Attention is drawn to the
non-publication order
at paragraph [96]

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2021] NZERA 314
3039151

	BETWEEN	MICHAEL BOLTON Applicant
	AND	WELLINGTON FREE AMBULANCE SERVICE (INCORPORATED) Respondent

Member of Authority:	Michael Loftus
Representatives:	Barbara Buckett and Matt Belesky, counsel for the Applicant Paul McBride and Frances Lear, counsel for the Respondent
Investigation Meeting:	9 to 11 April and 18, 19 June 2019 at Wellington
Submissions Received:	At the investigation with subsequent exchange up to and including 17 June 2020
Determination:	21 July 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Michael Bolton, was dismissed by the respondent, Wellington Free Ambulance Service Incorporated (WFA), on 30 August 2018. He claims the dismissal is unjustified as the behaviour for which he was dismissed did not constitute serious misconduct and did not impact the work environment as WFA claimed. He also says the process WFA used to reach the decision to dismiss was fundamentally flawed.

[2] A number of disadvantage claims were also pleaded but it was accepted from an early stage the majority mirrored alleged faults in the dismissal process and were not grievances in their own right. They were withdrawn.

[3] Separate however, and remaining live, were claims of unjustified suspension and that Mr Bolton's privacy had been breached through the disclosure of information to third parties, in particular the police.

[4] WFA accepts it dismissed Mr Bolton but believes both the decision, and the manner in which it was reached, justifiable. It claims the suspension was actioned after Mr Bolton agreed and denies any wrong doing in respect to the information provided to the Police.

Background

[5] Mr Bolton was engaged by WFA as a patient transfer officer in 2009 and subsequently promoted to the position of Team Leader in 2015.

[6] Mr Bolton describes himself as a *passionate boatie* and in the latter half of 2017 he and the colleague whose complaints would subsequently lead to his dismissal (VGY) worked together for a couple of weeks. Mr Bolton is of the view the two became friends and this led to an invitation VGY and a couple of her family and friends join Mr Bolton on one of his boating trips.

[7] The trip was arranged for 18 November 2017 but unfortunately the others chose not to go. Mr Bolton and VGY did, though he suggests this was against his better judgement. He says he phoned VGY the day before to cancel but her reaction persuaded him to change his mind and avoid disappointing her.

[8] Mr Bolton says there was success with respect to the fishing and on the return VGY, having seen his wetsuit, asked about the possibility of getting some paua as a family member was partial to it. That prompted the event which led to the dismissal.

[9] The statement of problem put it this way:

> It is alleged that the Applicant, whilst naked changing into his wetsuit and VGY who was stripped to her underwear, sexually assaulted and harassed her by standing naked in front of her, forcibly trying to kiss her and pressed himself against her.

> Whilst the Applicant says he was naked and she was partially naked he did not behave as alleged and there was no sexual assault.[1]

[10] About the incident Mr Bolton is recorded as saying:

> … I pulled up to a good spot and started getting into the wetsuit in stern of boat. I was unable to get into my wetsuit in the cabin. VGY was looking away at this point. At one point she turned around and I was half changed.
> VGY started to get changed not using the cabin.
> As it was getting windier the dive abandoned.
> At no point did I look or comment, did not try and kiss her.
> We did not go swimming, we were not wet or naked.[2]

[11] It is common ground that only two people know what actually occurred and it is fair to say their views differ. Whatever happened it is agreed the dive was abandoned and the two returned to shore. Mr Bolton says VGY then invited him to her home and he went. He says they filleted the fish they caught, had a hot drink and discussed travel. Mr Bolton then left.

[12] The next day VGY sent a text containing a photo of a meal she had prepared using the fish. Mr Bolton emphasises there was no mention of an incident on the boat.

[13] A further text followed on 22 November which did raise the incident and VGY's dissatisfaction with Mr Bolton having *... hugged and kissed me whilst naked on the boat*. It went on to advise VGY now felt nervous about being near Mr Bolton and *... I don't want to come back to work at the moment because it's all just too much*.

[14] Mr Bolton replied by text saying:

> I am so sorry. I let you down on Saturday and I have no excuse. I am not a good person. But please come back to work, talk to me. I care about our friendship. Sorry Sorry Sorry.

[15] A second text from Mr Bolton encouraging VGY's return to work followed shortly thereafter. Mr Bolton now says he has cause to regret those responses as notwithstanding their content they were not an admission of wrongdoing as others might now perceive them but an attempt to calm the situation. In his words *He regrets on hindsight this hasty response which does have the appearance of acceptance of that which didn't happen.*

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[1] Statement of Problem at 2.5 and 2.6
[2] Notes of meeting of 12 March (refer paragraph [28] below)

[16] Further texts followed with VGY saying that while what Mr Bolton did was serious she would forgive and come to trust him again *in time*. She said we all make mistakes and learn from them. She said she still needed time to heal and recover before returning to work before suggesting the possibility of *some sort of mediated catch up* in order to repair *our friendship*.

[17] The reference to a return to work reflects the fact VGY was absent and that would remain the situation for a couple of weeks though she told WFA it was due to gastroenteritis. It should also be noted VGY had some other issues which led to an ACC sponsored return to work discussion between herself and WFA on 7 December.

[18] During that meeting VGY raised the events of 18 November. Indeed the meetings notes suggest it was the first issue discussed. They record:

> There is a slight hiccup in going back on the road and will affect the pathway. Outside of work confided in a colleague and then was sexually assaulted by him. Not wanting to take any action against him but I'm uncomfortable with working with him.

[19] In a reply with which Mr Bolton takes issue one of WFA's managers is then recorded as saying:

> Once a name is mentioned it can't be unheard. It is a serious allegation, it is something that does need to be followed up on. But unless we know who it was, we won't take any action about it.

[20] Shortly thereafter the same manager was recorded as saying *We want to support you, but we can't not take appropriate action*. VGY then said she was nervous and felt no one would believe her as *the person is quite influential* and that she worked *with colleagues that are preferential to this person*.

[21] Another manager then said *That is not the approach to take as it needs to be addressed*. The conversation moved to VGY's admission she had misled WFA about the reasons for her absence and that she wished to apologise for the deception. The conversation then turned to the ACC issues with parts of the transcript being redacted though there was a return to the allegation of sexual assault probably because one of the return to work options meant it was possible VGY might see Mr Bolton even if she was not working with him.

[22] The transcript suggests VGY remained reticent about formally complaining and sought clarification about possible consequences. She says *The next step is where*

you stand in terms of trust in what I have to say and the response is another passage with which Mr Bolton takes issue. It is recorded as *If you say it happened we will believe you it happens. Employment law is balance of probability.*

[23] Shortly thereafter Mr Bolton's identity was disclosed and VGY began to discuss the incident in some detail. In a subsequent report Kiera Peters, a Human Resources partner within WFA who was present, wrote *She (VGY) felt she needed further time to consider how formal her complaint was, and whether she would approach the Police on this matter.*[3]

[24] There was a further meeting with VGY on 18 December at which Ms Peters says VGY *…had decided she would not pursue the matter with the Police, but accepted WFA would investigate the matter further*.[4]

[25] There was then a hiatus due to Christmas which was followed by a decision, made on 10 January, that the matter would be investigated by Ms Peters and Geoff Proctor, then WFA's Executive Director of Operations and the person who had been managing VGY's return to work programme.

[26] Again little further was done with this being attributable to a period of leave Mr Bolton commenced and confusion about the dates he would be away. Suffice to say he had no knowledge of WFA's concerns till March 5 when he received a telephone call from his line manager, Glen Worthington, asking the two meet urgently. That then occurred and Mr Bolton was handed a letter dated 5 March which advised he was required to attend a disciplinary meeting and outlined why.

[27] On 12 March Mr Bolton met with Mr Procter and gave his view of events.

[28] Matters progress from there with numerous interactions between the parties and their representatives. There were also meetings with various witnesses but not all those who Mr Bolton identified as relevant. There was also a further meeting with VGY during which, in Mr Bolton's view, she gave a view of events which *materially contradicted* her earlier statements. Also important from Mr Bolton's perspective was VGY's statement it had *all turned to custard and all blown out of proportion* and that of her support person who said *she (VGY) has never wanted this process, never wanted to say anything, never wanted him (Mr Bolton) to get into trouble.*

[29] Notwithstanding that the process continued with further meetings and correspondence significant amidst which was a letter from Mr Wright dated 15 June. It is a lengthy and detailed letter headed *Disciplinary Process: Preliminary Decision* which advises *It is our view that some or all of the conduct alleged by VGY occurred* and *Our preliminary view is that in the circumstances you should be dismissed*…

[30] The letter also asked that pending resolution of the matter Mr Bolton consider special leave and advised that should he not do so WFA would consider suspension. While not expressly said, other than in respect to suspension, the letter clearly implies Mr Wright was not part of the decision making process. Finally Mr Bolton was asked to comment on the preliminary views.

[31] On 18 June Ms Peters advised payroll that Mr Bolton was on leave and instructed this be recorded as special leave and not debited against any existing entitlement.

[32] Further correspondence followed between the parties and their representatives with Mr Bolton also seeking the assistance of an organisational psychologist who suggested any decision based on a preference for VGY's assertions was unsafe.

[33] That led to further delays while WFA also sought professional input from a Clinical Phycologist.

[34] Then on 24 August, and while the various exchanges continued, the Police, using Mr Bolton's words, raided his home and removed his firearms. The evidence is this was due to the fact one of WFA's shift managers received an e-mail from one of WFA's staff stating she had grave concerns for Mr Bolton's welfare. It was forwarded to Mr Procter and then Mr Wright who asked further enquiries be made. They were and in a subsequent conversation the author of the e-mail suggested Mr Bolton might be suicidal and that he had access to firearms at his house. That led to Mr Procter contacting the Police who clearly acted.

[35] Mr Bolton takes issue with this on the grounds *This information to the Police was false and in breach of the Applicant's rights to privacy and confidentiality*.[5]

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[3] Report Peters to Chris Wright, Executive Director People and Culture, dated 23 February 2018
[4] Ibid
[5] Statement of Problem at [2.53]

[36] Shortly thereafter the exchanges culminated with advice, by letter dated 30 August, that WFA was confirming a decision to dismiss with final responsibility for that resting with Mr Wright. The reason stated in the letter was:

> It remains our view that you acted in ways outlined in my letter of 17 August, including that you acted inappropriately against a colleague, who you knew to be vulnerable, during a weekend outing. We consider your behaviour to be serious misconduct. Our trust and confidence in you has been (at the very least) seriously damaged.

[37] The allegation referred to in the letter of 17 August was that Mr Bolton had *sexually harassed another WFA* employee.

[38] While the letter of 30 August acknowledged there were a range or penalties dismissal was chosen with three reasons being cited. They were:

a. Mr Bolton would, if he returned, be placed in a position of authority over others in a manner similar to that he had held with respect to VGY;

b. Concern at *your lack of acknowledgment and a minimisation of impact on VGY, as well as the lack of any responsibility accepted*;

c. Reputational damage to WFA should Mr Bolton remain and the circumstances of this incident become known to others.

[39] Mr Bolton replied the next day raising his grievance.

Discussion

[40] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

[41] Mr Bolton's prime claim is that he was unjustifiably dismissed. WFA accepts it dismissed Mr Bolton and in doing so accepts it is required to justify its actions.

[42] Section 103A of the Act states the question of whether a dismissal is justifiable:

> … must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal … occurred.

[43] When asked why Mr Bolton was dismissed Mr Wright said, more than once, that it was attributable to two factors. They are essentially those cited in the letter of dismissal and Mr Wright's evidence was echoed by other WFA witnesses who had participated in the process. The reasons were a preference for VGY's version of events, which led to a conclusion Mr Bolton was guilty of serious misconduct warranting dismissal, and a total loss of trust and confidence in Mr Bolton.

[44] The key, but not only, reason cited for preferring VGY's version were the texts Mr Bolton sent soon after the incident which, in Mr Wright's words, he *can't reconcile* as he considers *sorry* would be the last thing one would say if the allegations were groundless. That WFA relied to a significant extent on the contemporaneous texts is clear from the content of a letter it wrote to Mr Bolton on 15 June 2018 which also advised a preliminary conclusion *that some or all of the alleged conduct had occurred* and dismissal was considered appropriate.

[45] It is Mr Bolton's view neither of these reasons can be justified from either a substantive or procedural perspective.

[46] With respect to substance Mr Bolton maintains that:

> [While he] accepts that what happened on the boat may not have been "a good look", he does not accept that he did anything untoward. He certainly did not do what the employer claims.[6]

[47] He also argues that the consequential conclusion he might be a danger and risk to female colleagues and clients must therefore be untenable as it cannot be supported by the evidence.[7]

[48] With respect to a key factor Mr Wright says influenced his conclusions, namely the text quoted in [14] above, Mr Bolton says:

> Further, whilst [he] accepts that the "apology text" prima facie looks like a concession to the preceding "allegation text", the meaning and intent of that text was never properly interrogated,

[6] Applicant's closing submission at [2]
[7] Applicant's closing submission at [10]

> and the employer read into that text that which it wanted with a pre-determined, closed and subjective minded approach.[8]

[49] Mr Bolton is also of the view the predetermination just referred to was repeated with respect to a number of aspects of the investigation.

[50] The approach outlined in [46] and [47] above repeats what was a recurring theme throughout the Authority's investigation – namely Mr Bolton's determination to have his name cleared and a declaration he did not sexually harass VGY. As he was frequently told, and despite the fact he still *does not accept that he did anything untoward,*[9] that is not issue before the Authority. The issue is reflected in Ms Buckett's submission where she says:

> … the purpose and scope of the Authority's investigation is not to determine whether the alleged events of the boat trip occurred, but whether the employer followed a fair process leading up to the decision to dismiss and that the decision to dismiss was one a fair and reasonable employer could have come to in all the circumstances.[10]

[51] The simple fact is only two people know what actually occurred on the boat, Mr Bolton and VGY. That said and as it did, WFA was entitled to prefer one version over the other though in order to do so it is required to ensure its conclusion is one it could safely reach as the result of a thorough and complete investigation. It is the thoroughness of the investigation Mr Bolton primarily challenges.

[52] Mr Bolton also takes issue is WFA's impartiality and he has a view it failed to properly consider the points he raised as required by s 103A(3)(d) of the Act.

[53] In essence the argument is WFA, blinded by its bias, failed to take all reasonable *steps … to obtain relevant information and test major discrepancy. The applicant submits the respondent failed in its obligation which goes to the heart of natural justice*.[11]

[54] Having reviewed the evidence and the submissions this is an approach with which I concur. As the Court said in *C V Air Nelson*:[12]

> ... It is clear from those decisions that [counsel for ANL] is correct that the focus of the Court's inquiry must be upon the

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[8] Applicant's closing submission at [4]
[9] Above n 6
[10] Applicant's closing submission at [4]
[11] Applicant's closing submission at [18]
[12] *C v Air Nelson Limited* [2011] NZEmpC 27 at [48] and [51]

> employer's actions and how the employer acted. The Court must be satisfied that in reaching its decision to dismiss, the employer adopted a logical chain of reasoning, which is transparent and reasonable from the facts uncovered during its inquiry and presented to it. That is what the Court's review of "reasonable grounds to believe" requires. It is not for the Court, as [counsel for ANL] has correctly submitted, to enter into a fact finding inquiry, of the kind which would be required for example, in a criminal proceeding. That is not the purpose of the question which the Court must answer under s 103A of the Act.
>
> ... Based on the legal principles applying, the Court can appropriately inquire into whether Mr Hambleton had clear evidence upon which any reasonable employer could safely rely and/or whether he conducted reasonable inquiries, which left him on the balance of probabilities with grounds for believing, and he did believe, that the employee was at fault.

[55] These comments were cited with approval by the Court of Appeal[13] and it is here WFA falls short. The most glaring issue is the extent of it's inquiry into what actually happened on the boat and from which all subsequent actions flow.

[56] As counsel for Mr Bolton emphasises the evidence shows that WFA were faced with a number of inconsistencies in VGY's recital of events. For example, and at various times during WFA's investigation VGY either said, or was reported to have said to close confidents, that she:

a. *went for a swim* and *didn't go for a swim*;

b. *didn't have togs* and *got changed into togs*;

c. Was *naked* and *partially naked*;

d. Was *kissed* or *forcibly kissed*; and

e. Was *hugged* or *pressed against*.

[57] Given the underlying allegation which WFA concluded established and which led to Mr Bolton's dismissal these should have been queried in order to try and get a clearer view of what happened and the context in which it occurred. The evidence is this did not occur and that has to undermine the reasonableness of the conclusion reached. Indeed I note the letter of 15 June 2018 (see [29] above) records *We accept*

[13] Air Nelson Limited v C [2011] NZCA 488 at [18]

that we cannot know for certain who is telling the truth about what occurred before attributing the preliminary outcome to a credibility finding. In that regard, and notwithstanding a conclusion VGY's *account is consistent on the key points* it also notes *Memory is fallible* and VGY had various health issues which may have affected her memory and behaviour. The problem is the evidence shows VGY's account was not consistent and nothing was done to enquire into the inconsistencies.

[58] There is the fact the evidence shows VGY's conduct immediately after the trip is possibly at odds with the occurrence of the alleged incident yet once again this was not followed up. Once again that is answered with reliance on the statements of a counsellor which were not put to Mr Bolton prior to the preliminary conclusion and while both parties then engaged in a tit-for-tat expert war it is, I'm afraid a bit late for that.

[59] I move to the *sorry* text which the evidence shows was a key factor in persuading WFA to prefer VGY's version of events. Here I have some sympathy with counsel's submission that:

> In the Authority Hearing the Member asked Mike "the normal reaction is to reply [to the accusatory text] denying, why didn't you?" Mike explained to the Authority that he did not deny for a combination of reasons, …
>
> This is the type of question we would have expected the WFA to put to Mike but it never did. WFA instead drew its own conclusions without Mike's input, demonstrating again that its investigation was lacklustre.

[60] There are other points that add to this conclusion. For example the evidence shows Mr Bolton was not provided with all the information WFA had before it with the obvious example being the notes of its interview of VGY on 7 December. At various times he received two copies – both with redactions albeit different. This can do nothing to make Mr Bolton, or his representative consider the process transparent especially as some of the original redactions cover VGY's airing of her accusation and include comments which Mr Bolton says indicate predetermination such as VGY being told *If you say it happened we will believe you it happens. Employment law is balance of probability.*

[61] Similarly he had no knowledge of various factors about VGY's health that WFA took into account when preferring her version over his. Ultimately, and if it is to be a decisive factor as it was, then he is entitled to know and be allowed to reply.

[62] WFA also refused to interview witnesses suggested by Mr Bolton largely on the grounds there possible input was propensity evidence as opposed to directly applicable to the incident involving Mr Bolton. While such evidence is essentially unreliable and would carry little weight it might have been prudent to take all measures suggested by Mr Bolton. Finally I note the evidence is Mr Bolton was discouraged, indeed denied, an opportunity to have support people of his choosing.

[63] Returning to the accusation of predetermination. Trying to elicit a complaint VGY was reluctant to pursue with guarantees she would be believed is not a good starting point ([60] above). There is then, I conclude, some merit in the submission that events were described in a way that magnified the impression of wrongdoing. One example was an allegation Mr Bolton stood naked in front of VGY without mention of the purported context –namely he was changing into a wetsuit. Another was to add the word forcefully when describing the kiss when VGY had not said that.

[64] The culmination of this was to obtain an expert opinion which gave grounds for WFA to disregard inconsistencies in VGY account of events and to that I add the fact the evidence shows little consideration of any alternate to dismissal, This, as was submitted on Mr Bolton's behalf, is a significant omission given he and VGY worked in different areas where their paths would seldom cross and VGY was recorded as expressing reluctance about the process and the sanctioning of Mr Bolton.. The impression created is that the process was conducted in a manner that was predisposed to attaining Mr Bolton's dismissal.

[65] The above points lead to a conclusion the investigation into whether or not Mr Bolton was guilty of sexual harassment was far from complete and the conclusion reached was, as a result, less than safe.

[66] There is then the fact WFA now asserts the dismissal was attributable to two factors with the second being a conclusion it no longer had trust and confidence in Mr Bolton. This conclusion is even less safe than the first if, for no other reason, the first time this accusation was formally raised was in the letter confirming dismissal. WFA cannot, therefore, comply with the most basic criteria of a fair investigation with respect to this allegation, namely that having regard to the employers resources which is not an issue here, the investigation, as a bare minimum, sees the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[67] For these reasons I find Mr Bolton's dismissal unjustified.

[68] As said in introduction Mr Bolton has also raised two disadvantage claims which remain and must be considered. They are that he was unjustifiably suspended and that his privacy was been breached by the disclosure of information to the Police.

[69] WFA's response to the claim of unjustified suspension is that Mr Bolton agreed to a period of paid leave and as a result there was no need to consider suspension.

[70] Ultimately I rely on Mr Bolton's concession that, albeit reluctantly, he did agree as WFA claims.

[71] The breach of privacy claim must fail if only because the Authority lacks jurisdiction to consider it. At the time this complaint was made the process for dealing with an allegation that an agency, as WFA is, has interfered with an individual's privacy was dealt with under the Privacy Act 1993 and the power to investigate vests with the Privacy Commissioner.[14] While the 1993 Act has now been superseded this remains the case under the present legislation, the Privacy Act 2020.

[72] Even if that were not the case I would find it difficult to conclude WFA's action of involving the Police constituted an unjustified disadvantage in the circumstances. It was the recipient of unsolicited information raising an issue of concern about one of its staff and then passed it to the relevant authority with power to act on it. I also note the evidence shows this was a response consistent to that applied when similar information was tendered about another employee and that it appears dissemination of the information may well be permitted given exemption (f)(ii) to principle 11 of the Privacy Act 1993.

Remedies

[73] The conclusion the dismissal was unjustified leads to a consideration of remedies.

[74] Mr Bolton seeks reinstatement, lost wages and compensation pursuant to s 123(1)(c)(i) of the Act. He also sought special damages *in respect to the legal costs*

[14] Section 69 of the Privacy Act 1993

he incurred in engaging with the Respondent's investigation and a penalty for a breach of good faith.

[75] Mr Bolton seeks reinstatement but for that to occur it must be both practical and reasonable and notwithstanding the fact reinstatement has since become a primary remedy I find the Courts comment in *Angus v Ports of Auckland (No 2)* very pertinent. There the Court said:

> Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.[15]

[76] To be practical and reasonable the parties must be capable of re-establishing their relationship and to do that they must be able to have trust and confidence in each other. Notwithstanding my conclusion about WFA's ability to justify its conclusion it no longer had trust and confidence in Mr Bolton the evidence of its witnesses made it patently apparent it had lost that trust and confidence.

[77] I also have to say that Mr Bolton's responses and admissions during WFA's investigation played no small part in this occurring with examples being the fact Mr Bolton tried to hide the fact of the disciplinary process from his wife and lied to her. There is also the fact that even if Mr Bolton was innocent, which admittedly WFAQ did not accept, it was clear VGY had suffered and there was an impact upon her. The evidence is Mr Bolton failed to recognise this and that has affected WFA's view of his suitability for the role.

[78] Perhaps even more telling were various comments Mr Bolton made when giving evidence about the lack of trust he now had in WFA and its managers. Even though this may have been generated by his view of the process WFA adopted the fact is these views are now held provide a barrier to reinstatement. I find it impracticable to reinstate Mr Bolton to a role where he has no trust or faith in those to whom he answer and from whom he must take instruction.

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[15] *Angus and McKean v Ports of Auckland Limited (No 2)* [2011] NZEmpC 160

[79] Turning to lost wages. With respect to lost wages s 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser. That said Mr Bolton seeks full recompense.

[80] While I accept there are examples where a loss which exceeds the three months has been granted and there is a succinct comment about that at paragraph 98 of *Xtreme Dining v Dewar*.[16] That said I also have to note the Court's subsequent comments about obligations and particularly that related to mitigation. About that the Court said:

> In summary, where the employer puts mitigation in issue, the employee must provide relevant information as to the steps he took to mitigate the asserted loss, but ultimately it is for the employer to persuade the Authority or Court that the employee has acted unreasonably in failing to mitigate the asserted loss.[17]

[81] WFA has put mitigation in issue and Mr Bolton freely admitted he took no steps substantive steps to seek alternate employment choosing instead to engage in voluntary work.

[82] Here comment needs to be made that Mr Bolton did seek, unsuccessfully, interim reinstatement. Up to that point it might have been arguable that his rationale for not seeking alternate work – namely that WFA was the only provider of the type of work he had performed and enjoyed might have had some merit but after that it should have become clear reinstatement was far from guaranteed.

[83] From that point at least he should have made attempts to mitigate and in my view his failure to do so removes any entitlement to further reimbursement of wages. The period from cessation of payment by WFA to the issuing of the interim determination was 18 weeks and the loss $17,233.92 gross. That is payable.

[84] There is compensation. While no specific sum is sought reference is made to the fact $20,0000 should be the minimum and that is supported with reference to various cases in which significant awards were made.

[85] This is one area in which Mr Bolton gave strong evidence though it was undermined in a small way by one of his witnesses suggesting the hurt was more a result of the litigation process than the dismissal itself.

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[16] *Xtreme Dining v Dewar* [2016] NZEmpC 136
[17] Above n 16 at [104]

[86] With respect to hurt Mr Bolton evidenced that:

a. The impact of losing his job has been life changing;

b. The dismissal and attendant process had a major impact on his health and well-being and being preoccupied with it he struggled to sleep;

c. The dismissal changed his personality and he became grumpy and difficult to live with. Mrs Bolton supported this.

d. The dismissal led to him becoming withdrawn and avoiding things he enjoyed such as social activities

e. That he felt devastated and shocked after being dismissed and went *into a dark place*

f. That the dismissal had a heavily impact on his self-esteem and put a strain on the relationship with his wife.

g. That he held a strong sense of abandonment and betrayal which has led to self doubt and a diminished ability to trust people generally.

[87] As already said the evidence was strong and having consider it and precedent in relation to compensation I conclude the $20,000 amount suggested by Ms Buckett appropriate.

[88] Mr Bolton also sought special damages to cover the cost of representation though the disciplinary process. The claim is supported with reference to the Courts decision to make such an award in *Hall v Dionex Pty Lt*[18]*d* but there is little further argument. I consider Hall distinguishable given the Courts view that investigation was baseless. That is not the case here as there was a substantive issue that needed to be addressed. That and the lack of a detailed submission as to why this might be appropriate leaves me unconvinced.

[89] Finally Mr Bolton sought a penalty for an alleged breach of good faith. A specific breach was not pleased with the evidence pointing toward an argument the alleged failures are in fact the deficiencies which underpin the claim of unjustified dismissal. Those have already been taken into account in finding Mr Bolton was

[18] *Hall v Dionex Pty Ltd* [2015] NZEmpC 29

unjustifiably dismissed and a further penalty, payable to Mr Bolton as he seeks, would be a double dip and essentially another form of compensation. Neither is appropriate.

[90] The conclusion Mr Bolton has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.[19] While WFA argues strongly that the answer is yes, I disagree.

[91] The fact is I have concluded the way in which WFA reached the conclusions it did was incomplete and therefore unsafe. Those failures are largely procedural and Mr Bolton could not have contributed to them.

[92] In turn those failures also mean WFA has failed to establish the accusation of wrongdoing against Mr Bolton justified. As I said earlier, only two people actually know what happened and this process has not clarified that. In other words there is no evidence to support a conclusion Mr Bolton acted inappropriately and therefore contributed to his dismissal.

Non Publication

[93] WFA seeks an order prohibiting the publication anything which identifies VGY. While I understood Mr Bolton to agree during the investigation that is not clear in the submissions.

[94] That said, and if he didn't, this is an order I would make given the compelling reason tendered by WFA. Included therein is evidence of VGY's tenuous mental health, the fact she was not a party to the Authorities investigation and could not defend her position and the nature of the allegations.

Conclusion

[95] For the above reasons I conclude Mr Bolton has a personal grievance in that he was unjustifiably dismissed. As a result I order the respondent, Wellington Free Ambulance Service Incorporated, pay Mr Bolton:

a. $17,233.92 (seventeen thousand, two hundred and thirty three dollars and ninety two cents) gross as recompense for wages lost as a result of the dismissal; and

[19] Section 124 of the Employment Relations Act 2000

b. A further $20,000.00 (twenty thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[96] I make a permanent order prohibiting the publication of anything which might identify the colleague who accompanied Mr Bolton on the boat.[20]

[97] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

[20] Clause 10 of the Second Schedule to the Employment Relations Act 2000