

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 503
3054839

BETWEEN IAIN WARBURTON
Applicant

A N D DYNES TRANSPORT
(TAPANUI) LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Peter Cahill, advocate for the Applicant
Rachel Brazil, counsel for the Respondent

Investigation Meeting: 18 June 2019

Submissions Received: 7 July 2019 from the Applicant
25 June 2019 and 22 July 2019 from the Respondent

Date of Determination: 28 August 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dynes Transport (Tapanui) Limited employed Iain Warburton from 5 June 2018. Dynes Transport dismissed Mr Warburton on 27 September 2018 for serious misconduct.

[2] Mr Warburton says Dynes Transport actually dismissed him on 10 September 2018, when Malcom Payne, the General Manager at Dynes Transport told him he had “no future at the company”. Mr Warburton says this dismissal was unjustified and he raised a personal grievance for unjustified dismissal.

[3] Mr Warburton also says that Dynes Transport acted in an unjustified way toward him and this caused him disadvantage in his employment. The matters he complains of include:

- (a) That he was treated differently from other employees during the first 90 days of his employment whilst he was in a trial period.
- (b) That the expectation imposed on him in his role were high, yet there was no job description or any other record setting out the expected behaviour and standards applying to his role.
- (c) Being reprimanded or “told off” for incidents at work where he had acted in a manner he thought was reasonable and appropriate and where no time was taken to understand his explanation for why he acted as he did.

[4] Mr Warburton purported to raise a personal grievance for this treatment but Dynes Transport says the unjustified disadvantage grievance was not raised within the requisite 90 day period.¹

[5] Finally, Mr Warburton says Dynes Transport has breached the duty of good faith. The events which inform this allegation cover all of his complaints contained in his two grievances, so the unjustified dismissal and the unjustified actions.

[6] These matters form the employment relationship problem, which was lodged with the Authority and which I have investigated.

Issues

Unjustified dismissal

[7] The first issue for Mr Warburton’s unjustified dismissal claim is did Dynes Transport dismiss him on 10 September 2018?

[8] The second issue is, if Dynes Transport did dismiss Mr Warburton on 10 September 2018, was the dismissal:

¹ Section 114 of the Employment Relations Act 2000.

(a) carried out through a fair process, particularly in light of the requirements in ss 4(1A) and 103A of the Employment Relations Act 2000 (the Act); and/or

(b) substantively justified?

[9] If Dynes Transport did unjustifiably dismiss Mr Warburton then I will need to consider the remedies he is entitled to receive, including compensation and reimbursement. If I award Mr Warburton any remedies, I will then need to consider if he contributed to his grievance in such a way that the remedies awarded should be reduced and if so by how much.

Unjustified disadvantage

[10] The first issue that arises with the unjustified disadvantage grievance is whether Mr Warburton raised this grievance within 90 days of the events complained of occurring or coming to Mr Warburton's attention.

[11] If I am satisfied that Mr Warburton's personal grievance for unjustified disadvantage was raised within the 90-day period then the next questions, in respect of the unjustified disadvantage claim, are:

(a) Did Dynes Transport act toward Mr Warburton as alleged?

(b) If so, did these actions cause disadvantage to Mr Warburton's employment?
and

(c) If so, were Dynes Transport's actions justifiable?

[12] If Mr Warburton is successful with his unjustified disadvantage grievance, I will then need to consider remedies. If I award Mr Warburton any remedies, I will also need to consider if he contributed to his grievance in such a way that the remedies awarded should be reduced and if so by how much.

Good faith

[13] The issues for the breach of good faith claim include:

(a) Did Dynes Transport act as alleged?

(b) If so, is this a breach of the duty of good faith as set out at s 4 of the Employment Relations Act 2000?

(c) If so, were the failures which give rise to the breach, deliberate serious and sustained or intended to undermine the employment relationship, such that a penalty should be imposed?²

Unjustified dismissal

Events

[14] On Saturday 8 September 2018, James Harvey, an employee of Dynes Transport called Mr Warburton at home to get assistance with operational requirements at a Fonterra site. The detail of what was required and why Mr Harvey called Mr Warburton is not relevant, what is important is that Mr Warburton did not answer the call and did not subsequently return the call.

[15] Mr Harvey says that he called Mr Warburton at 7:00 am and left a message for him. He then called Mr Warburton another three times on 8 September 2018 but his calls were not answered.

[16] Mr Warburton says he missed a call from Raewyn Henderson, his manager at Dynes Transport, at 7:00 am on 8 September 2018. He says Ms Henderson left a message and he returned this call later in the morning. He then says that later in the day he found he had missed a call from Dynes Transport, but this was only one missed call and no message was left so he did not call back. Mr Warburton says he was unwell on 8 September 2018 and this is why he missed the call.

[17] On Monday 10 September 2018 when Mr Warburton arrived at work, Mr Harvey spoke to him about the missed calls on 8 September. Mr Harvey says Mr Warburton told him he does not work weekends whereas Mr Warburton said he told Mr Harvey that he was unavailable.

[18] Mr Harvey then decided he needed to have Mr Payne, who was his manager, involved in the conversation so he asked Mr Payne to join him in his office to discuss the matter.

² Section 4A of the Employment Relations Act 2000.

Mr Harvey then asked Mr Warburton again, why he did not answer his call on Saturday. Mr Warburton says he replied, by stating again that he was not available. Mr Harvey and Mr Payne both say that Mr Warburton said he was not required to answer his phone in the weekend. Mr Payne says Mr Warburton also said he needed to have his free time.

[19] This was the first time that Mr Payne became aware of the issue with Mr Warburton not answering his phone on 8 September 2018 and he was shocked by the answer he heard. This was particularly so because he had previously discussed with Mr Warburton that given the role he was undertaking he was expected to be available at times in the weekends to respond when issues arose. Mr Payne says that as a result he reminded Mr Warburton of the expectations of his role and asked him if he would answer his phone on the weekend in the future. Mr Warburton said no, probably not.

[20] Mr Warburton also said that if a message was left he would listen to it and if he decided it was urgent he would respond.

[21] Clearly, Mr Payne was annoyed by this answer. He says he responded by saying to Mr Warburton, if he carried on with an attitude like that he would not get far in the company. Mr Warburton says that Mr Payne told him, “then you have no future in the company”. Mr Harvey says that Mr Payne told Mr Warburton, your future will not be long with Dynes if that’s the case.

[22] Whatever, the exact words used by Mr Payne - which I will analyse further below - Mr Warburton took the statement to mean he was done with the company and his employment was finished. He says he simply responded to Mr Payne by saying; well see ya later then and he left Mr Harvey’s office.

[23] Mr Warburton then collected his personal items from the work Ute he had been using and from his office. He then went to the staff room where Mr Payne, Mr Harvey and others were having a break and gave his car keys and mobile phone to Mr Payne.

[24] Mr Warburton spoke to Mr Payne again in the staff room. There were a number of employees in the staff room at the time and I heard evidence about the conversation in the staff room from two of those employees, Mr Harvey and Tony McFarlane as well as evidence from Mr Warburton and Mr Payne.

[25] All four witnesses agree that Mr Warburton entered the staff room put down his keys and mobile phone. All four also agree that Mr Warburton talked to Mr Payne about the role and expectations of him being ambiguous.

[26] There is then conflicting evidence about what was discussed, in particular whether Mr Warburton and Mr Payne discussed notice and whether Mr Warburton had been dismissed or not.

[27] After this part of the conversation, all of the witnesses agree that Mr Payne told Mr Warburton to take his phone and the Ute and go away and cool down and they would discuss things later, following which Mr Warburton took his phone and left.

[28] Ms Henderson arrived at work later in the morning as she had been working off site. She was told about what had occurred with Mr Warburton, so she called him.

[29] Both Mr Warburton and Ms Henderson agree that in this telephone conversation, Mr Warburton told Ms Henderson that he did not want to speak to her and that he had been fired. Ms Henderson told him immediately that he had not been fired.

[30] Ms Henderson's evidence was that she then told Mr Warburton that he should return to work and he refused saying he would return when it suited him.

[31] Mr Warburton then ended the call and did not call Ms Henderson back.

[32] Later that day, Ms Henderson received a letter from Peter Cahill, the advocate for Mr Warburton. This letter raised personal grievances for unjustified dismissal and unjustified disadvantage. I will deal with the unjustified disadvantage grievance below. In terms of the unjustified dismissal grievance, Mr Cahill stated:

This morning, Monday 10 September 2018, [Mr Warburton] was confronted by a member of staff about not taking the phone call. He advised that no message was left so was unaware of any issues. That person told him it was unacceptable and went and got the GM, [Mr Payne].

[Mr Payne] queried him why he didn't answer the phone and he advised that it was not normal working hours and was not aware of that requirement. [Mr Payne] then asked him if he would answer the phone at 7am on a Saturday morning in the future. He responded that he probably wouldn't.

[Mr Payne] then told him he didn't have a future with the company. [Mr Warburton] took this as a dismissal and collected his belongings. [Mr Payne] then asked him about his months notice. When [Mr Payne] said he was leaveing, (sic) [Mr Payne] said "Good".

[33] Prior to receiving Mr Cahill's letter on 10 September 2018 Dynes Transport had prepared a letter to Mr Warburton inviting him to attend a disciplinary meeting because of the events that had taken place over the weekend and the Monday morning. This letter invited Mr Warburton to attend a meeting on 13 September 2018 and amongst other things, the letter recorded:

An incident occurred in the weekend and several attempts were made to contact you without success. When you arrived at work on Monday 10 September 2018, [Mr Harvey] asked you why you had not answered your phone during the weekend. You became angry and said you would not answer your phone in the weekends. [Mr Payne] tried to explain it was an expectation of the job and that you need to think about your future here with the company, given your ongoing negative attitude.

You then became increasingly angry, you left the office and came back 5 minutes later, put your keys and cell phone down and said to Mr Payne] see you later and left the workplace. [Mr Payne] said you haven't been fired where is the months' (sic) notice – you said I won't be spoken to like that.

I was notified of what happened when I arrived at work and rang you. You refused to return to work and insisted you had been fired. I advised this was not the case and to return to work.

[34] This disciplinary letter was then sent to Mr Cahill shortly after the personal grievance letter was received.

[35] Mr Cahill and Mr Warburton turned up for the meeting on 13 September 2018, but due to a miscommunication, Dynes Transport was not available to participate in the meeting. The meeting was cancelled and despite efforts to re-schedule it, it was never held.

[36] Mr Warburton never returned to work at Dynes Transport.

Dismissal

[37] So amongst all of this, I need to decide if Mr Warburton was dismissed. To do this I will establish what occurred, particularly where I have conflicting evidence over the material events, and then decide if that amounts to a dismissal.

[38] As is apparent from my summary of the evidence I heard, outlined above, there are significant conflicts over the key conversations.

Credibility

[39] In order to resolve the conflicting evidence I must decide whose evidence I prefer and this necessarily involves assessing credibility.

[40] As I have done in the past when considering conflicting evidence and making a decision on which evidence I prefer, or is more credible, I have relied on the guidance provided by Judge Harding in the District Court in *R v Biddle*³ that was cited with approval on appeal to the High Court⁴. This involves assessing what each witness said and reviewing how each witness expressed their evidence both orally and in writing, considering not just what was said but also how it was said. In the course of doing this I must look at the following aspects:

- (a) Consistency – looking at whether the witness’s evidence was consistent throughout; and whether the witness’s evidence was consistent with other evidence such as contemporaneous documents or agreed or known facts.
- (b) Reliability – considering whether the witness appears reliable and was accurate in his perceptions and recall of events.
- (c) Concessions – looking at whether the witness made appropriate concessions, noting that intransigent witnesses or those that are not open to alternative scenarios of events may have elements of confirmation bias reinforcing their evidence.
- (d) How plausible – asking, overall, how reasonable, plausible or probable the witness’s evidence was; and whether the witness’s evidence hangs together and has a degree of truth or is persuasive.

³ [2015] NZDC 8992

⁴ *Biddle v R* [2015] NZHC 2673 at [21]

- (e) Demeanour – considering the witness’s bearing, appearance and attitude but noting that this is limited as genuine witnesses may be mistaken in their memory and those who do not tell the truth can still be convincing, i.e. looks can be deceiving.

[41] I have also considered the likelihood that witnesses might be mistaken and their recollection subject to confirmation bias or whether witnesses might, in fact, be lying under oath or affirmation.

Assessment

[42] Two key conversations inform the question of whether Dynes Transport dismissed Mr Warburton:

- (a) The first conversation in the morning of 10 September 2018, between Mr Warburton and Mr Payne with Mr Harvey, in Mr Harvey’s office.
- (b) The second conversation in the morning of 10 September 2018, between Mr Warburton and Mr Payne with others present, in the staff room.

[43] I am satisfied that in the first conversation after discussing the missed calls on the Saturday morning of 8 September 2018, Mr Warburton said he was not available to answer his phone in the morning as he needed his free time and he was not required to work weekends. He also said he would not answer it in the future if he was called in the weekend, rather he would listen to any message left and then decide if the call was urgent and he needed to deal with it.

[44] The last part of this conversation, in which Mr Payne responded to these statements from Mr Warburton, is the crucial part and less clear:

- (a) Mr Warburton believes Mr Payne’s reaction to what he said was to end his employment relationship, and he understood this to be so by Mr Payne telling him, “then you have no future in the company”. In evidence, Mr Warburton described this as “the relationship had ended”. Mr Warburton accepted however that Mr Payne did not tell him he was fired or dismissed nor did he ask if he was being fired or dismissed.

- (b) Mr Warburton's account of what Mr Payne said to him is consistent with what Mr Cahill recorded in the letter raising the personal grievance sent later that day.
- (c) Mr Payne says his reaction to what Mr Warburton said was that if Mr Warburton wanted to develop a career in the company then his attitude was all wrong. He believes he conveyed this reaction by saying, "with an attitude like that you won't go far in the company."
- (d) Mr Harvey says Mr Payne's reaction appeared not to be to dismiss Mr Warburton but to respond to Mr Warburton's refusal to answer his phone in the weekend with an indication that if that was his attitude his future with the company was not great. Mr Harvey believes Mr Payne conveyed this by saying "your future will not be long if that's the case".
- (e) What Ms Henderson recorded in the disciplinary letter sent later that day, was that Mr Payne had said to Mr Warburton, "that you need to think about your future here with the company, given your ongoing negative attitude."

[45] Given the conflicting accounts of what Mr Payne said, I have no doubt there is a degree of confirmation bias in all of the witnesses evidence. And, in my view I think that confirmation bias set in almost immediately.

[46] I think Mr Warburton believed he was going to be dismissed in the conversation with Mr Payne, partly because he felt confronted by Mr Payne and Mr Harvey, partly because Mr Payne was angry at him, and because he realised his stance on not answering his phone was being challenged. Then when he heard Mr Payne refer to his future in the company, he took that as a dismissal.

[47] In contrast, what Mr Payne wanted to convey to Mr Warburton was that his attitude was not good for his future career with company and he needed to reflect on that. And his confirmation bias leads him to believe this is what he did say.

[48] Then, what Mr Harvey took from whatever Mr Payne said to Mr Warburton was, if you carry on like that you will not have a long future with the company.

[49] Reflecting on this and having analysed the evidence and assessed the credibility of the various witnesses, I am satisfied that Mr Payne's response to Mr Warburton telling him he would not answer his phone in the weekend was to tell him, that with that kind of attitude he would not have a long future in the company.

[50] Mr Warburton then replied, "see ya" and left Mr Harvey's office.

[51] Mr Warburton then came to the staff room a short time later when the second key conversation occurred.

[52] Based on the evidence I am satisfied that Mr Warburton entered the staff room and put down his keys and mobile phone. Mr Warburton then talked to Mr Payne about the role and expectations of him being ambiguous.

[53] The evidence regarding the next part of the conversation is conflicting:

- (a) Mr Payne says Mr Warburton told him he was finished. Mr Payne says he told Mr Warburton that he had not been fired rather he had stormed off (during the earlier conversation) so he should take his phone (and the Ute) and go away to cool down and then they would discuss things later.
- (b) Mr Warburton says Mr Payne did not say to him that he had not been fired, but rather he referred to working his notice period and this was what they needed to discuss later.
- (c) The other two witnesses all say there was no discussion of notice.
- (d) Mr McFarlane says Mr Warburton said "I quit".

[54] Again, I think the witnesses' recollection of what was discussed has been influenced by confirmation bias. Assessing the accounts of what was said and considering the overall circumstances of the morning's events I think the following occurred:

- (a) Having told Mr Payne that he thought the requirements around his role were ambiguous, Mr Warburton wanted to tell Mr Payne he was leaving, in response to his belief he had been dismissed. Mr Warburton expressed this by stating he was finished.

(b) Mr Payne was concerned about Mr Warburton storming off in the heat of the moment and quitting, when he said he was finished. Mr Payne wanted to calm Mr Warburton down by telling him he should not leave as he had not been fired and, in any event, if he was going to quit and leave he would have to work his notice period. Mr Payne expressed this by saying you have not been fired and you cannot leave as you will need to work your notice period.

(c) One of the other witnesses heard what Mr Warburton said about being finished and took this to mean he was quitting but I am satisfied that Mr Warburton did not resign when he said he was finished.

[55] Mr Payne then told Mr Warburton to take his phone and the Ute and go away and cool down and they would discuss things later, following which Mr Warburton took his phone but not the keys to the Ute and left.

[56] This last part of the conversation is particularly important because it confirms to me that Mr Payne's view was that Mr Warburton had not been fired, that he should not quit in the heat of the moment and he should take some time out and they would discuss the events later. And I think that should have been apparent to Mr Warburton.

[57] But, notwithstanding this Mr Warburton believed he had been dismissed and I need to determine whether that is right based on the two conversations.

[58] Dismissal is the termination of employment at the initiative of the employer⁵. It requires an unequivocal act, which amounts to an actual dismissal or a constructive dismissal. In the case of an actual dismissal, the unequivocal act will be a statement amounting to a sending away or sending apart⁶.

[59] In most cases of actual dismissal, an employer's statement of termination is straightforward and the issue of dismissal is not in dispute. However, there are cases where the employer may say it did not intend to dismiss an employee but the language used in an exchange with an employee can still be unequivocal and amount to a dismissal⁷. There are two points that arise in these circumstances. First, the assessment of whether the employer's

⁵ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

⁶ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC) at 976.

⁷ See for example, *No 1 Autohaus Ltd v Wrigley EmpC Auckland AEC75/97*, 18 July 1997 where the words "Good God, look at you, you can just go" were held to be a dismissal.

statement is an unequivocal sending away is a question of fact based on an analysis of not just the statement but also the circumstances giving rise to it. Second, if the employer does not intend to dismiss an employee but the employee believes they have been dismissed and the employer becomes aware of this misunderstanding then the employer must correct that misunderstanding⁸ - this is so even where the employer's statement is equivocal and does not amount to a dismissal.

[60] My conclusion is there was no equivocal statement of dismissal, that is there was no sending away either by Mr Payne's reference to Mr Warburton's future prospects with the company or by Mr Payne telling Mr Warburton to take time to cool off.

[61] In any event, Dynes Transport's position on any dismissal was clarified in the telephone conversation, in the afternoon of 10 September 2018, between Mr Warburton and Ms Henderson. Both Ms Henderson and Mr Warburton agree he was told, in that conversation, that he had not been dismissed.

Correcting mistaken belief

[62] There is one other issue that arises with Mr Warburton's claim that he was dismissed. It is clear from *New Zealand Cards Limited v Ramsay*⁹ that where an employer becomes aware that an employee misunderstood a communication to mean he/she was dismissed, contrary to the employer's intention, the employer cannot simply do nothing about this. In *Ramsay*, after referencing *Boobyer v Good Health Wanganui Limited*¹⁰ Judge Couch said:

[51] If the mistake is about dismissal rather than resignation, the analogous scenario is this. Where the communication is equivocal, the employer learns that the employee has misunderstood it as a dismissal contrary to the employer's intention but does nothing within a reasonable time to correct the employee's false impression. In such a case the employer must suffer the adverse consequences of passively standing by and letting the employee think that a dismissal has taken place.

[63] I accept that Dynes Transport met its obligation to not passively stand by and allow Mr Warburton to leave because he thought he had been dismissed. Mr Payne did this in the second conversation, in the staff room on 10 September 2018, Ms Henderson did this in her

⁸ *New Zealand Cards Ltd v Ramsay* [2012] NZEmpC 51.

⁹ [2012] NZEmpC 51.

¹⁰ WEC 3/94, 24 February 1994.

telephone call with Mr Warburton later that day and then Dynes Transport's letter of 10 September 2018 also confirmed this.

Conclusion

[64] In all of the circumstances, I conclude that Dynes Transport did not dismiss Mr Warburton and therefore there is no basis for Mr Warburton's unjustified dismissal claim.

Unjustified action causing disadvantage

[65] As I identified at the outset of this determination, the first issue for me to resolve in respect of Mr Warburton's unjustified action causing disadvantage grievance is whether Mr Warburton raised his personal grievance within the requisite 90-day time period.

[66] Counsel for Dynes Transport says this is not a question of assessing whether the grievance was raised in time by reference to when the alleged actions occurred and calculating the period to when the grievance was raised. Rather, counsel submits that Mr Warburton has not raised a separate claim of unjustified disadvantage at all. She says this is so because the personal grievance letter (Mr Cahill's letter of 10 September 2018) and the statement of problem, do not specify any actions that can amount to unjustified actions.

[67] In his evidence, Mr Warburton described his grievance in the following terms:

- (a) That he was treated differently from other employees during the first 90 days of his employment whilst he was in a trial period.
- (b) That the expectation imposed on him in his role were high, yet there was no job description or any other record setting out the expected behaviour and standards applying to his role.
- (c) Being reprimanded or "told off" for incidences at work where he had acted in a manner he thought was reasonable and appropriate and where no time was taken to understand his explanation for why he acted as he did.

[68] In a letter of 10 September 2018, Mr Cahill raised a personal grievance on behalf of Mr Warburton. In this letter he wrote:

[Mr Warburton] was employed with a valid 90 day trial period. He believes during his trial there were a number of issues and claims the company did not act in good faith. Indeed, he was treated differently that (sic) other employees whilst on his trial period.

He advises that the expectations were high without definition of what was actually expected and unreasonable.

[69] The letter then sets out the events Mr Warburton alleges gave rise to his dismissal. Following this the letter sets out obligations under the Act, including the test for justification.

[70] Under the heading “Conclusion” the letter then records:

It is clear the Company dismissed without meeting any of the considerations under ERA s103(A)3 and their actions would be found to be unjustifiable.

[71] Mr Warburton’s statement of problem then repeats these allegations as follows:

Indeed, he was treated differently that (sic) other employees whilst on his trial period.

He advises that the expectations were high without definition of what was actually expected and unreasonable.

[72] The statement of problem does however claim that the problem to be resolved includes “Unjustified Disadvantage” but there is no link between that problem to be resolved and the allegations.

[73] So, I must assess these statements and decide if a grievance has been raised.

[74] In *Creedy v Commissioner of Police*¹¹ the Court held that:

It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient and therefore not raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance without specifying the statutory type of the grievance as, for example, unjustified disadvantage in employment ... For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... What is important is that the employer has been aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

¹¹ [2006] 3 NZELR 293 at para.[37]

[75] Put simply the question is, did Mr Warburton sufficiently inform Dynes Transport of his grievance so Dynes Transport knew what to respond to? Answer is no – a simple statement that Mr Warburton had been treated differently and there were high expectations, which were not defined and unreasonable, does not meet this requirement.

[76] The letter and the statement of problem failed to identify what occurred that gave rise to these allegations of different treatment and unreasonable and undefined high expectations. And both failed to link these allegations to a complaint that the unidentified actions were unjustified and caused disadvantage to Mr Warburton's employment. In short there were no actions identified and no allegation that the actions were unjustified and caused disadvantage – so it cannot be said that an unjustified action causing disadvantage has been raised by either the letter or the statement of problem.

[77] The only time any detail was provided of the actions complained of was in the investigation meeting when Mr Warburton answered questions about his unjustified action grievance. Whilst this might constitute raising a grievance, the investigation meeting occurred almost nine months after Mr Warburton's employment ended and therefore any grievance raised at this time was outside the 90-day period.

[78] The failure to raise the grievance, other than in evidence at the investigation meeting, means Mr Warburton's personal grievance for unjustified action causing disadvantage was not raised within the 90-day period.

Good faith

[79] Mr Warburton's statement of problem does not specify what it is that he alleges that Dynes Transport did that constitutes a breach of the duty of good faith.

[80] In his evidence Mr Warburton provided some clarity around this, when he said the breach of good faith related to all of his complaints about Dynes Transport which make up his two grievances. So, that is:

- (a) The events of 10 September 2018.
- (b) Disparity of treatment during the 90-day trial period.

(c) High expectations which were unreasonable and lacking any reference in terms of a job description or other documents.

(d) Being unjustifiably reprimanded and told off for incidences of conduct or performance at work.

[81] I have reflected on Mr Warburton's evidence on these matters and am satisfied that there is insufficient evidence to establish that the events complained of in paragraphs [80] (b) – [80] (d) occurred or to the extent they did occur that they give rise to a breach of good faith. So, for example, there was no evidence of Mr Warburton being treated differently from other employees during the 90-day trial period. Further, whilst there was some evidence of Mr Warburton being reprimanded for actions at work, this was not unjustified nor was he treated differently from others – it simply occurred as part of the day to day management and supervision of his work.

[82] In terms of the events that occurred on 10 September 2018 I am not satisfied that the behaviour of the various Dynes Transport employees, which I have addressed in relation to the unjustified dismissal grievance, amounted to a breach of good faith. And even if it did, such behaviour was not serious and sustained or intended to undermine the employment relationship such that a penalty should be imposed.

[83] The result of these two conclusions is that Mr Warburton's claim for breach of good faith is dismissed.

Conclusion

[84] Dynes Transport did not unjustifiably dismiss Mr Warburton.

[85] Mr Warburton did not raise his personal grievance for unjustified action causing disadvantage within the requisite 90-day period and I do not have jurisdiction to investigate it.

[86] Dynes Transport did not breach the duty of good faith in a manner that justifies a penalty being imposed.

Costs

[87] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[88] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority