

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 214
3238339

BETWEEN ALAN HINCHLIFFE
Applicant

AND ENATEL
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
Korina Foot, advocate for the Respondent

Investigation Meeting: 29 February 2024 in Christchurch

Submissions Received: None.

Determination: 16 April 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Alan Hinchliffe was offered employment by Enatel as a Building and Site Services Coordinator on 6 March 2023. He accepted the offer and signed the individual employment agreement on 8 March 2023. Mr Hinchliffe's start date was delayed until 8 May 2023 at his request for personal family reasons. Initially he had proposed a start date of 27 March 2023 to Enatel in an email dated 23 February 2023. He then asked Enatel in an email dated 26 March 2023 if he could delay his start date until 8 May 2023. This was agreed to by Enatel.

[2] Enatel is a registered New Zealand unlimited company. It was incorporated on 15 April 2002 and its registered office is in Christchurch. Its ultimate holding company

is registered in the United States of America. Enatel carries on the business of electronics and machinery manufacture.

[3] On 8 May 2023 Mr Hinchliffe attended work and was inducted into the workplace. This date was the first and last day Mr Hinchliffe worked at Enatel.

[4] Mr Hinchliffe was unwell for a period of two weeks between 9 and 22 May 2023. He received a letter on 18 May 2023 from Enatel inviting him to a disciplinary investigation meeting on 22 May 2023 to discuss allegations of serious misconduct about excessive absenteeism and poor communication leading to a breakdown of trust and confidence.

[5] On 23 May 2023 following the meeting Mr Hinchliffe was issued with a final written warning for excessive absenteeism and misrepresentation or deceit that could undermine good faith and trust and confidence in him. The final written warning letter was dated 22 May 2023. Enatel say that the date of that letter could have resulted from its automatic use of American dates. I accept that could have occurred.

[6] On 23 May 2023 Mr Hinchliffe raised a personal grievance in a letter to Enatel. In the letter he alleged unfair treatment, harassment, and victimisation. He raised concerns that his medical certificates had been disregarded. He also raised concerns that he had been disadvantaged and discriminated against as he did not have an onsite parking space and his own office space. Mr Hinchliffe raised issues about a request that he had made that he start work each day at 8.45 am to 9 am but was told that he was to start work at 8 am.

[7] Mr Hinchliffe wrote amongst other matters about future attendance at work:

As my employer, Enatel have failed to support me during my illness. I am deeply concerned with the actions of Enatel and this has left me feeling that you are being deliberately awkward, treating me unfairly, disadvantaging me and attempting to intimidate me into leaving my position prematurely.

Enatel's unprofessional and unfounded actions and allegations have resulted me feeling that they have broken the good faith of our relationship. As a consequence I do not feel comfortable being at work until the matter is settled.

Given these inappropriate actions I feel it's only fair that Enatel pay me while I am stood down while an impartial investigation is carried out into this matter.

[8] On 24 May 2023 Enatel's then Operations Manager, now General Manager, Michael Clifford responded to Mr Hinchliffe in writing. He did not accept the validity of the concerns raised. Mr Clifford set out in his response that an office and car park were never discussed at the interview. He set out that for salaried employees the start and finish times are discussed during the hiring process and there had been a discussion about the need to align start and finish times with those of the main factory site hours due to the bulk of the building and maintenance work taking place there.

[9] Mr Clifford did not accept in his response that there had been inappropriate behaviour by the human resources team in their interactions over the period of unwellness. He stated in his letter there had been no unfair treatment of Mr Hinchliffe and that the disciplinary meeting had closed and Mr Hinchliffe remained employed in his role. Mr Clifford wrote that the process followed was a standard process for any disciplinary matter. He reminded Mr Hinchliffe of the access to the Employee Assistance Programme and did not accept that there would be payments whilst Mr Hinchliffe was out of the workplace.

[10] On 24 May 2023 Mr Hinchliffe responded to Mr Clifford and stated that it was clear that Mr Clifford was unwilling to accommodate any of his requests relating to working conditions and benefits and that he did not feel comfortable working under the current conditions imposed on him that were contrary to his employment agreement and position description. He wrote that he would apply for mediation with the Ministry of Business Innovation and Employment (MBIE).

[11] On 25 May 2023, Mr Clifford wrote again to Mr Hinchliffe asking if he could confirm whether he will be attending at work at Enatel and, if not, what the basis for non-attendance at work would be. Mr Clifford confirmed that Mr Hinchliffe was not stood down from his position in response to the use of those words by Mr Hinchliffe.

[12] Mr Hinchliffe wrote to Mr Clifford on 25 May 2023 by email. He advised that he was not comfortable working in the environment where he considered his role was being undermined and diminished. He additionally referred to inappropriate and unfair

treatment from Enatel whilst he was unfit for work. In his email Mr Hinchliffe stated he did not feel comfortable returning to work until after mediation.

[13] The then Senior People & Capability Advisor who I shall refer to as Carmel then emailed Mr Hinchliffe on 2 June 2023 and noted receipt of the mediation request. Enatel had confirmed this date with Mediation Services. Carmel is no longer at Enatel and the Authority did not hear evidence from her. In her email, Carmel stated that it was clear that Mr Hinchliffe did not wish to return to the workplace despite advice that he would be supported, and his job remained open. Carmel set out in her email the reassurance Mr Clifford had given that there would be no unfair treatment and the disciplinary matter was closed. The email set out that Mr Hinchliffe had confirmed notwithstanding he did not wish to attend work. Carmel then wrote the following:

On this basis, effective today 2 June 2023 we will terminate your employment through our payroll. Despite not receiving a formal resignation from you, you have refused to appear at work and have abandoned your employment per clause 33 of your IEA.

Any final pay owing to you will be paid in next week's pay run of 8 June 2023.

We look forward to speaking with you again at mediation.

[14] Mediation took place but the matter remained unresolved.

[15] Mr Hinchliffe lodged a statement of problem dated 3 July 2023 that he was unjustifiably dismissed, and his written warning was unfair. Mr Hinchliffe asked that he be reinstated to his position with the final written warning removed. He also asked for his own office space, parking space, flexible working hours, compensation and reimbursement of lost wages.

[16] Enatel in its statement in reply do not accept that its actions were unjustified and says that the final written warning was a justified action in all the circumstances. Enatel say that in the circumstances where Mr Hinchliffe had made it clear he would not come into the workplace until after mediation, it was not unreasonable for them to conclude that he did not wish to continue to be employed.

The investigation process

[17] The Authority held an investigation meeting in Christchurch. Mr Hinchliffe attended with his wife as a support person. The Authority heard evidence from Mr Hinchliffe and he answered questions put to him by the Authority and the representative for Enatel.

[18] The Authority heard evidence from Mike Clifford and Korina Foot who was at the material time acting Human Resources Director but has since departed the company. Ms Foot who is an experienced human resource practitioner said that she would be the representative for Enatel for the purpose of the Authority investigation meeting. Mr Clifford who is a director of Enatel was comfortable with that. The Authority also heard evidence from Amanda O'Regan who at the time held the position of Senior Coordinator People & Capability. They also answered questions from the Authority and asked by Mr Hinchliffe or his wife.

[19] At the end of the evidence and questioning of the witnesses the Authority asked both parties whether they wished to provide any closing remarks or submissions. Neither party considered that necessary.

[20] 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.

The test of justification

[21] The Authority is asked in this matter to consider whether the final written warning was justified. The Authority is also asked to reach a view about how the relationship ended and whether the abandonment clause in the employment agreement could be relied on to end the relationship. If the abandonment clause could not be relied on and Mr Hinchliffe was dismissed, the Authority would need to consider the justification of the dismissal.

[22] The Authority is required to apply the justification test set out in s 103A of the Employment Relations Act 2000 (the Act). The Authority does not determine

justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether Enatel's actions in finding serious misconduct and imposing a final written warning, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the warning. The Authority is required to apply the same test on an objective basis if it finds that the relationship ended by way of dismissal.

[23] The Authority must consider four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Mr Hinchliffe were sufficiently investigated, whether concerns were raised with him, whether he had a reasonable opportunity to respond to those concerns and whether the explanations were considered genuinely before the warning was imposed and the dismissal occurred. Other factors may also be considered as appropriate, and the Authority must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Hinchliffe being treated unfairly. Enatel could be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

[24] Interwoven with the factual matrix are concerns Mr Hinchliffe raised about his hours of work and the fact he did not have an office or a car park. These matters will need to be considered because in part they were reasons why Mr Hinchliffe did not return to work after the final written warning was issued to him and they are claimed as remedies in the event of reinstatement. I record at this point the Authority does not have jurisdiction to determine about any matter relating to the fixing of new terms and conditions of employment except in specific circumstances that do not arise in this matter.¹

The issues

[25] The Authority needs to consider the following issues in this matter:

¹ Employment Relations Act 2000 section 161(2)(b).

- (a) What are the material provisions of the individual employment agreement?
- (b) What were the allegations Mr Hinchliffe was asked to answer at the disciplinary meeting on 22 March 2023?
- (c) Was the imposition of the final written warning a justified action?
- (d) Why did Mr Hinchliffe not return back to work after the issue of the final written warning?
- (e) Was the absence for good reason and/or authorised?
- (f) Was Enatel required to pay Mr Hinchliffe after 22 May 2023 when he would not return to work until mediation had taken place?
- (g) Could Enatel rely on the abandonment clause to end the employment relationship:
- (h) If not, and the employment relationship ended by way of dismissal, was the dismissal justifiable?
- (i) If the final written warning and/or the dismissal are unjustified then what remedies is Mr Hinchliffe entitled to?
- (j) Are there issues about mitigation and contribution?
- (k) Is reinstatement practical and reasonable?
- (l) If so, should Mr Hinchliffe return with an office and carpark provided and for the work hours that he has suggested?
- (m) Should there be an award of costs and disbursements?

What are the material provisions of the individual employment agreement?

[26] The following are material provisions in the employment agreement between Mr Hinchliffe and Enatel.

Abandonment clause

[27] Clause 33.1 of the employment agreement provides as follows:

33.1 When an Employee is absent from his or her place of work for a continuous period of 3 (three) working days without notice, the employee shall be deemed to have abandoned their employment.

Hours of work

[28] Clause 4.2 in the employment agreement sets out the normal hours of work for both salaried employees and waged employees. Mr Hinchliffe was a salaried employee. Clause 4.2.1 was material to him. I will also set out the hourly rate for waged employees as this was referred to as being the hours Mr Hinchliffe was expected to work.

[29] These clauses provided as follows:

4.2.1 Unless otherwise agreed in writing, the Employee's normal hours of work shall be 40 hours per week, Monday to Friday or as agreed between the parties.

4.3 Hourly rate (waged employees)

4.3.1 The Employee's normal hours of work shall be Monday to Thursday 8.00am to 4.30pm and Friday 6.00am to 2.30pm.

4.3.2 The days and hours of work may from time to time be altered, by agreement between the parties, in order to accommodate operational requirements.

Sick leave

[30] Clause 9 and schedule C of the employment agreement refer to sick leave. They contain similar information so I will only set out the material provisions of clause 9:

9.2 Notification – you will make every reasonable effort to contact your Team Leader/Manager or other designated person before your normal time for commencing work on every day that you will be absent due to sickness or bereavement. We may elect to waive this requirement in the event of bereavement after the first day of leave. Texting is not acceptable unless you have first made all reasonable attempts to establish direct contact.

9.4 The Employer may require a medical certificate for sickness or injury of one (1) calendar day or more at the Employer's expense.

9.5 The Employer may require a medical certificate, at the Employee's expense, as proof of sickness/injury where the sickness/injury is for three (3) calendar days or more.

Relationship between employment agreement and the staff handbook

[31] Clause 3.2 of the employment agreement provides that the employee agrees to comply with all house rules contained in the Enatel staff handbook. There are some house rules about sickness. Non-production staff such as Mr Hinchliffe are required to email their manager as soon as possible to advise they are unwell and file the sick leave request in TimeFiler.

[32] The staff handbook provides under the heading sickness as follows:

The nature of Enatel's business is such that repeated staff absence or lateness to work can affect the productivity and operation of the business. We aim for 95% attendance for all staff. Please note, if your absenteeism has, in the reasonable view of your Manager, started impeding on the productivity of the business, then this may result in disciplinary action. Your Manager or Team Leader may call you if you are absent due to an unplanned illness for a wellness check-in.

Misconduct relied on for the warning

[33] Two types of misconduct described in the employment agreement are relevant with respect to the final written warning. Excessive absenteeism described in clause 18.1 as misconduct. Misrepresentation or deceit that could undermine good faith and trust and confidence of the employee described in clause 17.1 as serious misconduct was also relied on.

Steps in the Handbook to be taken if there is a finding that serious misconduct exists

[34] The handbook provides for a number of steps to be taken in the event there is a finding that misconduct has occurred. Step one is found in section 17 of the handbook under the heading "Dismissal procedure" and provides for a first act of misconduct a verbal warning may be issued. Step two, in the case of a second act of misconduct, is that the employee may be issued with a first written warning and step three, if a third act of misconduct occurs the employee will be issued with a final written warning and any further misconduct may lead to dismissal. Step four provides if there is a further

act of misconduct the employee will be dismissed. There is a note that the steps provide a guideline only. The section also provides as follows:

If the Company deems it appropriate and reflective of the misconduct in question, a step or steps may be skipped. In all cases employees will be issued with notice of the misconduct in question and investigation and/or formal disciplinary meetings will be arranged to address the matter. In a formal disciplinary process the employee has a right to bring a support person to such meeting.

What were the allegations Mr Hinchliffe was asked to answer at the disciplinary meeting on 22 March 2023?

[35] Carmel sent a letter on 18 May 2023 inviting Mr Hinchliffe to a disciplinary investigation meeting on 22 May 2023. The letter referred to two concerns.

[36] The first concern was about the level of absenteeism. The attendance level was noted as 12.5%. Clause 18.1 in the employment agreement was referred to as was the reference on the staff handbook to the absenteeism starting to impede on the productivity of the business.

[37] The second concern was that there was unacceptable communication regarding the absenteeism including late replies and Enatel having to contact Mr Hinchliffe on numerous occasions to find out why he did not appear at work. There was reference to Mr Hinchliffe requesting leave for 16 and 17 May for his wife's birthday and then being absent for both days after the request for leave was denied. It was stated that the combination of poor communication and excessive absenteeism is serious in nature particularly given the short period of employment and falls into the category of serious misconduct that has led to a breakdown in trust between the parties. Further that it "severely impacts our level of confidence" that Mr Hinchliffe would attend the workplace as required and meet attendance requirements.

[38] Attached to the letter was a timeline of interactions between Enatel and Mr Hinchliffe over the period of absence.

Was the final written warning justified?

Who was at the meeting on 22 May 2023

[39] Carmel and Mr Clifford were in attendance at the meeting on 22 May 2023. The meeting was led by Carmel although Mr Clifford was the decision maker. Mr Hinchliffe was advised that he was entitled to a support person at the meeting and said that he did not want one and attended the meeting alone. He was advised that the allegations were serious, and the outcome could be a final written warning or dismissal.

Notes

[40] Enatel took notes on a standard disciplinary meeting form with a number of actions and corresponding boxes to be ticked or otherwise. There was a box ticked that the notes would be taken and read back to the employee at the end of the meeting. Mr Hinchliffe said that he only received a copy of the notes with the letter containing the disciplinary outcome of a final written warning the following day. Mr Hinchliffe also took his own notes. Whilst there is some difference between them, the explanations viewed overall are reasonably consistent.

Explanations for the absenteeism and communications over the period

[41] Mr Hinchliffe's explanation was that he was unwell for the period he was away from the workplace and this was supported by the medical certificates. Enatel was provided with three medical certificates from Mr Hinchliffe during his absence for just short of a two-week period. Mr Hinchliffe said the nature of the unwellness changed over that time.

Being late on the first day of work

[42] There was some discussion about the extent of lateness on the day that Mr Hinchliffe attended work on 8 May. The notes that Enatel took record that they considered he was 30 minutes late and Mr Hinchliffe said that he was 5-10 minutes late due to difficulty finding a car park.

Explanation for first period of absence between 9 May and 12 May and communications over that period

[43] The first medical certificate provided was dated 11 May 2023.

[44] The medical certificate provided that Mr Hinchliffe had reported on 11 May 2023 stating that he had been unfit for work from 09/05/23 to 13/05/23. There was no dispute that the name at the bottom of the medical certificate is that of a nurse although that is not recorded on the certificate. Mr Hinchliffe was not examined in person but explained the medical certificate followed a discussion by telephone with the nurse about his symptoms.

[45] The timing and nature of the communications over the period of absence provide useful context in relation to conclusions about the warning and allegations made by Mr Hinchliffe of harassment. Mr Hinchliffe explained that he considered his own communications were adequate during his absence.

[46] There is some difference between Mr Hinchliffe's account of the interactions and Carmel's timeline for this first period. I have considered the explanations at the disciplinary meeting and the timelines provided by Mr Hinchliffe and Enatel together with the telephone records, emails, and text messages. I have relied particularly on the written records. The interactions were likely as set out below.

9 May 2023 (Tuesday)

[47] The first contact made by Mr Hinchliffe with Enatel about his absence was on 9 May 2023 by email at 8.25am to Ms O'Regan. The email explained that he had been up all night with gastroenteritis type symptoms and would not be in to work. Ms O'Regan was away that day and therefore no-one at Enatel was aware of the reasons for his absence. Carmel then telephoned Mr Hinchliffe. There is some dispute as to whether this was once or twice but the call(s) were not answered. Carmel then sent an email at 1.55pm asking that Mr Hinchliffe call her. There was also a text message asking Mr Hinchliffe to let her know if he is all right. At 3.02pm Mr Hinchliffe responded by text that he had emailed Ms O'Regan and stated that he had not seen Ms O'Regan's out of office reply. He forwarded the email he had sent to Ms O'Regan. At

3.36 pm the Production Engineering Team Lead Phil emailed Mr Hinchliffe with his phone number if he needed to talk or let him know anything.

10 May 2023 (Wednesday)

[48] On 10 May 2023 Carmel sent a text message at 10.46am asking if it was a good time to talk. Mr Hinchliffe then tried to call Ms O'Regan at 11.50am and left a voice message. He spoke to Phil at 11.52am to explain he was unwell; and then received an email from Ms O'Regan at 12.47pm asking how he was feeling and whether she could do anything to assist. At 1.56pm Mr Hinchliffe sent an email to Ms O'Regan advising that he had spoken to Phil. He also wrote that he would call Phil later in the day about the next day. Ms O'Regan then sent a further email apologising for missing his call as she was involved with a training session. At 8.27pm Mr Hinchliffe sent an email to Phil in which he referred to feeling a little better but was not sure about returning to work the next day and would see how his night was. He wrote that "at this point would probably say I won't make in tomorrow."

11 May 2023 (Thursday)

[49] On 11 May 2023 Carmel sent an email to Mr Hinchliffe at 8.06am asking if he could advise a good time for her to ring him rather than emailing and texting. She suggested about 10am. Carmel called again at 10.05am and the call was not answered. She sent a text message asking that Mr Hinchliffe make himself available to answer the phone at 10.15am. Carmel called again at 10.17 am and then sent an email at 10.22am asking Mr Hinchliffe to check his phone is turned on or to ring her directly on her extension. She then called at 10.40am and Mr Hinchliffe did answer and there was a discussion. Mr Hinchliffe has written in his timeline said that Carmel said something to him about it not looking good that he had only worked one day as it had taken them a long time to get him to start work. He considered that inappropriate. Mr Hinchliffe advised he was still unwell and said that he was glad it was that week and not the following as it was his birthday then. Carmel asked for a medical certificate from Mr Hinchliffe.

[50] At 11.48am Mr Hinchliffe called his medical practice. Mr Hinchliffe explained in evidence that he was discouraged from attending the medical practice in person because he was infectious. Enatel's notes says that his explanation was that medical centres are "under resourced" and are "pushing people" away. Mr Hinchliffe's notes of the meeting are consistent with his evidence.

[51] At 12.02pm Mr Hinchliffe emailed the first medical certificate to Carmel advising that the doctor had advised him to refrain from work the next day as he had been sick and will still be infectious for the following 48 hours. He wrote that he would return "next Monday."

[52] Carmel then sent an email at 1.58pm thanking Mr Hinchliffe for the medical certificate and asking that he provide a Fit to Return to work certificate as he had been infectious.

[53] Carmel sent a further email at 3.12pm advising that Enatel was not able to approve any leave for the following week as a five working day notice period was required and Mr Hinchliffe did not have annual leave owing.

[54] In his evidence Mr Hinchliffe said he was not sure why that email had been sent because he had only mentioned it was his birthday and had not requested any leave or submitted a leave request. There was some questioning about the birthday leave which was a concern for Enatel at the disciplinary meeting. Enatel understood on the Thursday 11 May that Mr Hinchliffe wanted the Tuesday and Wednesday of the following week off for his birthday. Mr Clifford was approached but was not prepared to grant leave and that was why Mr Hinchliffe advised of this. Neither set of notes provide a specific explanation for this matter. There was also a confusing aspect in that the letter inviting Mr Hinchliffe to a disciplinary investigation meeting referred to Mr Hinchliffe's wife's birthday rather than his birthday.

Explanations for second period of absence between 15 May and 19 May and communications over that period

[55] The second medical certificate advised that Mr Hinchliffe had reported on 17/05/23 that he was unwell and unfit for work from 17/05/23 to 22/05/23. It had at the

bottom of the certificate “Practice Nurse” with no name. An amended third medical certificate was provided again that same day with Practice Nurse at the bottom that backdated the initial date of the medical certificate to 15/05/23 to cover the unwellness for that entire week.

14 May 2023 (Sunday)

[56] On Sunday 14 May 2023 Mr Hinchliffe sent an email to Carmel advising that he was still unwell and would try and obtain another medical certificate and forward it to her as soon as he was able.

15 May 2023 (Monday)

[57] At 1.50pm Carmel advised Mr Hinchliffe that she would look out for the medical certificate and clearance that he was fit for work. She wrote that they were looking forward to seeing him at work the next day.

[58] At 3.55pm Carmel sent a text message asking Mr Hinchliffe how he had got on at the doctors. She asked that he bring the certificates in with him the next day.

[59] At 8.24pm Mr Hinchliffe sent a text message in response advising that he could not get an appointment with the doctor until Wednesday. He advised that he was still unwell.

16 May 2023 (Tuesday)

[60] At 7.32am Carmel sent a text message to Mr Hinchliffe asking him to use Enatel’s medical provider. She explained that Enatel would pay for the appointment and they looked forward to getting a medical certificate and Fit for Work clearance.

[61] At 9.49am Ms O’Regan sent an email to Mr Hinchliffe that as discussed during induction, all leave needed to be submitted via the TimeFiler app as soon as possible. She attached the instructions for doing this and the number of a person from Payroll if there were difficulties. She stated that she hoped Mr Hinchliffe felt better soon.

[62] At 10.55am Carmel sent a further email with information about Enatel's medical provider. She wrote that it was important they received a medical certificate and clearance that he was fit for work that day.

[63] At 11am Carmel emailed Mr Hinchliffe to check his emails as there was important information there for him to read.

[64] Mr Hinchliffe did not take up the offer to attend at Enatel's medical provider and did not respond to the emails sent that day. His explanation was that it would have involved an 80-kilometre round trip and he was not well enough to have undertaken that at that time. Mr Hinchliffe lives outside of Christchurch.

17 May 2023 (Wednesday)

[65] At 8.06am Carmel asked Mr Hinchliffe how he had got on at Enatel's medical provider and whether they were expecting him at work that day.

[66] Shortly after 9.00am Mr Hinchliffe received three emails that a leave request without pay and then a sick leave request without pay had been submitted for 10 – 16 May 2023 through TimeFiler and that the requests for sick leave had been approved.

[67] At 3.03pm Mr Hinchliffe sent the medical certificate advising in his email as follows:

Hi Carmel

Please find the attached medical certificate as requested.

I didn't realise until I got home that it is dated from today.

I have requested another medical certificate dated from Monday, but I haven't received it yet.

I will forward it to you as soon as I receive it.

As you can see I have been signed off work until Monday.

[68] At 3.06pm a further medical certificate was provided by Mr Hinchliffe to Enatel for the period 15 May 2023 – 22 May 2023.

[69] At 3.49pm Carmel sent an email that asked Mr Hinchliffe to confirm if he had been personally assessed or communicated with over the phone or by email.

[70] At 4.18 pm Carmel sent a further email

Thanks for sending the letter. However, we note that the letter from the nurse does not state that you have been medically examined and instead states that you have advised the Nurse you are not fit for work.

We do require a letter confirming there has been a medical assessment. Can you confirm you were assessed by the Nurse or Dr and if so, can you ask them to send a revised certificate stating this. If not, can you please arrange for an in-person assessment.

Mr Hinchliffe did not respond. He was provided with the invitation letter to the disciplinary investigation meeting on 18 May 2023.

Reasons for the final written warning

[71] Mr Clifford was the decision maker. He said when asked by the Authority about the reasons for the final warning that trust and confidence was “playing on his mind.” He was not reassured by the medical certificates that Mr Hinchliffe was “legitimately away.” The evidence from Enatel was that there was a growing sense of suspicion about the absences, including the request for leave and then continuation of sick leave for the leave days requested, amendment of the second medical certificate, the absence of a medical examination and the poor communication.

Conclusions about justification of the final written warning

[72] Aspects of the process were fair. Mr Hinchliffe was advised that he could bring a support person to the meeting, he was told who would be present from Enatel and he was given an opportunity to explain what had occurred over the period of his absence. He was provided with Enatel’s timeline about communications that he could comment on together with other documents that were relevant.

[73] Mr Hinchliffe raised a concern he was receiving the invitation whilst he was unwell. Attendance at the meeting was however scheduled for a time when according

to the medical certificate Mr Hinchliffe was fit to return. Carmel's attendance at the meeting was raised as a concern. The meeting was called to discuss Enatel's concerns. I am not satisfied that unfairness resulted from Carmel's attendance and Mr Clifford was ultimately the decision maker.

[74] Mr Hinchliffe said that he was concerned that Mr Clifford did not engage fully during the disciplinary process or answer questions. Mr Clifford did not accept that questions directed to him were ignored. It is more likely having considered the evidence Carmel did most if not all the talking at the meeting. I do not conclude that Mr Clifford did not listen but rather Carmel had had the most interaction with Mr Hinchliffe over the period of his absence.

[75] A concern of Mr Hinchliffe was that he understood the meeting was for the purpose of an investigation and not simply a disciplinary meeting. There was no further meeting before there was a disciplinary outcome given. Whilst there could have been a further meeting, I am not satisfied that the failure to have a further meeting before an outcome was by itself unfair. It is recorded in Enatel's notes that the meeting closed on the basis that an outcome would be provided within 24 hours. The understanding I heard evidence about was that until the disciplinary outcome Mr Hinchliffe would not be required to attend at work.

[76] The meeting was adjourned after about 20 minutes because Mr Clifford had another meeting. He did not return to the meeting. When the meeting resumed with Mr Hinchliffe and Carmel in attendance, Mr Hinchliffe discussed his concerns about wanting an office, car park and work hours with Carmel. The letter containing the final warning referred to those matters as well as the matters said to give rise to the final written warning.

[77] A fair and reasonable employer could have some justifiable concerns about the level of communication by Mr Hinchliffe over the period of absence. Clause 9.2 of the employment agreement required Mr Hinchliffe to make every reasonable effort to contact his Team Leader/Manager or other designated person before his normal time for commencing work on every day he was absent due to sickness. A perusal of the interactions set out above supports that did not occur every day.

[78] There were also some confusing aspects to the communications including those about the medical certificates. On 15 May 2023 which was the start of the second week of unwellness Mr Hinchliffe advised Enatel that he was still unwell but could not get an appointment with his doctor until 17 May 2023. A fair and reasonable employer could conclude that he had an appointment to see his doctor on Wednesday 17 May 2023. The explanation for not attending at that appointment was that before then Mr Hinchliffe called the medical practice to see if he could still attend and said he was dissuaded from attending with his symptoms. He did not however advise Enatel about that at the time. It would have been apparent from Carmel's emails on 16 May and 17 May 2023 about seeing Enatel's own medical provider that they wanted him to be medically examined.

[79] On 17 May 2023 Mr Hinchliffe sent an email to Carmel that stated he had not noticed the medical certificate was from that day and not from 15 May "until he got home." The email on its face could suggest that Mr Hinchliffe had been at an appointment. When questioned at the Authority investigation where he was coming home from Mr Hinchliffe said that he had been for a walk.

[80] When Carmel asked some questions by email on 17 May 2023 about the second and third medical certificates and whether there had been a medical examination Mr Hinchliffe did not respond. He was critical in his evidence about Enatel looking behind the medical certificates. I accept in the ordinary course of events a medical certificate could reasonably be relied on. There were some aspects in this matter objectively assessed that meant such enquiries into what had taken place with the medical certificates were not unreasonable.

[81] The letter inviting Mr Hinchliffe to the disciplinary investigation meeting does not refer to conduct of concern as misrepresentation or deceit or identify specifically what the misrepresentation or deceit is alleged to be. An employee is entitled to have concerns clearly put so that they can be fully explained. That was a procedural failing.

[82] With such a serious concern about misrepresentation or deceit undermining confidence and good faith further investigation could have been expected of a fair and reasonable employer. This could include investigation into Mr Hinchliffe's explanation

about the telephone assessments particularly those for the second week of unwellness when there had been an appointment made with a doctor and Mr Hinchliffe said he was dissuaded from attending that appointment. Enatel could have investigated the circumstances in which the medical certificates were provided by someone other than a doctor. Mr Hinchliffe could not in the circumstances have reasonably withheld his consent which would be necessary to such enquiries as they were appropriate in light of the concerns and accorded with his explanations.

[83] Further investigations could have significant impact on the disciplinary outcome and conclusions about trust and confidence. The concern about excessive absenteeism is described in the employment agreement as misconduct. Whilst the absence was inconvenient and difficult for Enatel, it was Mr Hinchliffe's first period of absence. Mr Hinchliffe's employment agreement in clause 9.1 provided he was entitled after six months continuous service to 10 days sick leave in a 12-month period. Mr Hinchliffe had taken nine days leave in advance of that entitlement. The leave was unpaid. Prolonged periods of sickness that impact on a business are often assessed as cases of medical incapacity rather than misconduct. The period of absence considered for medical incapacity generally exceeds any contractual entitlement for sickness. It is less likely that a fair and reasonable employer could have imposed a final written warning for excessive absenteeism in the circumstances or for communication issues if satisfied that the absence was otherwise for reason of unwellness.

[84] Enatel had serious concerns not allayed by the medical certificates that Mr Hinchliffe had misrepresented he was unwell but did not take steps to investigate those concerns sufficiently. For this reason and the failure to adequately state the allegation before the disciplinary meeting the final written warning is unjustified. The requirements in the test of justification are not met.

[85] The final written warning caused disadvantage to Mr Hinchliffe because it made his employment less secure.

[86] Mr Hinchliffe has established his grievance that the final written warning was an action that was unjustified and caused disadvantage. He is entitled to consideration

of remedies and this will be undertaken after assessing the claim that there was a dismissal that was unjustified.

Why did Mr Hinchliffe not return to work following the final written warning?

[87] The final written warning provided that Mr Hinchliffe was expected to return to work at 8.00 am on 24 May 2023. He did not.

[88] In the letter raising his personal grievance dated 23 May 2023 Mr Hinchliffe advised Enatel he would not be returning to work at that time.

[89] He asked for an investigation into the treatment during his period of unwellness, the final written warning and the process, the failure to provide an individual office and car park and that his request to commence employment between 8.45 and 9am was not agreed to. He set out that he did not feel comfortable attending work until the matter was settled. He asked by way of resolution that Enatel agree to a flexible start time and provide him with an individual office and onsite parking space as other managers had. He also advised he would be claiming lost remuneration.

[90] Mr Clifford by emailed letter dated 24 May 2023 to Mr Hinchliffe responded to all matters raised. In relation to the carpark and office he wrote that Mr Hinchliffe's role was a coordinator position and not that of a manager. Further that an office was not discussed in the interview and most employees including many leaders and managers are in an open plan work environment.

[91] Mr Hinchliffe correctly pointed out to the Authority that Mr Clifford wrote in his letter of 24 May that it was provided in the final written warning letter Enatel would review and reconsider the request for a different starting time in 3 months. That was not in the warning letter which provided modification with approval on a one-off basis to the hours of work set out as 8.00 am – 4.30 pm Monday to Thursday and 6.00am to 2.30 pm on Fridays but not a review.

[92] Mr Hinchliffe's first email dated 24 May 2023 about why he was absent was focussed on the unwillingness by Enatel to agree to his request about his terms and conditions and his view that his role was being undermined and diminished by not

having his requests agreed to. His second response on 25 May 2023 about why he was away referred additionally to unfair and inappropriate treatment received when he was unfit for work.

[93] A mediation date of 28 June 2023 was agreed to by Enatel. Mr Hinchliffe was critical that Enatel did not attempt to resolve the matter before mediation. Enatel had comprehensively put its position on the issues of concern in writing.

Was the absence for good reason and/or was it authorised?

[94] Mr Hinchliffe had raised a personal grievance and asked for mediation if his proposals for resolution were not agreed to. Enatel had provided its written responses to the matters of concern raised by Mr Hinchliffe and did not agree to his proposals. Enatel agreed to mediation which was set for 28 June 2023. The concerns about the warning could be dealt with in the mediation and if not resolved there at the Authority.

[95] Mr Hinchliffe raised concerns that he had been harassed and victimised throughout the period of unwellness and that Enatel was unsupportive. Further that there was pressure on him to return to work whilst unwell. I have set out the interactions above. I accept that there were more communications than may have ordinarily been expected when an employee reports as unwell. Mr Hinchliffe may well have found them challenging and viewed them as being unsupportive. The Authority however is tasked with undertaking an objective assessment in the circumstances.

[96] Like any relationship, trust and confidence builds over time. Mr Hinchliffe had undertaken one day of work before his unwellness. Trust and confidence had not had a time to build to any degree. Communications occurred over the period of unwellness mainly because Mr Hinchliffe had not communicated with Enatel before his normal time for starting each day that he would be absent as required in his employment agreement in clause 9.2.

[97] I agree with Mr Hinchliffe that it is difficult to understand the need for requesting a fit to work certificate as well as the medical certificate which had an expected return to work date. It seemed related to Mr Hinchliffe using the word

infectious. In any event Mr Hinchliffe took no steps to obtain such a certificate and the matter was not pursued by Enatel.

[98] Enatel was entitled to ask for a medical certificate at its own expense for sickness of one day or more and require a medical certificate at Mr Hinchliffe's expense as proof of sickness where the sickness is for more than three days in clauses 9.4 and 9.5 of the employment agreement. It was not inappropriate for Enatel to suggest that Mr Hinchliffe see their medical provider. He chose not to as is his right.

[99] A medical certificate is an important document because whilst issued to the patient, it is done so often in the knowledge that it is for a third party. Ordinarily an employer could rely on a medical certificate. Enatel were not reassured by those medical certificates provided by Mr Hinchliffe in the absence of a medical examination for two weeks of unwellness. Mr Hinchliffe said he explained his symptoms before the certificate was issued to the nurse and he was told to stay away from the medical centre because of his symptoms. The medical certificates did not elaborate about that.

[100] The request to complete TimeFiler was not inappropriate but so that Mr Hinchliffe's absences could be properly recorded for pay purposes. In any event Enatel completed that for Mr Hinchliffe and Mr Clifford said it was not taken into account in imposing the warning although it was an expectation for the future for this to be completed.

[101] Mr Clifford responded to a concern of Mr Hinchliffe's that Carmel had inappropriately commented when he was unwell about the lengthy delay to his commencement date in a letter dated 24 May 2023. Mr Hinchliffe said that there was a good reason for that and Enatel had agreed to the delayed start date. Mr Clifford in his communications did not accept that the comment was inappropriate but was said to highlight the importance for Enatel of having a Building and Site Services Coordinator on site and the impact of an absence. I accept that is a likely explanation for what was said and the context in which it was said.

[102] I do not find objectively assessed that the communications over the period of unwellness were such as to amount to harassment, victimisation or designed to exert pressure on Mr Hinchliffe to return to work whilst unwell.

[103] The office and carpark were not terms and conditions of employment and there was no dispute nothing was said about these at the interview. These did not present good reasons for non-attendance at work.

[104] The starting time was an issue for Mr Hinchliffe. His request for a later time had been considered and declined with reasons.

[105] In an email to Ms O'Regan dated 10 February 2023 Mr Hinchliffe asked a question about salary and hours. Ms O'Regan advised in an email dated 13 February 2023 that it was a salary position so that the hours are flexible for attending appointments. She wrote that she believed the suggested hours would be 8.00 am - 4.30pm. She did suggest that Mr Hinchliffe advise if he was thinking of something different but there was nothing sent by him. He was then offered the role on 6 March 2023. Mr Hinchliffe knew before commencing employment what the hours would likely be. They were not specifically set out in the employment agreement for salaried employees.

[106] The hours on Friday were different to what Ms O'Regan had advised. There were other options however to remaining away. Mediation was obviously an opportunity to discuss matters. In the meantime Mr Hinchliffe could have proposed maintaining the 8.00 am – 4.30 pm for Fridays until mediation. If he considered there was non-compliance with the flexible working provisions in the Act then he could have referred the matter to the Labour Inspector or Authority to assist in resolving the matter if mediation did not.²

[107] Mr Hinchliffe was absent from his employment without good reason and without authorisation from 24 May 2023 until the relationship ended.

² Employment Relations Act 2000 sections 69AAG, 69AAH and s 69AAI.

Was Enatel required to pay Mr Hinchliffe when he was away without authorisation?

[108] Enatel was not required to pay Mr Hinchliffe for the period he was absent from work without good reason or authorisation.

Could Enatel rely on the abandonment clause to end the employment relationship.

[109] The requirements of clause 33.3 of the employment agreement have to be met in order for the employment relationship to be end for reason of abandonment. If the requirements are met then the relationship ends by virtue of the clause and not by dismissal.

[110] There is confusion on the face of the email sent by Carmel on 2 June 2023 about what was relied on to end the relationship.

[111] The first part of the email refers to Mr Hinchliffe making it clear that he did not wish to return to work despite advice he would be supported and was reassured there would be no unfair treatment. Further that the disciplinary process was closed and his job remains open. It then refers to confirmation that Mr Hinchliffe did not want to attend work. There is then reference termination through the payroll and abandonment on the basis of a refusal to attend at work.

[112] The earlier communication from Mr Clifford to Mr Hinchliffe after he advised he would not be attending at work from 24 May 2023 expressed concern about the absence and requested the reasons for it. Importantly it did not refer to a possibility that the abandonment clause would be relied on.

[113] Mr Hinchliffe had remained away from the place of work but Enatel had been notified why he was absent. The absence was an unauthorised absence rather than an abandonment.

[114] I do not conclude that the clause 33.1 of the employment agreement could be relied on in these circumstances to end the relationship. It did not apply.

[115] The relationship ended by way of dismissal and the Authority will need to consider the justification of the dismissal and whether it was an action of a fair and reasonable employer.

Was the dismissal justified?

[116] Enatel did not comply with the minimum procedural fairness requirements in s103A (3)(a) – (d) of the Act. Mr Hinchliffe was not told that a failure to attend at work was seen as an unauthorised absence that could result in his dismissal. He was given an opportunity to provide reasons why he was absent in writing but was not told that continued absence could result in his dismissal before the relationship ended by way of the abandonment clause.

[117] Enatel held a view that Mr Hinchliffe did not wish to return to work but that was not specifically put to him. The process defects were not minor. The dismissal therefore was unjustified.

Substantive justification for the dismissal

[118] A fair and reasonable employer could conclude that the absence was without good reason. There had been a two-month delay between Mr Hinchliffe accepting the role and starting. Enatel had agreed to that later start but Mr Clifford said it was with some reluctance as they were keen to have someone in that role. After Mr Hinchliffe attended work on 8 May 2023 he was then away for two weeks because he was unwell. It would have been apparent to Mr Hinchliffe that the absence was of concern to Enatel and they were keen to have him back to work as soon as possible. Mr Hinchliffe did not agree to returning, although was well enough to do so until after mediation had taken place. Mediation was scheduled for 28 June.

[119] The period of absence was unauthorised and there were not, as concluded earlier, good reasons for the absence.

[120] A disciplinary process to discuss Mr Hinchliffe's failure to attend work could have justified an outcome of dismissal.

Remedies

[121] It is appropriate to consider remedies.

Lost wages

[122] Mr Hinchliffe provided his income summary from My IR that showed for the period between 1 April 2023 and 31 March 2024 his only income was from Enatel. He provided a number of applications that he had made for other roles.

[123] Under s 128 (2) of the Act the Authority must whether or not it provides for any other remedies order the employer to pay the lesser of a sum equal to lost remuneration or 3 months ordinary time remuneration. The Authority can order a sum greater than that. The Authority focuses on whether the remuneration lost has been as a result of the grievance.

[124] The Authority has considered whether the employment relationship would have remained on foot for a full three months. The counterfactual assessment involves consideration of the following. With a fair process a dismissal for unauthorised absence could have been justified. A fair process could have been undertaken within four weeks.

[125] Additionally, there was some basis for Enatel's concerns about whether Mr Hinchliffe wanted employment with the company. Notes of the disciplinary meeting dated 22 May 2023 support a degree of uncertainty from Mr Hinchliffe about the role at Enatel when talking to Carmel after Mr Clifford had left the meeting. I have taken into account other evidence about the timing of the commencement of his employment with Enatel. Ms O'Regan says that on 8 May 2023 when Mr Hinchliffe attended at work she talked to him while he was initialling the employment agreement to reflect the changed start date. He told her he was going to ask for the start date to be moved again to mid the following week but "knew it would not go down well." Mr Hinchliffe could not recall saying that but Ms O'Regan was certain. She put it in the context of thinking Mr Hinchliffe had a "fun personality." I conclude that evidence is likely.

[126] I cannot be satisfied that the employment relationship would in all likelihood have continued for a period of three months. An award of lost wages should reflect this.

[127] A fair and reasonable award in all the circumstances is reimbursement for a period of four weeks. Mr Hinchliffe's salary was \$75,000 which divided by 52 weeks is the sum of \$1,442.30 gross. The amount subject to contribution for lost wages is \$1442.30 multiplied by eight weeks which is \$5,769.23 gross.

Compensation

[128] Mr Hinchliffe has claimed an award for "sufferance and humiliation". There can be an award of compensation under s 123(1)(c)(i) of the Act when there is humiliation, loss of dignity and injury to feelings from an unjustified action or dismissal.

[129] I have assessed compensation on the basis that the unjustified disadvantage in respect of the final written warning and the unjustified dismissal are inextricably linked and it is appropriate to assess compensation on a global basis. The warning and the alleged treatment during unwellness featured quite significantly in the reason for the continuing absence from the workplace when well.

[130] Mr Hinchliffe said that he suffered under all three heads when Enatel questioned the legitimacy of his absence resulting in the final warning and failed to support him when there were medical certificates. Further that he was harassed and victimised and Enatel diminished and undermined his role. There was then reliance on the abandonment clause to end the relationship.

[131] I accept with any action or dismissal that is found to be unjustified there will be a measure of humiliation, loss of dignity and injury to feelings. I do not take into account in assessing compensation the communications during the unwellness because of the findings made that they do not amount to harassment, pressure to return to work or a lack of support in the circumstances of this matter.

[132] This was not a relationship of a long duration. Mr Hinchliffe had only worked for one day.

[133] There was some evidence of financial consequence and some loss of dignity and injury to feelings in the imposition of a final written warning and the quite abrupt

ending to the relationship in which Mr Hinchliffe had no input. Mr Hinchliffe described a continuing loss of confidence.

[134] I have considered where the evidence about the impact of the final written warning and the dismissal sits with other cases and the nature and quantum of any award.³ I conclude the evidence supports an award at the lower end of awards. Subject to contribution an appropriate award is the sum of \$8,000.

Reinstatement

[135] Reinstatement is set out in s 125 of the Act as a primary remedy and the Authority must provide for this as a remedy wherever practicable and reasonable. These are two separate requirements.⁴ Mr Hinchliffe wants to be reinstated.

[136] In determining the practicability of reinstatement, the Authority considers whether there is potential for the relationship to be carried out successfully in the future. In doing so it looks back at how the relationship has been in the past to be reassured that it will be able to succeed in the future. Unfortunately, the history of this relationship does not enable me to conclude that it could in the future be a successful and constructive relationship. The relationship never really got underway and was clouded by distrust, suspicion, dissatisfaction, and continued absences.

[137] The level of suspicion is amplified when considering that on 8 May when Mr Hinchliffe attended for work Mr Clifford said that he could not locate him in the afternoon and concluded that he had gone home. Mr Hinchliffe denied that he left early but had in fact left a little later than the usual time to make up for a slightly late start because of the parking issues. He said that he was left alone by Phil at some point in the afternoon.

[138] Enatel have also changed the nature of the role that Mr Hinchliffe was appointed to one that is more junior in the structure and that is currently filled.

³ *Waikatpo District Health Board v Archibald* [2017] NZEmpC 132 [62] and *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162].

⁴ *Hong v Auckland Transport* [2019] NZEmpC 54 at [65].

[139] I am not satisfied in the circumstances of this case that reinstatement is practicable and reasonable and it is not ordered.

Contribution

[140] Section 124 of the Act requires the Authority to consider the extent to which the actions of Mr Hinchliffe contributed to the situation giving rise to the grievance and, if required, reduce the remedies that otherwise would have been reduced.

[141] I conclude that there were some blameworthy actions over the period of unwellness. Mr Hinchliffe did not communicate fully with the company as can be seen from the interactions over that period. He did not answer all requests for information. At least by the time of the second week of unwellness Mr Hinchliffe knew that Enatel wanted him medically examined. Mr Hinchliffe had advised he had an appointment with his doctor. When that did not occur and the medical certificate resulted from a telephone discussion with a practice nurse, he did not advise Enatel about the reasons for this even when they asked.

[142] Mr Hinchliffe whilst aware of the concerns Enatel had about his absence and their view about how important it was to have someone working in the position, continued to be away from the company even though he was well. I have not concluded good reason for the continuing absence and it was unauthorised. It strengthened Enatel's view that Mr Hinchliffe did not really want to work at the company. They then took action with some haste to incorrectly rely on the abandonment clause.

[143] I conclude a causal connection between these actions (omissions) and the situation giving rise to the personal grievances. I do take into account that Mr Hinchliffe did not contribute to the adequacy of Enatel's investigation into its conclusion that there was misrepresentation or deceit.

[144] It is appropriate to reduce the above award by 20% for contribution.

Findings and orders made

[145] The Authority has found that Mr Hinchliffe was unjustifiably disadvantaged by the imposition of the final written warning.

[146] The Authority has found that Mr Hinchliffe was unjustifiably dismissed.

[147] The Authority has awarded remedies but has not ordered that Mr Hinchliffe be reinstated to a position with Enatel. Issues about removal of the warning, hours on return and provision of an office and car park do not need to be addressed.

[148] Applying contribution to the amounts set out above for lost wages and compensation Enatel is ordered to pay to Mr Hinchliffe the following:

- (a) The sum of \$4,615.38 gross being reimbursement of lost wages under section 123(1)(b) of the Act.
- (b) The sum of \$6,400 without deduction being compensation under section 123(1)(c)(i) of the Act.

Costs

[149] Neither party were represented so there may be no issue as to costs. Mr Hinchliffe is entitled to reimbursement of the filing fee of \$71.56 and that is ordered payable with the monetary sums above.

[150] If there is an issue about costs then Mr Hinchliffe may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Enatel will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[151] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁵

⁵ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

Helen Doyle
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