

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAUROA ROHE**

[2023] NZERA 495
3100612

BETWEEN

ANDREW MCLELLAN
Applicant

AND

THE PRIORY IN NEW
ZEALAND OF THE MOST
VENERABLE ORDER OF THE
HOSPITAL OF ST JOHN OF
JERUSALEM t/a ST JOHNS
AMBULANCE
Respondent

Member of Authority: Michael Loftus

Representatives: Adam Mapu and Nadia Tu'itahi, advocates for the
Applicant
Charlotte Parkhill and Stacey Fletcher, counsel for the
Respondent

Investigation Meeting: 24 and 25 February 2021 at Christchurch

Submissions Received: 29 March and 3 May 2021 from the Applicant
18 April 2021 from the Respondent

Date of Determination: 4 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Andrew McLellan, claims he was unjustifiably dismissed, albeit constructively, by the respondent which is better known by its trading name, St Johns Ambulance (St John). He also claims he was unjustifiably disadvantaged by virtue of St John having failed to address the unreasonable demands imposed by an increased and changing workload though these are in effect the grounds he says caused his resignation. That said the

way the investigation progressed saw the focus of this claim concentrate on an allegation that Mr McLellan's terms and conditions (namely the nature of his duties) were unilaterally altered to his disadvantage.

[2] St John denies the claims saying it treated Mr McLellan fairly and that his resignation was freely tendered with his partner having moved to Tauranga and he was soon to follow.

This Determination

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[4] 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.

Background

[5] Mr McLellan was employed by St John as an Ambulance Officer in 1988.

[6] In January 2015 he was appointed to the role of Clinical Support Officer (CSO) - Clinical Desk/Clinical Coach. This involved coaching and training staff, working on the clinical desk and engaging with external stakeholders such as hospitals.

[7] Mr McLellan claims the clinical desk work came close to ceasing between 2017 and mid-2019. Mr McLellan says he was required to deliver more formal education to external clients and coaching of ambulance officers reduced. He says he raised concerns about the changes and resulting high workloads but there was no real response and it was this that ultimately led to his resignation.

[8] About this St John has a different view saying "*... ultimately the Applicant's preference was to carry out only one component of his role (coaching) and because he was unable to do so (due to organisational priorities) and for personal reasons, he voluntarily decided to resign*".

[9] It is here another issue arises which is that when first appointed to the role of CSO Mr McLellan's terms were governed by an individual employment agreement. This subsequently changed in 2016 when the role came within the coverage of a collective agreement. About this St John says:

Clinical Support Officers historically held portfolios that reflected their expertise, when appointed in 2015 the Applicant held the Desk/Coach portfolios. In the 2018 – 2020 Collective Agreement the differentiation between portfolios was removed to reflect that all Clinical Support officers are expected to promote clinical excellence across St John. In practice this meant that Clinical Support Officers (CSOs) were expected to deliver educational training as part of their day to day job. ..

As part of their day to day work, CSOs carry out non-rostered work (coaching) and rostered work (educational training and clinical desk). This allowed them the flexibility to de-prioritise non-rostered work to deliver on rostered work. In 2018, an increased focus for CSOs to deliver more educational training occurred because this was one of the main income streams for the organisation. This meant that coaching work was not as higher a priority as delivering education.

[10] On 18 December 2018 there was a meeting attended by Mr McLellan, Curt Ward (the Clinical Practice Manager) and an HR advisor. It was called to discuss concerns Mr McLellan had raised with Dan Ohs, the then Assistant Director of Operations, about his being unhappy with the direction his role was going and, in particular, a growing focus on education as opposed to coaching. Mr Ward's voiced a view that ideally Mr McLellan's role would see him spend 50% of his time coaching and 50% on other duties and he expected all CSO's conduct educational training as it was considered the businesses "bread and butter" as it provided one of the main income streams.

[11] In July 2019, Mr McLellan participated in a performance review and says he raised his growing concern that he was unable to achieve the coaching key performance indicators (KPI's) due to the time now dedicated to delivering formal education programmes. He says the reply was that formal education was now the priority as it brought in revenue but claims that was not reflected in his KPIs yet the requirement he maintain coaching targets remained. This was, in his view, essentially unfair.

[12] St John disputes the assertion KPI's were discussed or imposed and in support of that refers to the resulting performance review document signed by both parties. In that document Mr McLellan recorded:

While not always being happy with the direction that the team is going or the increasing expectations and workload I effectively just get on and get the job done. I think I do provide a role model and overcome whatever barriers that present themselves.

[13] On 30 July 2019 Mr McLellan sent an email to his supervisor, Stephanie Vos, stating that his work schedule for August and September was unreasonable with the period 18 to 29 September labelled “extreme”. It suggests “Something is going to have to give before it breaks” before reminding Ms Vos of his contractual entitlements with respect to days off and noting “Coaching has all but disappeared” despite its inclusion in his job description.

[14] In his written evidence Mr McLellan stated there was no response which caused further angst, as did another two points raised in the e-mail. One was the fact he was performing the duties of a person who had left a year earlier and not been replaced. The other was the fact a contractual provision requiring two consecutive days off each week would not be complied with and while he says it had not worried him too much in the past it was now of concern as it appeared he would get no time off.

[15] St John denies there was no response saying the email was acknowledged (which Mr McLellan conceded when questioned) and the two met that same day. It also claims Mr McLellan “screamed” at Ms Vos about his workload to such an extent she felt threatened. It also says Ms Vos then met with others to canvass some possible solutions and this led to a further meeting in August where the two discussed his upcoming workload and at which she encouraged Mr McLellan to develop his own schedule which he refused to do instead insisting that was Ms Vos’ job. St John says that as a result Ms Vos worked on a proposal but its presentation was stymied by Mr McLellan’s departure on sick leave and he was unaware of this. St John also accepts it redistributed the duties an employee who left while it was seeking a replacement but denies the increased workload was excessive as claimed.

[16] Given what he considered the lack of a response Mr McLellan then raised his concerns regarding an unreasonable workload with Blair Andrews, the Clinical Team Manager, during a Continuing Clinical Education training session held in Christchurch on 15-16 August 2019. He says Mr Andrews reply was “education makes the money, coaching doesn’t. It doesn’t make it right, but that’s how it is.” Mr McLellan says this left him feeling deflated and even more anxious about his job and the employer’s ability to act fairly and reasonably`.

[17] St John accepts the conversation took place but has a different view about what was said. It says Mr Andrews acknowledged Mr McLellan's concerns but noted that both education and clinical desk work are fundamental to St John's income streams which enables the coaching and Mr McLellan was well aware of that.

[18] Later that month Mr McLellan briefly noted his concerns when, in his monthly report, he commented "Increasing demand from preceptors to assist with CAD preparation or to ride along on the ambulance but very little current capacity to achieve this".

[19] Becoming ever more concerned, and in his words overwhelmed, Mr McLellan sought medical advice on 9 September 2019. This saw him receive a medical certificate stating he was unfit for work for a period that while unknown would probably see a return later that month. As events transpired, he returned at the end of September though St John asserts it was unaware the absence was attributable to work stress as that was not stated in the medical certificate and nor was it said to those with whom Mr McLellan had contact while away. Indeed, it is said that on 10 September a manager acting in Ms Vos' absence telephoned Mr McLellan having been advised he was sick. After a bit of telephone tag the two spoke and, amidst other things, Mr McLellan was asked if he needed any support. None was sought and nor did Mr McLellan mention that his absence was due to workload or stress.

[20] Similarly, Ms Vos sent a text when she returned on 16 September asking if he needed anything. There was no response. Another text followed on 20 September as the medical certificate had indicated a return around the 23rd. Mr McLellan's response was that a further certificate had been delivered and he returned on 30 September.

[21] That said, and while away, Mr McLellan continued to air further concerns and on 14 September he emailed Mr Ohs. The email was a lengthy one ending with a request Mr Ohs "... not share the contents of this email but act on its contents".

[22] Mr Ohs replied the following day indicating that as he was not the responsible manager he had copied someone more appropriate and who he would approach to discuss "a plan" when he returned from an overseas trip in a week's time.

[23] On 30 September Mr McLellan and Ms Vos spoke. Mr McLellan says he sought a meeting and tried to explain the depth of his work-related stress and that the lack of response

by St John had badly affected his mental health. He says Ms Vos responded by defending the high workload and indicating there would be no change.

[24] St John says Ms Vos asked how he was to which Mr McLellan stated “you do know I was on stress leave, don’t you?” Ms Vos advised she did not and asked what had caused it, to which Mr McLellan advised an unreasonable workload and the requirement to teach and travel. St John says he also added that it serious enough that he had considered self harm. Ms Vos says she asked what he thought she needed to put in place to manage the stress to which Mr McLellan replied he should not be booked into courses. This effectively meant he did not wish to deliver training and Ms Vos says she advised she was not willing to commit to that but would consult with Mr Ward, which she did. She also consulted HR given concern about the self harm comment.

[25] When questioned Mr McLellan conceded the discussion extended to his being offered a health, safety and wellness referral and assessment but stated he felt this punitive and made him regret mentioning why he had been on leave. He says he felt all St John wanted to do was manage him and that as a result the “workload would be hell and the message was suck it up”. Mr McLellan also says he reached this conclusion given Ms Vos’s body language and the fact “I’d sorted my own assistance” which he told Ms Vos.

[26] One outcome of the approach to Mr Ward was immediate access for all CSO’s to a stress workshop to be held on 2 October though Mr McLellan did not enrol for a ticket. As a result, and when Ms Vos heard this, she offered hers but that was declined.

[27] On 3 October 2019 Mr McLellan and Ms Vos met for a formal one on one meeting. In its statement in reply St John summarised the meeting as follows:

Amongst several matters they discussed, she asked him how he was emotionally, and he stated he felt fine. Ms Vos told him that she remained concerned about the self-harm comments he made on 30 September. The Applicant responded, “I did not mean that, I only said it for effect”. Ms Vos also brought up the possibility of a wellness referral and the Applicant decided that he did not need it. The Applicant said that no one contacted him while he was away (which is denied) and when asked again about strategies to manage stress he responded that the answer was for Ms Vos not to book him onto courses (i.e. delivering educational training). The Applicant further stated, “I am a coach and that is all I want to do, that is my passion”.

[28] This approach is supported by notes Ms Vos took at the time which also records they spoke about concerns Ms Vos had after the meeting in July as a result of what she saw as his

increasing agitation in this meeting and her view Mr McLellan had not availed himself of leave opportunities in August.

[29] Mr McLellan says:

- (a) Ms Vos advised the following months would continue to be busy and would involve a lot of travel. She also advised she could not guarantee he would get his contracted 2 consecutive days off per week;
- (b) He advised Ms Vos that coaching was still to be included in the schedule yet she replied she was unaware of his coaching commitment despite his having told her about it a number of times. Mr McLellan states Ms Vos said she would have to speak to the South Island Clinical Practice Manager (Mr Ward);
- (c) Ms Vos accepted the team was one member short but then observed “everyone will just have to pitch in until Gavin’s role is replaced next year.” Mr McLellan says Ms Vos also acknowledged the team was under-resourced but offered no possible solution instead saying the team had to work harder to cover the lack of staff; and
- (d) Ms Vos told Mr McLellan he should have raised the stress he was feeling by now to which he expressed shock given his view he had done so on multiple occasions yet got no response.

[30] Mr McLellan, dismayed with this, concluded nothing would change and that his issues would not be addressed. As a result he tendered his resignation on 7 October. The letter, to Mr Ward, said:

Given the recent stresses that I have experienced in my role as Clinical Coach and the confirmation from my line manager, Steph, that the workload expectations will not change in the near future, I have made the decision to tender my resignation. It is my desire to finish the commitments I have in my calendar to the end of October. I will confirm with payroll, but I would like to use my leave entitlement which would give me a projected finish date of 31 January 2020.

[31] The resignation was acknowledged some 45 minutes later with an email from Mr Ward that read:

I acknowledge your resignation dated 7 October 2019. I will explore your request around annual leave with P&C and be in touch in the next 2 working days,

We acknowledge the hard work and contribution you have given the team over your tenure as CSO.

[32] Further e-mails followed including one from Mr Ward dated 11 October which, having addressed the leave entitlements, though not in the way Mr McLellan sought, goes on to say:

I am concerned about the recent stress you have raised in your resignation letter, and would like to understand this a bit more. You have been with us for over 30 years and are a valuable member of the team. I am happy to meet with you if you would like to discuss this with me, but otherwise I am able to arrange a discussion and / or exit interview with someone from the HR team if you would like to speak with someone more independent than myself.

[33] The letter finishes by stating “*Given all of the above, I won’t act on your resignation for the next 7 days so you can consider the options around leave – or want to discuss the above.*”

[34] Mr McLellan remained of the view he was going and the response regarding leave saw him alter his leaving date to a much earlier one, namely 3 November though that was preceded by some leave. He also stated he would be happy to have an exit interview with a member of the HR team and that occurred by phone on 7 November.

[35] Mr McLellan’s departure was followed with the formal raising of a personal grievance on 12 November.

Discussion

[36] As already said Mr McLellan claims he was constructively dismissed. He also claims he was disadvantaged in his employment but it is those purported disadvantages that are the reason why he says he was left with no option but to resign.

[37] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where a breach of duty by the employer causes an employee to resign. There must be a causal link between the employer’s conduct and the tendering of the resignation² and the possibility of resignation in response to that conduct should be foreseeable.³

¹ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

² *Z v A* [1993] 2 ERNZ 469

³ *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[38] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. The onus falls on Mr McLellan to establish, prima facie, there was such a breach.

[39] The breaches Mr McLellan alleges, and which he says led him to conclude he had no option but to resign are succinctly summarised in the letter of 12 November raising the grievance, where it says:

Andrew had increasing and unrealistic targets imposed on him, he felt he was failing in his role as he was unable to keep commitments made to the operational staff. The trust and respect that he worked over three decades to build were slipping away, leaving him embarrassed and ashamed. In good faith, Andrew made every attempt to raise his concerns with his employer which were consistently met with inaction.

[40] Essentially St John's position is that Mr McLellan was resisting a requirement he perform a full range of duties, especially external education which generated income which St John says it required in order to perform its work.

[41] It is here cognisance must be taken of Mr McLellan's employment agreement and two items in particular. One is just what his job was and the other is the obligations in respect to time off.

[42] With respect to Mr McLellan's job the agreement provides that "CSO / Clinical Support Officer is a role that champions clinical excellence by working with St John personnel to develop, improve and implement good clinical practice, with the aim of enhancing patient outcomes".

[43] Here I accept there is strength to the argument tendered on Mr McLellan's behalf that the work that was now being emphasised, namely the educational work, does not actually fall within that description as it emphasises working with people external to St John's as opposed to St John's personnel. The agreement's definitions are also consistent with Mr McLellan's job description which emphasises internal functions and relationships and makes only passing mention of "education". At the very least Mr McLellan was entitled to raise the issue, which he did, and have it discussed rather than be simply told there was a new emphasis which the evidence suggests is what effectively happened.

[44] There is then the issue of workload and its volume which is, in my view, the more serious issue. While the parties might disagree about what happened during the July

performance review, Mr McLellan's note confirms issues of expectation and workload were of concern. The evidence is also clear that this remained the case with Mr McLellan continuing to raise the issue as he did in the email of 30 July and again soon thereafter in his monthly report. He also started raising his concern with others such as Mr Andrews. Also, and accepting Ms Vos's evidence Mr McLellan screamed at her to the extent she felt threatened, it must have been apparent he was under stress especially as that followed his email statement something had to give before it broke.

[45] It must, or at least should, have been obvious there was an issue that needed addressing. It surely required a response and while I accept there was one via the meetings between Mr McLellan and Ms Vos, it was ineffectual. I do not consider it sufficient Mr McLellan be asked to furnish a proposal when the evidence makes it clear his contractual right to time off was not being adhered to. That was, as he said, the responsibility of his supervisors and while Ms Vos did start to act on it Mr McLellan was not made aware of progress.

[46] For three reasons it is also inadequate to say Mr McLellan was well aware education was essential to St John's income streams and necessary to enable coaching. First the evidence does not actually confirm that. Secondly education is not, as already said, an emphasised part of Mr McLellan's job description and third it should have been clear there was an issue, yet there was no obvious response to Mr McLellan that his concerns were being constructively addressed, at least as at the time he went on sick leave.

[47] That then leaves the meeting of 30 September. Again, the evidence makes it clear Mr McLellan expressed concern. It is also clear the response did not indicate his concerns were being heard with, for example, Ms Vos accepting when asked about Mr McLellan saying he could no longer cope unless the education portion of the job reduced, she just advised that he had to "look at the full picture" and that education was a company priority. The evidence leads to a conclusion this was the focus of St John's management and as a result they were failing to hear that one of their employees was not coping, let alone address the issue.

[48] By the time Mr Ward reconsidered his earlier acceptance of the resignation and put its actioning on hold it was too late. Not only had Mr McLellan clearly concluded he could no longer trust St John's to properly address the issues the letter is inconclusive in that it still talks of exit interviews and the use of leave prior to departure.

[49] In essence Mr Mapu is correct when he submits, albeit indirectly, that in the face of clear expressions of concern from Mr McLellan, St John had to either explain why it considered it was operating in accordance with his employment agreement or address the concerns by either changing its approach or making him redundant. It did neither and as a result exposed Mr McLellan to stressors that should have been avoided.

[50] As to whether or not resignation was foreseeable the answer must be yes. Mr McLellan having raised his concerns numerous times and continued to do so. A failure to address those concerns and instead reiterate their cause as going to remain must, in my view, mean the prospect of Mr McLellan resigning was foreseeable.

[51] For these reasons I conclude Mr McLellan was, as he claims, constructively dismissed. In such circumstances there can be no justification given a total failure to comply with the requirements of s 103A of the Employment Relations Act 2000.

[52] That conclusion raises the issue of remedies. Mr McLellan seeks:

- (a) Lost wages plus interest;
- (b) Compensation pursuant to s 123(1)(c)(i);
- (c) A penalty for the failing to act in good faith; and
- (d) Costs

[53] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser. There is then a discretion to award more and this is what Mr McLellan seeks as he was out of work for some eight months.⁴ The problem with this is there are a number of factors which mitigate against exercising the discretion.

[54] The first is the evidence is that he did little to seek work initially with his wife evidencing the fact he appeared at ease and given he had a significant leave in lieu payment could direct his attention toward selling their home in Dunedin and relocating city. The relocation could not have helped either and nor did his conscious decision which he concedes he made to avoid seeking work in health and using his expertise or experience. Having acted

⁴ Closing submission at [103]

this way further impediments to finding work then arise as a result of covid and the subsequent lockdowns and St John cannot be held accountable for that combination of events.

[55] Mr McLellan attempts to counter this by attributing his failure to look for work to “rejections based on health status”. He does not, however, directly attribute that health status to the hurt he felt as a result of the dismissal though both his and his wife’s evidence imply this. That said he also concedes there is no evidence before the Authority to support this claim and similarly his wife conceded that health issues were nothing new.

[56] In the circumstances I feel constrained by the statutory provision and award the three months wages specified in s128.

[57] The interest claim I disregard. Interest is to compensate of the loss of use of money to which a person is known to be entitled. Until this determination issues there is no known entitlement and therefore no loss to be compensated.

[58] Turning to compensation pursuant to s 123(1)(c)(i) of the Act. The amount sought is unspecified in either Mr McLellan’s statement of problem, his brief of evidence or submissions. That said this was an area in which strong evidence was given with Mr McLellan talking about his health, albeit unsupported, and a strong feeling of betrayal as a result of the way he was treated and St John’s lack of response to his concerns. It is also clear he felt significant hurt that his 37 year career elicited no recognition. As he put it he felt excommunicated.

[59] His wife’s evidence supported Mr McLellan’s and while she states he appeared at ease with himself and happy after the cessation she had reservations about this being a facade.

[60] Having considered the evidence, which as I said was strong, and current precedent, I consider \$20,000 appropriate compensation.

[61] The conclusion Mr McLellan has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.⁵ The answer is no. The evidence is clear that Mr McLellan repeatedly raised his concerns and it was St John that failed to respond adequately. Issues of contribution cannot arise in such circumstances.

⁵ Section 124 of the Employment Relations Act 2000

[62] Finally, there is the issue of good faith and a claim for a penalty. For two reasons I do not consider this appropriate. The first is that the penalty would, in effect, be for the lack of response and it is that that has ensured Mr McLellan's success. It would be a matter of double jeopardy and two penalties for the one breach. Second and even if that were not the case, penalties are to punish wanton and deliberate behaviour. I am not satisfied that is what occurred here with St John's response, or lack thereof, being more a case of blinkering itself to an appropriate response as a result of what it saw as fiscal imperatives and prioritising organisational wellbeing. It was not done with malice.

Conclusion and Orders

[63] For the above reasons I conclude Mr McLellan has a personal grievance in that he was unjustifiably dismissed. As a result, I order St John Ambulance pay Andrew McLellan:

- (a) Three months wages as recompense for wages lost as a result of the dismissal; and
- (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.

[64] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Mr McLellan may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date St John will have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.⁶

Michael Loftus
Member of the Employment Relations Authority

⁶ www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf