already had knowledge of Mr O'Flaherty's performance, it was not necessary to go through the usual pre-employment process or to ask questions about his suitability for the role or his previous experience. The nature of the discussions was instead focussed on the role Mr O'Flaherty would occupy and his rate of pay in that role as the rate of pay at \$17 per hour was a lower hourly rate than he had previously been paid at Steve's Grooming.

[13] Mr O'Flaherty said he had read the individual employment agreement provided to him before signing it, including clause 12 which referred to health and safety and stated:

12.2 General Health and Safety Obligations

Both the employer and the employee shall comply with their obligations under the Health and Safety in Employment Act 1992. This includes the employer taking all practical steps to provide the employee with a healthy and safe working environment. The employee shall comply with all directions and instructions from the employer regarding health and safety and shall take all reasonable steps to ensure that in the performance of their employment they do not undermine their own health and safety or the health and safety of any other person

The employee shall assist in identifying, minimising and/or eliminating hazards and constructively be involved in proposing solutions in this regard.

The employee has an obligation to report to work in such a condition that they are able to perform duties properly and safely and shall ensure that they do not put their own or anyone else's safety at risk.

If the employer has any concerns at all in respect to their safety and wellbeing or the safety and wellbeing of others, the employee shall report this to management immediately.

[14] Mr Rogers said that a few months after Mr O'Flaherty commenced employment he had spoken to Mr Keatley about increasing Mr O'Flaherty's responsibilities to include the supervision of other employees. Mr Keatley said he was happy to action Mr Roger's recommendation and Mr O'Flaherty was offered the position of Leading Hand at a salary increase to \$20.00 per hour in April 2015.

[15] Mr Keatley said he had explained, at the time of offering the position, that in the position of Leading Hand, Mr O'Flaherty was to train and mentor less experienced staff. At this stage Mr O'Flaherty did not disclose any history of mental health issues.

[16] Mr O'Flaherty said he had been happy to accept the position of Leading Hand and it had worked well.

[17] Mr Matthew Wales, Dealer Principal, explained that car grooming is a relatively low skilled job and that Andrew Simms employs groomers from a variety of backgrounds including reformed prisoners re-entering the work force, individuals with learning disabilities, or with Autism or Asperger's. This had not presented any problems in the workforce.

[18] Mr Keatley said he had personal experience and knowledge of autism and Asperger's. He explained that provided that employees with autism or Asperger's were given clear directions, those employees were capable of performing the tasks required of them as well as any other employee.

The employment of ADS

[19] During early August 2016 Mr Keatley said he had considered employing ADS who suffering from Asperger's. It was his assessment after meeting with ADS that his condition was such that he could be successfully trained to be a car groomer. Prior to employing ADS he had met with Mr O'Flaherty and the other team members to explain about Asperger's and what would be involved in training ADS. In particular he had explained that he would deal with any issues which might arise.

[20] Mr Luke Burnett, Car Groomer, said that Mr Rogers had explained what Asperger's was to him, and had provided a printed page of information on the condition.

[21] Mr O'Flaherty said in his written evidence that he had no experience of Asperger's and did not really know what it was when he had agreed to train ADS.

[22] Mr Keatley said he considered that he made Mr O'Flaherty very aware of the characteristics of individuals who have Asperger's and provided him with sufficient guidance to ensure he could undertake this role safely. He said it had not been his expectation that it was to be Mr O'Flaherty's sole responsibility to train ADS, but that others would assist.

[23] Mr Rogers confirmed that Mr Keatley had made it very clear to Mr O'Flaherty what he could expect when training ADS and that Mr O'Flaherty did not express any reservations by taking on the role. He confirmed that Mr Keatley had told Mr O'Flaherty that he could approach him (Mr Keatley) about ADS at any time.

[24] Mr Burnett said that he had found Mr Keatley to be approachable.

[25] Mr O'Flaherty confirmed that Mr Keatley and Mr Rogers had discussed the training of ADS and was asked whether or not he would be prepared to train him. He said he was told

it would take ADS some time to learn the basics and adapt to the role but with repetitive instruction he would become accustomed to the task. He also confirmed that they had told Mr O'Flaherty they would give him plenty of support and guidance.

Employment of ADS 14 August 2016

[26] Mr Rogers said he had told Mr O'Flaherty at the outset that if he felt training ADS was a problem, he was to let him know and other arrangements would be made for ADS to be trained. He had also moved ADS from time to time and placed him with other employees in one of the other car grooming areas or in the wash bay to wash cars in other areas. Mr Burnett confirmed that ADS had worked in other areas from time to time.

[27] Mr O'Flaherty said he commenced training ADS on a one to one basis after he commenced on 14 August 2016. He said ADS immediately proved that he was very difficult to educate in the basics of car grooming and to keep focussed on the job. He did not have the required attention to detail. In addition, ADS frequently walked off from the shop floor without permission and he had to frequently redo his work.

[28] Mr Rogers said he spoke to Mr O'Flaherty on a daily basis and enquired how he was progressing in the training of ADS. He would generally approach him three or four times a day and the nature of the responses which he received varied from comments that ADS was improving to that or that he was not performing too well. Mr Rogers said he would continually tell Mr O'Flaherty that if training ADS became too much for him, he needed to tell him.

[29] Mr O'Flaherty said any issues he encountered in his role as Leading Hand he would pass on the Mr Rogers who would address them by speaking to Mr Keatley. During August and early September 2016 he had encountered issues in training with ADS, specifically ADS leaving work without permission on 19 August, taking extended morning and afternoon tea breaks in addition to extended lunch breaks in the period 22 August to 2 September, and leaving the workplace without permission in the period of 5 – 9 September 2015.

[30] He had reported these issues as they occurred and Mr Rogers had spoken to Mr Keatley. On each occasion Mr Rogers said that Mr Keatley had spoken to ADS about his behaviour and given him direction and guidance.

[31] On Friday 9 September 2016 Mr O'Flaherty said that ADS had failed to complete the basic tasks of looking under seals and in compartments of cars for rubbish, vacuuming properly and cleaning the plastic and leather interiors of the cars adequately.

Absence 12 – 19 September 2016

[32] Mr O’Flaherty said that he had taken annual leave on 12 September 2016 as he felt seriously exhausted as a result of his experiences training ADS.

[33] Mr Keatley said he received a text message from Mr O’Flaherty on 13 September 2017 asking if he could extend his annual leave by an additional three days. Mr Keatley was aware of Mr O’Flaherty’s concern about his mother’s illness when on or about mid-August 2015 Mr O’Flaherty had taken sick leave due to his mother being critically ill and rushed to hospital. Accordingly he responded with a text message asking: “*Is there a problem with Mum Daniel?*” to which Mr O’Flaherty responded:

Fortunately mum is well. I feel I need a further few days to recharge as I was feeling quite run down lately.

[34] Mr Keatley said he received a further text message on 15 September 2016 which stated that Mr O’Flaherty was: “*still feeling tired and low on energy. I am going to see my doctor this morning.*” However there was no indication from the text messages that Mr O’Flaherty was mentally unwell as a result of training ADS.

Events 19 to 30 September 2016

[35] Mr O’Flaherty returned to work on 19 September 2016, and Mr Keatley and Mr Rogers had spoken to him about the possibility of his assuming Mr Rogers’ role following Mr Rogers’ retirement.

[36] At the Investigation Meeting Mr O’Flaherty stated, when asked if he had considered himself able to take on a more responsible role whilst still training ADS, that he had felt better at that stage and able to step up to a new role.

[37] Shortly after his return however Mr O’Flaherty said he had become frustrated when ADS had not performed the necessary work on a Mitsubishi Mirage vehicle. At that stage he had told Mr Rogers that he could no longer continue working with ADS who was very slow and that he found him to be extremely frustrating and mentally exhausting.

[38] Mr Rogers said that Mr O’Flaherty had told him he was feeling exhausted, but not that he was mentally exhausted.

[39] The incident with the Mitsubishi Mirage vehicle had been followed an incident involving ADS grooming a Dodge Journey vehicle during the week 26 – 30 September 2016 which Mr O’Flaherty said he regarded as the final straw. As a result of his experience at this stage he had told Mr Rogers that he was on the point of resigning as his mind was “*fried*”.

[40] Mr Rogers said that Mr O'Flaherty had told him he was struggling with training ADS particularly following a job grooming Dodge Journey vehicle and he no longer wanted to continue training ADS who was not following his instructions. However Mr O'Flaherty had not told him that he was on the point of resigning because of training ADS, nor had Mr O'Flaherty told him that his mind was '*fried*'.

[41] As a result he had immediately reported Mr O'Flaherty's refusal to continue training ADS to Mr Keatley on Friday 30 September 2016, and he had accompanied him to the car grooming area where they met with Mr O'Flaherty and the other team members who also voiced their frustration with ADS.

[42] During that meeting Mr Rogers said Mr O'Flaherty did not indicate to either himself or Mr Keatley that he considered that the responsibility of ADS was impacting on his health. Rather his major complaint was that ADS would not take instructions from him.

[43] Mr Keatley said that Mr O'Flaherty had stated that he was no longer prepared to training ADS and the team members had told him that they were not happy working with ADS. Accordingly after the meeting he had met with ADS who was on a trial period at that time and dismissed him with immediate effect.

[44] Following the meeting with Mr Keatley Mr O'Flaherty said ADS had told the team members that he had been: "*let go*" and he was disappointed.

[45] He confirmed he had felt relieved at the news, although he was sorry for ADS. After the termination of ADS' employment, he had left the workplace as he had felt mentally and physically unable to carry on with his duties.

Sick Leave

[46] Mr O'Flaherty had taken 3 October and 4 October 2016 as sick leave. Mr O'Flaherty said he had taken the sick leave as he had felt mentally and physically unable to carry on with his duties.

[47] He had sent a text message to Mr Rogers on 3 October 2016 in which he stated:

Hi Lester, I require day off today for mental health reasons. I spent Friday afternoon in bed and the weekend resting. I believe I am suffering from mental exhaustion. I have been here before so I recognized the symptoms of burn out. I'll see how I go and see how I feel 2moro. Cheers Dan.

[48] Mr Rogers said Mr O'Flaherty had not previously mentioned having suffered burn out in the past, nor had he been aware that Mr O'Flaherty thought his mental health problems had been caused by ADS.

[49] Mr O'Flaherty returned to work on 5 October. However on 10 October 2016 he said he had suffered an anxiety attack as a result of his experiences with ADS, and Mr Rogers had sent him home.

[50] Mr Rogers said, and Mr Keatley confirmed he had told him, that Mr O'Flaherty had not looked well when he was in work on 10 October 2016 and he had advised him to go home. However he had not been aware that Mr O'Flaherty was having a panic attack.

Meeting 17 October 2016

[51] Mr O'Flaherty said when he had met with Mr Keatley on his return to work on 17 October 2017 he had told him that ADS had been responsible for his mental breakdown. In response to a question from Mr Keatley as to what he believed had caused it, he had said ADS, referring to his previous experience of 'burn out' in 2001.

[52] He had asked if Andrew Simms could offer him some financial support as he had used all his sick leave, and Mr Keatley had agreed to speak to Andrew Simms.

[53] Mr Keatley said that during the meeting on 17 October 2017 Mr O'Flaherty had told him he had had a mental breakdown and explained that he believed working with ADS had caused it.

[54] He had been very surprised at Mr O'Flaherty's response and asked him if he had ever experienced anything of a similar nature previously. It was then that Mr O'Flaherty had told him the first time that he had previously mentally burnt out due to stress.

[55] Mr Keatley said during the meeting Mr O'Flaherty said he wanted Andrew Simms to support him by paying wages and his medical bills. He had subsequently spoken to Andrew Simms who agreed that they would support Mr O'Flaherty by paying his wages that week and make a contribution towards his medical expenses..

[56] As a result of Mr O'Flaherty's advised medical condition Andrew Simms had allowed him to return to work on a part-time basis in an attempt to rehabilitate himself back in to the work place.

[57] Mr O'Flaherty attended work on 17 November 2016 and told Mr Rogers that he would be resigning on 21 November 2016 provided that his uncle's house had sold on 19 November 2017.

[58] His uncle's house had not sold and Mr O'Flaherty told Mr Rogers that he was experiencing a buzzing in his ears and headaches, as a result of which he required sick leave.

Further meeting on 5 December 2016

[59] Mr O'Flaherty and Mr Keatley had a further meeting on 5 December 2016 when he (Mr O'Flaherty) explained that he was experiencing buzzing sounds and headaches. Mr Keatley had asked when he would be able to return to work on a fulltime basis but Mr O'Flaherty had not been certain when this will be.

[60] Mr Keatley said Mr O'Flaherty had appeared agitated in the meeting on 5 December 2016 and referred to the fact that his doctor had prescribed medication. He had suggested to Mr O'Flaherty that he might find it of more assistance if he saw someone qualified in mental health issues, especially in light of the fact that he had recently advised him that there had been a similar occurrence previously.

Personal Grievance Letter dated 9 December 2016

[61] On 9 December 2016 Mr O'Flaherty was referred to a psychiatrist and provided with a medical certificate to be off work until 23 December 2016. On that date he sent Mr Keatley a personal grievance letter.

[62] The personal grievance letter had been the result of many drafts which Mr O'Flaherty had prepared but had not sent to Andrew Simms dated 10 October, at 2.20 p.m., 10 October at 4.21 p.m., 30 October and 1 November 2016.

[63] The personal grievance letter dated 9 December 2016 referred to Mr O'Flaherty having to train ADS from 15 August to 30 September 2016 as a result of which he had suffered from mental burnout and a debilitating anxiety attack. He believed that the issue was caused by a lack of support on Mr Keatley's part in not supporting him with the training of ADS.

[64] The letter sought compensation for sick leave and loss of full time employment hours as well as the opportunity lost to incur holiday pay. Mr O'Flaherty said he had also not been reimbursed doctors' fees or psychiatric fees.

[65] The psychiatrist Dr Scott Chambers had provided him with a letter on 12 January 2017 recommending a graduated return to work initially for one to two days per week. Mr O'Flaherty returned to work.

[66] Mr O'Flaherty said that as he was still suffering from stress and depression due to his experienced of training ADS, he resigned on 16 February 2017. The last day he had actually worked was on 18 November 2016 and he had been unable to work after that.

Determination

[67] The common law duty to maintain a safe work place has been firmly established¹. The duty to maintain a safe work place is an implied term of an employment agreement and this is reflected in the provisions of the Health and Safety at Work Act 2015 in particular s. 36 which outlines the duties of a PCBU (a person conducting a business or undertaking).

[68] Section 45 of the Health and Safety at Work Act 2015 outlines the duties of workers while at work, stating:

a worker must—

(a) take reasonable care for his or her own health and safety; and

(b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and

(c) comply, as far as the worker is reasonably able, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with this Act or regulations; and

(d) co-operate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.

[69] Pursuant to the Health and Safety at Work Act 2015 the duty to maintain a safe work place falls on the employer, but it is a duty in which an employee has some responsibility as was noted in *AG v Gilbert* in which the Court of Appeal stated:

... The standard of protection provided to employees by the Health and Safety in Employment Act is however a protection against unacceptable employment practices which have to be assessed in context. That is made clear by the definition of “all practicable steps”. What is “reasonably practicable” requires a balance. Severity of harm, the current state of knowledge about its likelihood, knowledge of the means to counter the risk, and the cost and availability of those means, all have to be assessed. Moreover, under s19 the employee must himself take all practicable steps to ensure his own safety while at work. These are formidable obstacles which a potential plaintiff must overcome in establishing breach of the contractual obligation. Foreseeability of harm and its risk will be important in considering whether an employer has failed to take all practicable steps to overcome it.²

[70] The Employment Agreement reflected this joint responsibility in clause 12 in which outlines the employee’s responsibility to identify, minimise and/or eliminate hazards; to

¹ *Auckland Electrical Power Board v Auckland Provisional District Local Authority Officers IUOW (Inc)* [1994] 2 NZLR 415, *Gilbert v Attorney-General* [2000] 1 ERNZ 332, *A-G v Gilbert* [2002] 1 ERNZ.

² *AG v Gilbert* [2002] 1 ERNZ CA

ensure that he/she does not put their own safety at risk, and to report any concerns about their safety of well-being to management immediately.

[71] As outlined in *AG v Gilbert* Andrew Simms' foreseeability of harm to Mr O'Flaherty as a result of his training ADS is a key consideration in this issue.

(i) *Initial Interview*

[72] Mr O'Flaherty's evidence is that he made Andrew Simms aware from the outset that he was mentally vulnerable when he claimed to have informed Mr Rogers and Mr Keatley at the initial interview that he had suffered 'burn out' when he had operated his own car grooming business.

[73] Mr Keatley and Mr Rogers disputed that there had been any discussion of previous mental health issues at the initial interview which they described as informal.

[74] Mr Rogers' evidence was that he first became aware of the mental health issue in the text message which Mr O'Flaherty sent to him on 3 October 2016 referring to Mr O'Flaherty's belief that he was suffering from mental exhaustion.

[75] I find this evidence to be supported by the text message in which Mr O'Flaherty states that he recognized the symptoms of burn out as: "*I have been here before.*" The phrasing of that text is more consistent with a new piece of information being provided to Mr Rogers than a reminder to Mr Rogers of what he had been told previously.

[76] Mr Keatley's evidence is that Mr O'Flaherty had not informed him until he had asked him in the meeting held on 17 October 2017 what he believed had caused his mental breakdown.

[77] I find this evidence to be supported by the fact that there is no mention of the previous incident of mental burn out having been discussed prior to Mr O'Flaherty's employment in the several drafts which preceded Mr O'Flaherty's personal grievance letter dated 9 December 2016.

[78] Moreover in the personal grievance letter dated 9 December 2016 Mr O'Flaherty states in reference to the meeting between him and Mr Keatley on 17 October 2016:

You asked if I had experienced this before and I mentioned that I had mentally 'burned out' due to stress back in 2001 after losing my grooming manager and being unable to replace him so I worked long hours to cope with the demand from my customers. I temporarily closed my grooming business in Newmarket to recover and returned

offering a mobile service on a part time basis which suited my clients better.

[79] I find that this to be a full description of what Mr O'Flaherty experienced on a previous occasion rather than a reminder of what had been discussed previously.

[80] I find Mr Keatley and Mr Rogers' evidence that Mr O'Flaherty had not advised them of any mental vulnerability at the commencement of his employment to be supported by the evidence.

(ii) Nature of the incidents with ADS prior to 12 September 2016

[81] Mr O'Flaherty had agreed to help train ADS. Whilst his evidence was that he did not have: "*any experience at all with Asperger's Syndrome and did not really know what it was*" Mr Rogers' evidence was that Mr Keatley had explained to Mr O'Flaherty about Asperger's and Mr Burnett 's evidence was that Mr Rogers had explained the condition to him, and provided printed page of information.

[82] Mr Keatley's evidence that there had been no expectation that Mr O'Flaherty would have sole responsibility for ADS, and Mr Rogers' evidence that he would move ADS to work with other employees and in other work areas from time to time was supported by that of Mr Burnett.

[83] Mr O'Flaherty had also been told by Mr Keatley before ADS commenced employment that he could approach him about ADS at any time, however he had not done so.

[84] Mr Rogers' evidence was that he would speak to Mr O'Flaherty several times during the working day and asked about the progress being made in training ADS. Mr O'Flaherty was not expected to address the issues with ADS, instead he reported them to Mr Rogers who referred them to Mr Keatley, who immediately attended the grooming area and spoke to ADS, explaining why his behaviour was not acceptable.

[85] The issues raised by Mr O'Flaherty about ADS and reported to Mr Rogers during the period 15 August to 12 September 2016 were performance related issues. Further there is no evidence that Mr O'Flaherty indicated that the issues were such that his mental health was suffering as a result. Nor did he report any such issue to Mr Keatley as he had been invited to do before ADS commenced employment.

[86] I find there is no evidence that Mr O'Flaherty informed Andrew Simms prior to 12 September 2016 that his experiences with ADS were affecting his mental health.

(iii) Absence 12 - 19 September 2016

[87] Mr O'Flaherty was absent as a result of annual leave on 12 September 2016 which he said was caused by his feeling exhausted as a result of his experience training ADS.

[88] He had contacted Mr Keatley on 13 September to request an extension of time. When Mr Keatley asked him if the request was because of a problem with his mother, Mr O'Flaherty's response was that he was feeling run down, but despite the opening provided by Mr Keatley, he did not explain that he believed training ADS had had an adverse effect on his mental health.

[89] When he returned to work on 19 September 2016 Mr O'Flaherty's evidence was that he had told Mr Rogers that he was exhausted.

[90] In cross-examination Mr O'Flaherty confirmed that his GP Dr Norcliffe's opinion had been that he was suffering from a cold. I find this to be supported by the notes provided by Dr Norcliffe to Dr Chambers in a letter dated 9 December 2017 in which is stated in reference to a consultation held with Mr O'Flaherty on 15 September:

Worn out. Has had 2 days off so stayed off. Blocked up head. No energy. T.36.8, mildly red throat, cold symptoms suggest rest and paracetamol

[91] The medical certificate provided to Andrew Simms signed by Dr Norcliffe's in relation to Mr O'Flaherty's absence on 15 September 2016 stated only that Mr O'Flaherty was suffering from a disability that had rendered him unfit to attend work for a period of 5 days.

[92] I find there is no evidence from either the text message to Mr Keatley or the medical evidence which would have indicated that Andrew Simms had been advised that Mr O'Flaherty's experiences with ADS were affecting his mental health.

(iii) Events 19 – 30 September 2016

[93] Mr O'Flaherty returned to the workplace on 19 September 2016, at which time his evidence was that he had been feeling better and able to indicate that he would be prepared to accept Mr Rogers' position upon his (Mr Rogers) retirement.

[94] I observe that acceptance of the position would have involved more responsibility and at this time ADS was still employed. This is at odds with Mr O'Flaherty's evidence that shortly after his return he told Mr Rogers that he was mentally exhausted.

[95] This was denied by Mr Rogers, who agreed Mr O'Flaherty had said he was exhausted, but not mentally exhausted.

[96] I find Mr Rogers' evidence is supported by the fact that although the personal grievance letter dated 9 December 2016 states that Mr O'Flaherty told Mr Rogers ADS was: "*mentally exhausting to be around*", in the drafts which pre-dated the personal grievance letter dated 9 December 2016 there is no reference to 'mental' exhaustion:

- The draft dated 30 October 2016 states: "*At this point I had a chat with Lester and mentioned I have had enough of working with [ADS]. He was unbearably slow to a point and where was extremely frustrating to me*".
- The draft dated 1 November 2016 states: "*At this point I had a chat with Lester and mentioned I have had enough of working with [ADS]. He was unreliable as a team member and unbearably slow to a point where it was extremely frustrating*".

[97] Mr O'Flaherty stated that he regarded the incident with the Dodge Journey vehicle to be the final straw and he had told Mr Rogers that he was on the point of resigning as his mind was '*fried*'.

[98] Mr Rogers' evidence was that Mr O'Flaherty had not told him his mind was 'fried' and he wanted to resign, but on 30 September 2016 he had said that he was no longer prepared to train ADS, whereupon he told Mr Keatley.

[99] Mr Keatley had immediately met with Mr O'Flaherty and the other team members to hear their concerns, following which ADS was dismissed forthwith.

[100] I find Mr Rogers and Mr Keatley acted promptly when informed that Mr O'Flaherty no longer wished to train ADS.

[101] Whilst I accept that Mr O'Flaherty found working with ADS frustrating and exhausting, I do not find that he had made Andrew Simms aware his training of ADS was having an adverse effect on his own mental health.

(iv) Events after ADS's employment had been terminated

[102] Mr O'Flaherty left his workplace on the day ADS' employment was terminated and there followed periods of sickness absence and part-time working which he claimed was as a result of training ADS.

[103] Mr O'Flaherty informed Mr Keatley that ADS had been responsible for his mental breakdown at the meeting on 17 November 2016. This was after ADS's employment had been terminated and he had left Andrew Simms employment.

[104] I note that Dr Chambers' evidence was that in addition to the stressor of his mother's illness, ADS had been an additional stressor to Mr O'Flaherty. He had ascertained this from

Mr O’Flaherty’s evidence and that of his GP. There is no evidence that Dr Chambers investigated the workplace issue but appeared to rely on what Mr O’Flaherty and Dr Norcliffe had reported to him.

[105] In *Nilson-Reid v Attorney-General of the Department of Conservation* the Employment Court stated that: “... *the Court may reject specialist evidence based on the self reporting a litigant if the specialist uncritically accepts what the litigant has said*”³

Health and Safety Responsibilities

[106] Andrew Simms had a responsibility to take all practicable steps to ensure Mr O’Flaherty’s safety in the workplace.

[107] I find that Mr O’Flaherty was provided with relevant information about ADS’s condition prior to Andrew Simms agreeing to employ ADS, and he agreed to undertake the training of ADS willingly after receiving that information.

[108] Thereafter Mr Rogers checked with him several times a day during ADS’s employment to see if there were any issues. I have found that the issues raised were performance related and were addressed by Mr Rogers passing the information to Mr Keatley who promptly met with ADS to address them.

[109] Mr Keatley had offered to meet with Mr O’Flaherty if he had any issues when training ADS before the training commenced, but despite this Mr O’Flaherty had not chosen to speak to Mr Keatley as invited to do, preferring to communicate via Mr Rogers.

[110] As soon as Mr Keatley was made aware by Mr Rogers that Mr O’Flaherty no longer wanted to train ADS and that the other team members shared his frustration, he acted immediately to terminate ADS’ employment.

[111] Employees also have a responsibility towards ensuring their safety in the workplace as outlined in s 45 of the Health and Safety at Work Act 2015. This responsibility is outlined in clause 12 of the Employment Agreement in accordance with which Mr O’Flaherty was to: “*assist in identifying, minimising and/or eliminating hazards*” and to report any concerns about their safety and well-being to management immediately.

[112] As observed, the issues about ADS Mr O’Flaherty raised with Mr Rogers and which were conveyed to Mr Keatley, were performance related matters. I have found no evidence that Mr O’Flaherty made Mr Rogers or Mr Keatley aware that he was experiencing anything other than the frustration associated with a trainee who is not performing as expected to do.

³ *Nilson-Reid v Attorney-General of the Department of Conservation* [2005] ERNZ 951 at [60]

[113] I have found that the evidence does not support Mr O'Flaherty having made Andrew Simms aware of the impact training ADS was having on his safety, in particular his mental health, in the workplace prior to ADS's employment being terminated.

[114] I determine that Mr O'Flaherty was not unjustifiably disadvantaged in his employment with Andrew Simms.

Costs

[115] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority