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Felman v Auckland City Council AA458/10 (Auckland) [2010] NZERA 810 (22 October 2010)

Last Updated: 18 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 458/10 5285037 & 5293543 & 5304029

BETWEEN

SIDNEY FELMAN Applicant

AND

AUCKLAND CITY COUNCIL Respondent

Member of Authority:

Robin Arthur

Representatives:

Applicant in person

David Hood for Respondent

Investigation Meeting:

12 May 2010

Determination:

26 October 2010

DETERMINATION OF THE AUTHORITY

- A. **The three personal grievance applications lodged by Sidney Felman, alleging he was unjustifiably disadvantaged by actions of Auckland City Council, are dismissed.**
- B. **Costs are reserved with a timetable for application for determination of costs by the Authority if the matter is not resolved between the parties.**

Employment Relationship Problem

[1] Sidney Felman has worked as a parking officer for the Auckland City Council (the Council) since August 2008.

[2] While carrying out his duties on 30 January 2009, he had to quickly avoid a car being driven by an angry motorist to whom he had just issued a parking ticket. In doing so he injured his ankle and Achilles tendon. In the following weeks Mr Felman had difficulty continuing with his normal duties with his general practitioner issuing a medical certificate declaring Mr Felman's work capacity as restricted to "*sedentary activities*" and recommending he limit walking and carry out light duties only. For some time his managers were able to provide light duties but were finding difficulty in identifying tasks Mr Felman could do. By mid August, and following an assessment by an orthopaedic surgeon, Mr Felman's GP issued a medical certificate stating Mr Felman's work capacity was for sedentary activities only with "*no walking until further notice*". He was also stated to be unable to resume full duties for a 70 day period starting from 20 July 2009 (that is until late September).

[3] On 21 August the Council's parking services manager Geoff Keber met with Mr Felman and discussed the difficulty in

continuing to provide light duties. Mr Felman was given a letter to take to his doctor. In light of the most recent diagnosis and treatment plan for Mr Felman's injury, Mr Keber wanted the doctor to consider whether Mr Felman should be declared unfit for any work and therefore eligible for ACC weekly compensation.

[4] However, although Mr Felman's injury had earlier been accepted as work-related, gaining ACC approval for weekly compensation proved more difficult than expected and he sought to return to work in late September. He was directed to first attend a medical assessment with a Council-appointed occupational health specialist.

[5] This assessment was delayed due to another and different injury - this time to his knee - while Mr Felman was on his way from calling into the Council offices to sign paperwork concerning annual leave payments.

[6] After an operation on his knee Mr Felman attended the assessment with the Council-appointed specialist but disputed the content of information given to that doctor by the Council. Mr Felman also declined consent for that doctor to contact his GP or the specialist involved in his care for the knee injury.

[7] Mr Felman raised a personal grievance over the actions of his managers in directing him to attend medical assessments and their communication with the doctors involved.

[8] After returning to work in December 2009 Mr Felman took offence at a request from his supervisor, David Talapati, to provide more details about his work on two days in early January. Mr Felman's response to that request led to a disciplinary inquiry and ultimately a written warning, dated 21 January 2010, about his "*communication style*" which was described as inappropriate, aggressive and argumentative. Mr Felman raised a personal grievance over that warning and sought its removal.

[9] During late March 2010 there was further discord between Mr Felman and Mr Talapati. Mr Felman was upset that he did not receive the same information as other parking officers on the day after a fellow officer had unexpectedly died. He wrote an email to Mr Talapati complaining about this and other matters. Mr Talapati responded with an email which was sharp in tone and included a reference to which Mr Felman took offence. Mr Felman then raised a personal grievance about his treatment by Mr Talapati on 30 and 31 March 2010.

Issues

[10] Under [s103A](#) of the [Employment Relations Act 2000](#) (the Act) the actions of the Council's managers and how they acted towards Mr Felman as an employee, are deemed justifiable if - considered on an objective basis - what they did and how they did it were what a fair and reasonable employer would have done in all the circumstances at the time.

[11] In respect of the Council's actions which are the subject of Mr Felman's three personal grievance applications, the issues for determination are:

(i) Whether the Council managers were justified in their actions (and how they acted) in

- directing Mr Felman on 21 August to attend a general practitioner for an assessment of whether he was fit for work; and
- not providing Mr Felman with further light duties from August 2009; and
 - how they dealt with him in the last quarter of 2009 over arrangements for his return to work; and

(ii) Whether the Council was justified in issuing a written warning in relation to Mr Felman's response to his supervisor's request for information and particularly his letter of 11 January 2010 to Mr Talapati; and

(iii) Whether Mr Felman was unjustifiably disadvantaged (including by unlawful discrimination, whether of a racial or religious nature) by:

- not being provided with certain information on 30 March 2010; and
- the contents of an email from Mr Talapati on 31 March 2010?

The investigation

[12] Written witness statements were lodged by Mr Felman, Mr Talapati, Mr Keber, the Council's parking division area manager Garry Brown and the Council's parking operations manager Rick Bidgood. Each witness under oath or affirmation, confirmed their written statement at the investigation meeting and answered questions from the Authority. The parties had opportunities to ask additional questions of the witnesses and provide closing submissions on the issues for determination.

[13] In preparing this determination I have considered the witnesses' written and oral evidence, the parties' closing submissions, and relevant background documents provided. As allowed for under [s174](#) of the Act, I have not recorded here all evidence and submissions received but state findings of facts and issues of law and express conclusions on the issues for determination.

Light duties and medical assessments

[14] Mr Felman asserts his Council managers acted illegally or improperly in deciding no further light duties were available for him, directing him to seek further assessment from his GP of his work capacity, and how he was dealt with in the following months before his return to work in December 2009.

[15] His employment agreement included two clauses allowing the Council to direct him to attend, at its expense, a medical examination by a registered medical practitioner to assess his fitness and safety for work after a period of absence due to injury or illness.

[16] In answering questions from the Authority Mr Felman accepted he was not correct to decline, on three separate occasions prior to 22 May 2009, to attend a medical examination as required by his managers or supervisor.

[17] He also accepted there was a significant difference between the limitations on his capacity stated in his medical certificate of 18 May - "*Sedentary activities only. Limit walking*" - and that stated in the 13 August certificate - "*Sedentary activities only. No walking until further notice*".

[18] The evidence of Mr Brown and Mr Talapati confirms considerable efforts were made to find light duties suitable for Mr Felman from February 2009. He carried out a range of tasks such as sorting out cubby holes for other officers, organising notebooks and testing hand-held PDAs. However it became increasingly difficult to find much work for Mr Felman to do.

[19] I accept Mr Brown's evidence that the work capacity limits stated in Mr Felman's medical certificate of 13 August 2009 prevented the Council assigning him to tasks working in community patrols by car or attending cameras monitoring bus lanes. Car patrols involved getting in and out of the vehicle and walking to do various tasks. Bus lane monitoring required some walking in carrying and setting up cameras as well as standing for two or more hours at that position.

[20] Other potential light duties, in parking or other Council divisions, were not viable because Mr Felman lacked necessary computer and keyboard skills.

[21] In light of that situation and the 13 August medical certificate, Mr Brown asked Mr Felman to return to his GP for further consideration of whether he should be assessed as fit for work at all. Mr Brown also explained in a letter to Mr Felman's GP that the Council was "*struggling to continue to provide meaningful light duties*" and asked the doctor to "*medically sign [Mr Felman] off as unfit for work until he is able to undertake the tasks required in his position as a Parking Officer*".

[22] Mr Keber acknowledged in the Authority's investigation that the request to the doctor was "*perhaps poorly worded*" and "*too direct*" in asking for Mr Felman to be signed off as unfit. He considered that the Council should have asked for "*reassessment*" of Mr Felman's capacity in the context of what was available as light duties. Despite that technical flaw in the request to Mr Felman's GP, I am satisfied the intention of the request - and the need for it to be made - was open to a fair and reasonable employer in all the circumstances at the time. I accept, from the evidence of Mr Brown and Mr Keber, that the decision to make that request was one made only after making extensive efforts to accommodate his capacity to carry out light duties and having exhausted the reasonable avenues for such duties.

[23] And it was a course of action that Mr Felman was prepared to go along with until he struck problems with the ACC bureaucracy in approving the payment of weekly compensation to him. He then became engaged in a dispute with ACC as to whether the injury to his ankle was caused by the incident at work or was the result of natural degeneration due to aging. Mr Felman's evidence was that, by October 2009, ACC had declined to grant him weekly compensation for time off work recovering from the ankle injury. However his dispute over his entitlements for that injury and the subsequent knee injury continued with an adverse decision coming only in early 2010 which he decided not to continue to contest through review or appeal.

[24] Through August and the months following in 2009 Mr Felman found the ACC process very frustrating, particularly when it left him receiving neither wages from the Council nor weekly compensation payments from ACC. In emails to Mr Keber, Mr Felman described "*the epic struggle featuring Felman versus ACC*", said he was "*now at boiling point with steam emerging from every orifice*", and wished he could show someone from ACC "*the full force of my hate and anger*". While his strong feelings were understandable in such difficult circumstances, it was not a situation caused by the Council acting in an unjustified manner, I hold.

Requirements before return to work

[25] Frustrated by his lack of income Mr Felman sought to return in late September 2009. At that point, the Council, as it was entitled to do, directed Mr Felman to attend an examination with its occupational health specialist. Those arrangements were delayed by Mr Felman's further injury but by late November, an appointment was made for Mr Felman to be examined by Dr Steve Culpan.

[26] Mr Felman questioned the accuracy of the Council's briefing letter sent to Dr Culpan. There was possibly some technical inaccuracy in how Mr Keber described Mr Felman's arthroscopy operation but it was based on what Mr Felman had told him. However it was a subject Mr Felman was able to directly describe and discuss in his examination by Dr Culpan on 3

December 2009. There is nothing to suggest such a minor point had any negative effect on the conclusions drawn by Dr Culpan as Mr Felman was subsequently cleared for a return to work.

[27] Another alleged inaccuracy in Mr Keber's letter to Dr Culpan was in fact confirmed by the specialist. Mr Felman criticised Mr Keber for writing that Mr Felman was "*limping*". However Dr Culpan, from his observations in the 3 December examination, stated that "*Mr Felman still walks with a slight limp*".

[28] Mr Felman also criticised his managers for having effectively abandoned him in the period that he was off work and ignoring "*my cries for help*". However his own evidence confirms that he had frequent contact with Mr Keber by email - whom he described as showing courtesy and genuine concern - and they met on a number of occasions for coffee. The emails show Mr Keber was sympathetic about the difficulties that Mr Felman had with ACC and his limited finances during that period. He assisted with arrangements for Mr Felman to be paid annual leave entitlements.

[29] There was no need for other managers to duplicate the efforts of Mr Keber. There was no unjustified disadvantage to Mr Felman on that count.

The written warning of 21 January 2010

[30] In early January a random audit of time logs for parking officers identified two days where there were gaps in the records for Mr Felman. This was drawn to the attention of Mr Bidgood who asked Mr Talapati to get further information from Mr Felman. Mr Bidgood's evidence to the Authority confirmed that Mr Felman was not singled out for particular attention and that he had requested similar information about other parking officers during the previous 12 months as a result of queries arising from random audits.

[31] Mr Felman reacted angrily to the request for information from him. In a handwritten letter to Mr Talapati dated 11 January 2009 Mr Felman described the request as part of a "*campaign of harassment ... [which] ... has plummeted to its ugliest and lowest possible level*". He regarded the request as an accusation that he was "*stealing time*" and was a deliberate attempt to destroy his reputation. He stated that unless documentary evidence was provided to him substantiating the claim he would "*seek legal redress*" and that this was "*not a threat but a promise*". He continued with nine questions which he wanted answered, including whether he was under investigation and surveillance, and if so why.

[32] Mr Talapati responded with a formal letter citing the Council's code of conduct on following lawful instructions and repeating the request for details of Mr Felman's activities between specified hours on the two identified days in early January. Mr Felman then responded with a note setting out his activities in those hours and no further action was taken by Mr Talapati.

[33] However Mr Bidgood was concerned about the content of Mr Felman's letter to Mr Talapati and called Mr Felman to a disciplinary meeting. He did so because he had already cautioned Mr Felman in December about expectations for communication with other Council staff. On the earlier occasion Mr Bidgood was concerned about the content of emails sent by Mr Felman to Mr Keber on 10 and 14 December.

[34] Mr Felman was told the disciplinary meeting was to consider allegations that his communication style was inappropriate and aggressive. After hearing from Mr Felman, Mr Bidgood concluded a formal written warning was the necessary disciplinary measure. The letter advising Mr Felman of this warning also gave him notice that he was required to respond to fair and reasonable requests from his manager and to "*communicate in a timely, efficient and succinct manner*" appropriate to the business environment in which he worked.

[35] Having heard from Mr Felman and the Council witnesses, and having reviewed all the correspondence referred to between the parties, I am satisfied that the warning was an action that a fair and reasonable employer would have taken in the circumstances at the time. Mr Felman had adequate notice of the disciplinary meetings, an opportunity to seek representation and was able to make submissions on the allegations which were considered before a disciplinary sanction was decided and imposed.

[36] Mr Felman accepted in questioning by the Authority member that he had made an assumption that he was being accused of stealing time. I find that in demanding Mr Talapati respond to his nine questions in writing before he would provide the requested information, Mr Felman both failed to obey a lawful instruction and to meet his own good faith obligations to be responsive and communicative. The warning issued to him on 21 January 2010 was justified.

Information and comments from Mr Talapati

[37] Mr Felman alleges he suffered unjustified disadvantage as a result of Mr Talapati failing to properly provide him with information about work requirements on the morning after the unexpected death of parking officer Paul Knowles and then, in an email to Mr Felman, criticising him by using a Christian biblical reference Mr Talapati should have known would be offensive to Mr Felman whom he knew to be Jewish.

[38] I find neither concern amounts to an unjustified disadvantage.

[39] At 9am on March 30 Mr Bidgood held an impromptu briefing for parking officers to tell them of Mr Knowles' sudden death from a heart attack. Officers there were told that usual work requirements for ticketing during the day were eased and they could work in pairs.

[40] Mr Felman's shift did not start until 10am and he did not hear of Mr Knowles' death until later in the afternoon when he was told by another officer.

[41] I accept Mr Talapati's evidence that he did not intentionally omit to tell Mr Felman the news of Mr Knowles' death but there was a note of the relevant information in the briefing book available to officers starting at later shift times.

[42] There is also no evidence that Mr Felman was disadvantaged in any real way by hearing the sad news later.

[43] However Mr Felman then wrote a sharply critical email to Mr Talapati. Through some problem with the time and date setting on Mr Felman's computer the email was dated 1 April but the parties agree it was sent to Mr Talapati on 31 March. The email refers to an attempt by Mr Talapati to arrange a meeting that day to discuss a work matter. Mr Felman had refused to participate saying he wanted Mr Talapati's views in writing rather than verbally. Mr Felman had also said he would present Mr Talapati with a letter to which Mr Felman records Mr Talapati's response as *"being a point blank refusal to accept any written communique from me, hence this email"*.

[44] Mr Felman's email then continued with a complaint about not getting information about Mr Knowles death and the following comments:

The fact that you considered it unnecessary to relay this information to me ranks slightly above your last show of indifference towards me.

I refer to your decision not to invite me to the team Christmas dinner. A team leader should lead by example and further, treat each and every member of his team with dignity and respect, having no regard to race, age or religion.

I do not wish to have any comment from you since your actions, or lack of them, speak far louder than any words.

[45] Mr Talapati responded with an email which he has since accepted was hasty and emotional:

Before you comment anything, think carefully and assess yourself. First take the spool from your eye and then try to take a speck from others eye. This sums up your comments. I do not like you to write any emails to me in future and this is an instruction. Come speak to me one on one.

[46] Shortly after he sent the email, Mr Talapati spoke with an advisor in the Council's human resources department who suggested seeking to recall the email, which he did. He then sent Mr Felman the following email:

Sid,

You should understand that Paul's demise also has an effect on me since I know him closely and have a long association with him. This impacts human behaviour and I fail to understand how you could not see this. Happy to discuss this verbally one on one if you like. Feel free to get in touch with me if you require any further assistance.

[47] However Mr Felman was not satisfied with this explanation and raised a personal grievance.

[48] I find no unjustified disadvantage arising from Mr Talapati's initially emotive response to criticism from Mr Felman on 31 March. It occurred in a context of continual 'sniping' by Mr Felman towards Mr Talapati about a number of work matters. Mr Talapati was particularly sensitive at the time as Mr Knowles had been both a work colleague and a personal friend. Mr Talapati had also quickly reflected on his response to Mr Felman and taken steps to explain his comments.

[49] Mr Talapati migrated to New Zealand eight years ago. He was originally from Hyderabad in India. Hinduism and Islam are the city's predominant religious traditions but Mr Talapati's grandfather had converted to Christianity during the Raj period. Mr Talapati has attended an Anglican Church while growing up in Hyderabad and in Auckland he was a member of a Lutheran congregation. He had become good friends with Mr Knowles outside of work as they were both involved in similar church activities.

[50] I accept as genuine Mr Talapati's evidence that his use of metaphor about 'specks' and 'spools' was not intended to have any religious significance. Rather it was an aphorism, not particular to any religion or philosophy, about considering one's own behaviour before judging others.

[51] The metaphor appears to be based on this passage in the New Testament -found in Luke 6:41-42 and Mathew 7:3-5:

Why do you see the speck that is in your brother's eye, but do not notice the log that is in your own eye? How can you say to your brother, 'Brother, let me take out the speck that is in your eye,' when you yourself do not see the log that is in your own eye? You hypocrite, first take the log out of your own eye, and then you will see clearly to take out the speck that is in your brother's eye.

[52] However Mr Talapati's expression of it was somewhat idiomatic - referring to a spool rather than a log, plank or mote as is found in various versions of those biblical writings.

[53] While comments that were, subjectively, offensive to a person of Jewish cultural background and religious belief may conceivably come within the scope of discrimination prohibited under [s104](#) and [s105](#) of the Act, the actual content of Mr Talapati's comments lack any statement of religious or ethical belief which I consider could reasonably be found to amount to disadvantage to Mr Felman, or if so, was unjustified. It was a figure of speech and nothing more.

[54] I note too that Mr Talapati was not responsible for Mr Felman missing a team dinner. Mr Felman's evidence was that Mr Talapati had already apologised to him about that anyway.

Determination

[55] For the reasons given above, I find the actions of the Council managers which were the subject of each of Mr Felman's personal grievance applications were justified. To the extent there was any disadvantage to Mr Felman from those actions, it was not unjustified. Consequently he has no personal grievances and the three applications are declined.

Costs

[56] Costs are reserved. The parties are encouraged to resolve any matter of costs between themselves. If they are not able to do so and a determination of costs is sought from the Authority, the Council (or the legal entity which is by that time, the successor to its rights and liabilities) may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Felman will then have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this timeframe without prior leave.

Robin Arthur

Member of the Employment Relations Authority