New Zealand Employment Relations Authority Decisions

Jones v Downer New Zealand Limited (Christchurch) [2017] NZERA 1102; [2017] NZERA Christchurch 102 (27 June 2017)

Last Updated: 6 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 102
5636126

BETWEEN GARRY JONES Applicant

A N D DOWNER NEW ZEALAND LIMITED

Respondent

Member of Authority: David Appleton

Representatives: Mary-Jane Thomas, Counsel for Applicant

Anthony Russell, Counsel for Respondent

Investigation Meeting: 27 and 28 April 2017 at Invercargill

Submissions Received: 12 May and 9 June 2017, from the Applicant

31 May 2017, from the Respondent

Date of Determination: 27 June 2017

DETERMINATION OF THE AUTHORITY

A. The applicant was not unjustifiably constructively dismissed.

B. The applicant was subjected to unjustified disadvantage in his

employment and is awarded remedies in respect of that.

C. Costs are reserved.

Employment relationship problem

[1] Mr Jones claims he was unjustifiably constructively dismissed on 30 June

2016 and that he suffered unjustified disadvantage in his employment. The respondent denies that Mr Jones was unjustifiably constructively dismissed and that he suffered any unjustified disadvantage in his employment.

Roster concerns

[2] Mr Jones commenced working at the respondent as a Reticulation and Rural Water Supply Serviceman in February 2013. Mr Jones worked on a roster with another colleague called Roger McDougall. Mr Jones's evidence is that the roster he was originally on changed without consultation, which entailed Mr Jones working with Mr McDougall on days one and two, and then working by himself on days three and four. He would then have the next two days off. Mr Jones says that he worked this new roster for over a year before he asked for it to be reviewed.

[3] As the respondent does not contest that the roster did cause Mr Jones genuine concerns, it is not necessary to describe what his concerns were or the details of the rosters.

[4] Mr Jones says that, in November 2015, he raised concerns about the roster system with the Contract Supervisor, John Wilson, after a performance review. He was told by the Invercargill-based manager, Geoff Gray, that he would arrange a meeting as soon as possible to discuss Mr Jones's concerns. However, no meeting was arranged according to Mr Jones. Mr Jones says that, on 18 February 2016, he again asked Mr Gray for a change in the roster arrangement. Mr Gray disagrees that there were no discussions about the roster, and says that there was a detailed discussion with both Mr Jones and Mr McDougall after Christmas of 2015.

[5] A meeting to discuss rosters was arranged to take place on 8 April 2016 in Invercargill. Mr Jones says he travelled from Te Anau to attend the meeting but, when he got there, after waiting 40 minutes, Mr Gray told him that the meeting could not go ahead because Mr McDougall was not prepared to discuss the roster without Mr Wilson being present, who was away from work due to a bereavement. Mr Jones says that he was told by Mr Gray to be patient and suggested that he and Mr McDougall discuss the matter themselves. Mr Jones says that he then tried to discuss the matter with Mr McDougall but that Mr McDougall refused to talk about it, saying that the system suited him "just fine".

[6] Mr Gray says that Mr Jones spoke to him in a very aggressive manner when Mr Gray told him he was cancelling the meeting, Mr Jones calling him "f**ing gutless" and saying, "you have no f***ing balls". The respondent also says that

Mr Jones then aggressively shouted at Mr McDougall in the yard, using swear words. Mr Jones denies both these allegations.

[7] Later that morning Mr Gray sent an email to Mr Jones, Mr Wilson, Mr McDougall, Mr Dawson and one other saying the following:

Following discussions with all parties, I have decided to leave the roster "as is". As no roster will ever suit all parties, I feel that the current roster is as good as it can get.

I know this won't suit everyone, but I'm afraid no decision will suit all parties. I am always available to discuss in an adult manner all and future aspects of this decision.

[8] Mr Jones's evidence is that he got very upset after having received this email as no discussion had taken place about the roster. He said that he became very anxious during the following weekend and was unable to sleep, and that his heart was racing. He therefore went to see his doctor and he was then on sick leave for the next

36 days because of work related stress.

[9] Mr Gray's evidence is that he had had discussions with Mr Jones, Mr McDougall and Mr Wilson, and noted that they had had different opinions about changing the roster and that no scenario would work for everyone. He decided that he would therefore not make any changes. He said that he was also annoyed by Mr Jones' swearing at him.

Jones Electrical

[10] Mr Jones's evidence is that, while he was on sick leave, he was told by fellow employees that Mr Gray had instructed Downer workers not to use Jones Electrical, a company owned by Mr Jones' son. Mr Jones says that he subsequently asked Mr Wilson and Mr Dawson about this instruction but they denied that they had instructed anyone to use a rival electrical company. Mr Jones says that he felt that his son was being punished because of him.

[11] Mr Gray's evidence is that it had been him who had allowed Jones Electrical to work for Downer in the first place (although subsequent evidence suggests that this may not have been correct) but that he told one operator not to use Jones Electrical without his permission as he was concerned that Mr Jones junior had been effectively spreading dissent amongst the workforce on his father's behalf.

[12] Mr Jones returned to work on 18 May 2016 and attended a back to work meeting on that day. At this meeting, which Mr Jones recorded covertly, a transcript of which was seen by the Authority, the discussion concentrated on whether Mr Jones was able to return to work, which was a stressful job, with Mr Gray wanting to be assured that Mr Jones was able to move on after the disagreements that had occurred previously in relation to the roster. Mr Jones was told that he should not come back to work if he could not "move on" because that created tension amongst the other employees. Mr Jones was also told at the meeting that Mr Dawson was going to give him a new team leader in Te Anau, Aaron Green, and that Mr Jones was to report to him.

[13] Mr Jones' evidence was that he was not sure what he was supposed to have been moving on from, and that he had no problem with Mr Gray or Mr Dawson, but they had a problem with him. Mr Jones said he disagreed with a letter that Mr Dawson sent him after the meeting which, amongst other things, asked for his consent to get a medical opinion on his fitness to work. He refused to give this consent.

PPE concerns

[14] On 27 May 2016, according to Mr Jones, he saw Mr Green on a Downer's work site not wearing the correct Personal Protective Equipment (PPE). He says that he asked Mr Green to put on the correct gear but that he refused. Mr Jones reported this incident to Mr Gray who, he says, told him that Mr Green was on holiday and so did not need to comply with health and safety procedures. Mr Jones then reported the incident to WorkSafe New Zealand. Mr Jones says that Mr Gray later told him that he had reported the incident to WorkSafe New Zealand himself, but that Mr Jones later found out that this was not true. Mr Gray denies this, although subsequent evidence suggests that Mr Gray did tell Mr Jones this.

[15] Mr Jones says that he also received photographs (apparently from his son) of Mr Green on a different site not wearing the correct PPE. Mr Jones forwarded these photos to the Zero Harm Manager.

[16] According to Mr Green, he was not on site (but outside it) when Mr Jones spoke to him on 27 May, but he admitted being on site without the correct PPE on

31 May (the incident which was the subject of the photographs). Mr Green says that, as a result of this, he relinquished his role as Health and Safety representative.

[17] Mr Green said that the photographs were subsequently placed on the noticeboard, and various desks, on successive days and that he assumed that Mr Jones was responsible for distributing them. Mr Green says that Mr Gray told him to take them down, but each time he did so they were posted up again. Mr Jones admitted that he had kept putting the photograph back up on the noticeboard. He denied that he did so out of malice.

[18] According to Mr Gray, when Mr Jones reported the 27 May PPE incident to him by telephone, Mr Jones became very agitated and was very sarcastic. He says that he phoned Mr Jones later that evening and that Mr Jones was aggressive and argumentative with him. Mr Jones said to him that all communications between him and Mr Jones should be in writing, and that he would not answer his phone if Mr Gray called him. Mr Gray also says that he asked Mr Jones for further information about the incident on several occasions, after Mr Jones had completed an HSE Incident Report, but that Mr Jones would not give him the information sought. Email evidence supports this.

The email of 31 May 2016

[19] Mr Jones says that, on 31 May 2016, Mr Green contacted him more than two hours after his shift had finished to tell him what work he wanted Mr Jones to complete the following day. Mr Jones said that this happened frequently, and that he felt that Mr Green did not respect his personal time away from work. He said he could not turn his phone off as he had been told he was not allowed to as he was on call.

[20] In reply to Mr Green's email, the following email was sent to Mr Green:

Hi Aaron,If you see me smiling,it's because I'm thinking of doing something evil or naughty.If you hear me laughing it's because I've already done it.!

[21] Mr Jones denies he sent the email, and says it had been sent by his wife using his phone without his knowledge. He says he had been annoyed about this, and they had a row about it, but that the message was not too bad anyway. He says he had

found the phrase on Facebook, and that a child had posted it. He subsequently showed the Authority a copy of a Minion character showing the same message.

[22] Mrs Jones corroborated Mr Jones' evidence, saying she had sent the email to Mr Green as she was annoyed by him sending her husband work emails when he was at home. She denied that the message was meant to be a threat, and said it was supposed to send a message to Mr Green not to email Mr Jones after work hours.

[23] Mr Green's evidence is that he asked Mr Gray to talk to Mr Jones about the email, and he was told by Mr Gray that Mr Jones said it had been sent as a joke. Mr Green said that his wife had found it threatening. He also said that the email had worried him, and that he had been concerned for his family's safety. He said he stopped taking his children to the beach as a result, as it was an isolated spot and Mr Jones lived nearby.

Further incidents

[24] On 1 June Mr Jones spoke to Mr Gray to ask whether it was appropriate for Mr Green to remain his team leader after the PPE incident that had occurred. Mr Jones says that he began to feel targeted by his colleagues and his supervisors in June 2016, giving the following examples:

a. On 8 June, at an employee's leaving party, Mr Gray said they could not go to the club for a farewell drink because Mr Jones would report them all. Mr Gray denies this.

b. Mr Jones says that he was told by fellow employees that on 12 June Mr Gray instructed some employees to stop phoning Mr Jones unless it was absolutely necessary. Mr Gray said that he did not request employees to stop phoning Mr Jones specifically but did speak to an individual about the volume of telephone calls he made to Mr Jones during work hours.

c. On 13 June Mr Gray sent an email to the staff referring to poor and unsafe workmanship carried out by an electrical contractor. Mr Jones believed that this email was about his son and that it had been sent out of spite. Mr Gray said he sent this email out because he was concerned

about a health and safety issue presented by poor workmanship, although he did not know which contractor had been responsible.

The disciplinary meeting

[25] On 13 June 2016 a letter was sent to Mr Jones by Mr Dawson, requiring Mr Jones to attend a disciplinary investigation meeting to discuss the following allegations:

a. That Mr Jones refused to take instruction from Mr Green and that he would only accept instruction from Mr Gray if it were in writing;

b. That Mr Jones had sent the 31 May email to Mr Green with a threatening message;

c. That Mr Jones reported health and safety concerns directly to WorkSafe New Zealand without first informing or raising them with management or health and safety representatives;

d. That Mr Jones failed to provide information when requested with respect to the two health and safety incidents relating to Mr Green;

e. That Mr Jones had spoken to Mr Gray and other staff in an aggressive and derogatory manner on a number of occasions (examples being given in the letter); and

f. On a number of occasions Mr Jones had failed to carry out the work issued to him in a reasonable and timely manner.

[26] The letter stated that some of these allegations amounted to serious misconduct or misconduct and that the options available to Downer's included dismissal.

[27] A disciplinary investigation meeting took place on 23 June and, at its end, Mr Jones was informed that no further disciplinary action would be pursued. Mr Dawson, the decision maker, explained that this is because there were conflicts of evidence and that he effectively gave Mr Jones the benefit of the doubt.

24 June 2016

[28] A further meeting was scheduled for 24 June to discuss Mr Jones' concerns regarding the roster. Mr Jones was told to submit an alternative roster arrangement for the managers to consider. Mr Jones says in his evidence that he agreed at this point that he would accept and work with whatever roster arrangement was decided on.

[29] The meeting between Mr Jones, Mr Dawson, Mr Gray, and Mr Wilson took place in Invercargill on 24 June 2016. Mr Wilson had drafted a new roster which meant that, on Mr Jones' last rostered day, he would be working alongside Mr McDougall. Mr Jones said he was happy with this because it would allow for a changeover before his two days off. Mr Jones says, however, that Mr Gray did not support the new arrangement and continued to say that the new roster would not work.

[30] Mr Jones says that Mr Gray also brought up the disciplinary concerns that had already been dealt with the previous day. Mr Jones says that he then suggested that Mr McDougall and he could swap rosters for a year and Mr Gray replied "Why would I burden Roger with your roster?"

[31] Mr Jones says that Mr Gray then said that he would support the new roster for six months but, if there were no benefits, he would revert back to the old one. Mr Jones says that, in return for agreeing to change the roster, he had to comply with certain demands. These were:

a. Mr Jones would have to report to the yard every morning and talk to Mr McDougall and Mr Green about sorting out work. Mr Jones said that he would always go to the yard in the mornings anyway, but that Mr McDougall and Mr Green would not always be there.

b. That Mr Jones had to be more responsive to Mr Green and to acknowledge that he was Mr Jones' team leader in Te Anau and to communicate better with him.

c. Mr Jones was required to communicate with Mr Green regardless of whether it was on a normal working day or on his day off as that was part of his contract.

[32] Mr Jones said that he was told that if he did not comply with those stipulations then the roster would revert back to the old roster immediately without consultation.

[33] Mr Gray denied that he had required Mr Jones to communicate with Mr Green outside of his working day, but said that he regarded communication with management as a part of ensuring the rosters worked. Mr Dawson said that he did not believe

that these requirements had been presented as a stipulation or condition of changing the roster, but that the group had agreed after some "robust discussion" that the rosters would change, and be subject to a review.

[34] Mr Jones says that Mr Gray then said that "the bullsh*t had to stop". Mr Jones said he felt at that point that the meeting was getting hostile and suggested they should end it. Mr Jones said that he told Mr Dawson that he should contact Sally Giddens (HR Adviser) as he was "sick of Mr Gray's bullying behaviour". Mr Jones says that Mr Wilson then yelled "You don't take photos of your workmates and dob them in".

[35] Mr Jones says that Mr Dawson asked Mr Gray and Mr Wilson to leave the meeting and that Mr Dawson then apologised for their behaviour. Mr Jones says that there was no resolution of the roster issue after that meeting as Mr Gray and Mr Wilson were "so uncooperative".

[36] According to Mr Dawson, after Mr Gray and Mr Wilson had left the meeting, he spoke with Mr Jones over the following hour and that Mr Jones continued to be very angry and volatile, repeatedly talking about "seeking revenge, never stopping, and taking people down who cross him or his family". Mr Jones denies this, saying they had a calm discussion, but that he was talking about wanting "justice".

[37] Mr Dawson says that he was extremely shaken by the meeting and worried. He says that all of the progress that had been made the previous day seemed to have been undone, largely due to the reactions of Mr Jones and the threatening comments he had made. Mr Dawson then had some text communications with Mr Jones, and Mr Jones indicated that he wanted to work as normal.

[38] According to a long and detailed email sent by Mr Dawson to Ms Giddens on

28 June in relation to the meeting on 24 June, the trigger for Mr Jones getting angry was when Mr Gray said he was "happy to make the change but the 'bullsh*t' stops from this point on". At this point, according to the email, Mr Jones had jumped out of his chair extremely aggressively, saying he was not taking Mr Gray's bullying.

[39] The detailed email sent by Mr Dawson to Ms Giddens corroborates the evidence given by Mr Dawson about the statements made by Mr Jones regarding the seeking of revenge and taking people down.

25 June 2016

[40] According to Mr Jones, on Saturday, 25 June he was at the Te Anau office completing some paperwork when Mr Green told him to pack up his computer and put the trailer on the truck so that he could go down to the sewer ponds and fill the trailer with gravel to repair some roads. A discussion ensued between Mr Jones and Mr Green in which Mr Green told Mr Jones that he was not allowed to use the digger that was available in the yard and Mr Jones argued that the digger should be used when it was available. According to Mr Jones, Mr Green then told him to go and get the weed eater and go tidy up an area of grass, at which point Mr Jones got a call from Mr Gray telling him he was suspended on full pay and to finish work immediately.

[41] Mr Green's version of events is somewhat different. Mr Green says that he arrived in the yard on 25 June to see that Mr Jones was sitting in the smoko room and, when Mr Green asked him why he was still in the yard at 9am, Mr Jones replied he was waiting for the digger to arrive from Invercargill. Mr Green said that he replied that the digger was not needed or justified, that the trailer was already full of gravel, and Mr Jones replied that he was not going to fill the pot holes by hand and that it was "too bad". Mr Green says that he then dropped the subject of the pot holes, and asked Mr Jones to take the weed eater and cut the grass around the ramparts intake.

[42] Mr Green says that, as he was about to leave, as it was his day off, Mr Jones looked at him "with a funny grin" and said three times "Ensure you have a great and safe day". Mr Green said that he was concerned about this due to the email he had received on 31 May saying "If you see me smiling, it's because I'm thinking of doing something evil or naughty. If you hear me laughing it's because I have already done it". Mr Green said that he was feeling increasingly uneasy about Mr Jones' actions, including laughing and smiling (out of context), and generally "acting weird".

[43] Mr Green left and phoned Mr Gray and Mr Dawson and expressed his concerns about the actions of Mr Jones. Mr Gray also filled out an HSE Incident Report. He said he was going to resign because he had had enough from Mr Jones.

[44] Mr Dawson says that he received a call from Mr Jones on 25 June about the disagreement regarding the digger in which Mr Jones stated that Mr Gray and Mr Green were "stressed and not themselves". Mr Dawson says that Mr Jones was talking "in a condescending manner and appeared to think that it was funny".

[45] Mr Dawson then received a call from Mr Green who was "extremely upset and worried for his safety". Mr Dawson spoke to Mr Gray who had also received a call from Mr Green about his concerns.

[46] Mr Dawson said that, being conscious of Mr Jones's comments the previous day regarding revenge and "taking people down", and that Mr Jones was smiling and laughing, which matched a threatening email he had sent Mr Green earlier, he instructed Mr Gray to tell Mr Jones that he should be removed immediately from the workplace on full pay until further notice. Mr Dawson said his priority was to protect and prevent potential harm by Mr Jones. Mr Dawson says that he had not intended

to suspend Mr Jones in a disciplinary sense, but wanted to remove him from the workplace at that point only.

[47] According to Mr Jones, he was dismayed that he had been suspended with no explanation and felt betrayed that Mr Dawson had told him that he could call Mr Dawson if he ever had any further issues, but it was he who had made the decision to suspend him.

[48] Mr Gray says that he contacted Mr Jones on Tuesday 28 June about attending a meeting. The Authority heard a recording of a telephone conversation between Mr Jones and Mr Gray. In the conversation, Mr Gray was seeking to arrange a meeting with Mr Jones (which he termed a "catch up"), which Mr Jones declined. Mr Gray was also trying to understand what Mr Jones was upset about, and to try to work out a way to repair the relationship. Mr Jones indicated that he was upset about the meeting of 24 June, and that it was too late to continue with the relationship. He said on several occasions that the matter was with his solicitor and that they would "sort it out in court".

[49] Mr Jones's evidence is that "the toll that the series of events had taken on [his] health was becoming too much and [he] did not feel like anyone was willing to work towards a resolution". Mr Jones said that he could not believe how much bullying he had faced from the people who were meant to be his managers and that he did not feel

that their attitude towards him was likely to change in the future. He felt that the issues had become more personal and that they were never going to take his concerns seriously.

[50] On 30th June Mr Jones wrote a letter to Ms Giddens in the following terms:

Dear Sally,

I Garry Jones wish to resign from my employment with Downers Invercargill. I understand that I am to give four weeks' notice as per my Individual Employment Agreement. My last day of work will be

28 July 2016.

I am saddened that it has come to this as I love my job. I feel that I have been treated unfairly, bullied and ostracized by people that I truly believed were my friends and by those staff that should be setting a better example.

The negative comments and being yelled at during the meeting on Friday 24 June 2016, was the last straw, I then realised that I am always going to be a target. Whatever I do or say, it going [sic] to be twisted and again I would be facing disciplinary procedures. The suspension on Saturday came as no surprise as mentioned above, I am a target.

I honestly believe that I am being treated this way because "I stood in the gap" and because I had issues with the roster.

I feel that I have had no other choice but to resign from my employment.

Yours faithfully, Garry Jones

[51] The reference in the resignation letter to "standing in the gap" is a reference to the policy within Downers for people to report other employees or contractors if they are seen to be doing something wrong or unsafe.

[52] A personal grievance was raised on behalf of Mr Jones by way of a letter dated

6 July 2016 by a case worker from Southland Community Law Centre. This alleged constructive dismissal and unfair treatment resulting in disadvantage.

The issues

[53] The Authority must determine the following issues:

a. Whether Mr Jones was unjustifiably constructively dismissed by the actions of the respondent;

b. Whether Mr Jones suffered unjustified disadvantage in his employment by the actions of the respondent.

Was Mr Jones unjustifiably constructively dismissed?

[54] In considering this question, it is first necessary to understand the fundamental legal principles relating to the law on constructive dismissal in New Zealand. These were enunciated in the Court of Appeal case of *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*1, which set out three non-exhaustive categories of constructive dismissal:

a. Where the employee is given a choice of resignation or dismissal;

b. Where the employer has followed a course of conduct with a deliberate and common purpose of coercing an employee to resign;

c. Where a breach of duty by the employer leads a worker to resign.

[55] I understand that Ms Thomas submits that the third category applies, and that the respondent's actions taken as a whole are breaches of sufficient seriousness to establish constructive dismissal.

[56] With respect to the third of the three non-exhaustive categories of constructive dismissal referred to above, the Court of Appeal elaborated on that category in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc2*. The Court of Appeal stated at [172]:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

1 [1985] 2 NZLR 372 (CA) at 374-375

2 [1994] NZCA 250; [1994] 2 NZLR 415 (CA)

[57] There are a number of duties of an employer that are potentially relevant in this field. One common duty, as affirmed by the Court of Appeal in *Auckland Electric Power Board*, is that "employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage a relationship of confidence and trust between employer and employee".

[58] Mr Jones said in his evidence that he resigned because of the cumulative effect of the respondent's actions. It is not clear whether the catalyst for the resignation (the last straw as he put it) was the suspension on 25 June 2016, or the comments made by Mr Gray and Mr Wilson on 24 June. The resignation letter says that "the negative comments and being yelled at during the meeting on Friday 24 June 2016 was the last straw". However, Mr Jones had asked to see Ms Giddens after those comments were made, and had presented himself to work the following day. He had also stated in a text to Mr Dawson that he wanted to work as normal. It seems, therefore, that the resignation letter may not accurately reflect what was in Mr Jones' mind. I assume it was drafted on his behalf by his legal representative of the time.

[59] It is more likely that the catalyst for the resignation was the argument with

Mr Green about the potholes, and the suspension.

[60] According to Ms Thomas' submissions, the actions relied upon by Mr Jones are as follows:

a. The respondent failed to be communicative regarding the roster;

b. The return to work meeting was unfair, raised performance and misconduct issues and was conducted in a way that caused further stress to Mr Jones;

c. Mr Jones was censured and targeted after adhering to the company's

Zero Harm policy;

d. The respondent unfairly targeted the business of Mr Jones' son;

e. Mr Jones was intimidated and targeted in the roster meeting, that was in effect a meeting raising performance issues; and

f. Mr Jones was unjustifiably suspended in a procedurally defective manner.

[61] Before addressing each alleged action individually, I shall comment on credibility generally. Mr Jones denied all of the many and varied allegations of aggressive behaviour cited by the respondent's three witnesses, and he denied he sent the email to Mr Green on 31 May.

[62] On balance, I find that it is not credible that each of the respondent's witnesses have systematically made up, over a period of time, a number of separate allegations regarding Mr Jones' conduct. Whilst I accept that there were some inconsistencies in Mr Gray's evidence, (but not all the ones that Ms Thomas alludes to in her submissions) the evidence of the respondent's other witnesses (Mr Dawson and Mr Green) was consistent, coherent and credible.

[63] On the other hand, some material aspects of Mr Jones' evidence were not

credible. I especially find that it is not credible that Mrs Jones sent the email of 31

May 2016 to Mr Green without Mr Jones' consent, as both Mr and Mrs Jones stated in evidence. Mrs Jones' evidence on this in particular was flustered and illogical. Furthermore, there were clear similarities of idiosyncratic punctuation between that email and other emails that Mr Jones admitted sending, which neither could explain.

The respondent failed to be communicative regarding the roster

[64] There is a conflict of evidence between Mr Gray and Mr Jones about whether Mr Gray had discussed the roster issue with Mr Jones and his colleague after Christmas 2015. I accept that such discussion did take place. There was also a discussion about rosters at a toolbox meeting in February 2016 which Mr Jones did not attend (but in respect of which he should have received minutes, although he denied this). Mr Gray also said that Mr Jones was aggressive to him when he tried to explain why the meeting on 8 April 2016 could not go ahead, and I infer that this was part of the reason Mr Gray then went ahead and sent an email later that day stating that the rosters would not be changed.

[65] In the circumstances it was not the action of a fair and reasonable employer to have sent the email that Mr Gray did at that point. A better approach would have been to have convened a disciplinary investigation into Mr Jones' aggressive conduct (which I accept occurred) and to have reconvened the meeting about the rosters once Mr Wilson was available again.

[66] However, it was clearly the case that there was disagreement between Mr Jones and his colleague about the rosters, and the respondent could not simply change the rosters at Mr Jones' request. It owed a duty to both workers. Furthermore, and importantly, Mr Gray had added to the bottom of his email "I am always available to discuss in an adult manner all and future aspects of this decision". This demonstrated that Mr Gray's decision was not final, and Mr Jones could have taken the opportunity to seek to engage with Mr Gray about his decision.

[67] For these reasons, I do not accept that the action of sending the email was sufficient on its own to constitute a repudiatory breach of contract.

[68] Mr Jones was then away from work on sick leave for around 36 days. On 18

May 2016, the return to work meeting occurred and on 24 June, just over 5 weeks later, the meeting about rosters occurred. Although the meeting did not end well, there was a genuine attempt by the respondent during this meeting to come to an agreement about rosters. Indeed, Mr Jones' requested roster was agreed to.

[69] I do not believe that the respondent unreasonably failed to be communicative with Mr Jones about rosters. There were at least five occasions when rosters were either discussed or there had been an intention to discuss them (after Christmas 2015, at the toolbox meeting, on 8 April, on 18 May and on 24 June). The respondent could not just go ahead and change the roster to suit Mr Jones as his co-worker did not want it to change. Also, Mr Jones was away from work for over a month (and refused to communicate with management during this time) and he displayed aggression towards management and his co-worker on 8 April, making communication difficult.

[70] All in all, therefore, I do not accept that the respondent failed unreasonably to communicate about the roster situation with Mr Jones.

The return to work meeting on 18 May 2016 was unfair, raised performance and misconduct issues and was conducted in a way that caused further stress to Mr Jones

[71] First, I accept that it was reasonable for the respondent to wish to be certain that Mr Jones was fit to return to work after his 36 day absence on sick leave due to stress. I understand that he frequently worked alone, sometimes in remote locations. He had also displayed aggressive behaviour immediately before he had gone on sick leave, and had refused to communicate with management during his sick leave.

[72] I do not agree with Ms Thomas' submission that the respondent could not assess whether Mr Jones was "compos mentis", as Mr Gray put it in evidence. The respondent wanted to be sure that Mr Jones could put his previously displayed disgruntlement behind him and, I infer, was content to take at face value his word that he was. That was not a formal clinical assessment of his mental health, but an assessment of his state of mind.

[73] I also do not agree that the return to work meeting was in the nature of a performance review or misconduct investigation meeting. The meeting necessarily had to discuss Mr Jones not communicating with management during his sick leave, as the respondent needed to explore why he had felt stressed. The fact that the respondent had heard second hand from other employees about Mr Jones' issues made it even more important to establish Mr Jones' concerns from him personally.

[74] Mr Dawson's letter to Mr Jones following the meeting set out the steps that the respondent was putting into place to assist Mr Jones' return to work and to mitigate risks. I heard nothing in evidence that suggested that these steps were not genuinely intended, or unreasonable. In addition, there is nothing in the letter that imposes a sanction upon Mr Jones.

[75] In short, I cannot see how the respondent could reasonably have conducted the back to work meeting in all the circumstances without referring to Mr Jones' lack of communication during the sick leave as that provided the context for exploring his stress. Therefore, I do not believe that the respondent acted unreasonably in this meeting.

Mr Jones was censured and targeted after adhering to the company's Zero Harm

policy

[76] It is not clear from Ms Thomas' submissions exactly which actions Mr Jones says constitute him being censured and targeted. I infer that one was the alleged comment by Mr Gray that staff could not go to the club for a drink because Mr Jones would report them. Mr Gray denied saying this, and Mr Jones did not hear the alleged comment himself. Nor did he call a witness who had heard Mr Gray say this. Therefore, in the absence of any corroborative evidence, I prefer the direct testimony of Mr Gray.

[77] Another possible alleged action falling under this heading is that Mr Gray told staff to stop phoning Mr Jones. Mr Gray says he told one employee not to call Mr Jones because too many calls were being made. Again, Mr Jones did not hear this instruction personally, and did not call anyone to give direct evidence. Therefore, I again prefer Mr Gray's evidence. His explanation does not show that Mr Jones was targeted personally.

[78] A third action that falls under this heading presumably is that Mr Jones was called to a disciplinary investigation meeting to answer a number of allegations, one of which was that he had reported a breach of health and safety directly to WorkSafe NZ without raising it with the respondent first.

[79] I agree with Ms Thomas that this does not, on its face, appear to be an appropriate matter to treat as a potential disciplinary issue. However, the outcome of the meeting was that there would be no disciplinary action in respect of any of the allegations. Therefore, Mr Jones was not censured in respect of that matter.

[80] A final act that possibly falls under this heading is the alleged comment made by Mr Wilson during the meeting of 24 June 2016 that "You don't take photos of your workmates and dob them in". This was a reference to the photograph of Mr Green that Mr Jones admitted placing on the notice board on several occasions.

[81] Mr Dawson's report of Mr Wilson's words in his email to Ms Giddens four days after the meeting was different, in that he said Mr Dawson stated "we all need to communicate and things like taking photos of other employees and putting them on noticeboards needed to stop as [it] was not a team culture".

[82] It is unarguable that Mr Jones' version of Mr Wilson's comment was not appropriate, and was capable of being taken as a criticism of Mr Jones raising a health and safety concern. Mr Dawson's version, however, appears to be more focussed on the placing of the photograph on the noticeboard, which could be seen as an attempt by Mr Jones to humiliate Mr Green. Mr Wilson's comment as characterised by Mr Dawson would be more justifiable. Mr Wilson did not present any evidence to the Authority.

[83] On balance, I believe that it is more likely that Mr Dawson's version of what

Mr Wilson said is accurate, as he recorded a very detailed note of events in his email

to Ms Giddens just four days later. This note, by the way, accords with Mr Jones'

account of what Mr Gray said.

[84] I find, therefore, that the comment by Mr Wilson was directed at Mr Jones' repeated posting of the photograph on the noticeboard, rather than him raising a legitimate health and safety concern. I cannot, therefore, find that this supports the contention that Mr Jones was censured and targeted for doing so.

The respondent unfairly targeted the business of Mr Jones' son

[85] Again, there is a conflict of evidence about this. Mr Gray admitted that he had instructed an operator to speak to him before using Jones Electrical because he was concerned that Mr Jones junior had been effectively spreading dissent amongst the workforce on his father's behalf. Mr Jones' asserts that his son's business had been "black listed" to punish him.

[86] First, Mr Jones' assertion was speculation, whereas Mr Gray's evidence was direct testimony. Second, and more importantly, I do not accept that the respondent owed any duty towards Mr Jones to use his son as a sub-contractor. Any duty in that respect would be owed to Jones Electrical pursuant to the contractual terms between that entity and the respondent. Whilst the respondent would have been in breach of its duty of good faith towards Mr Jones if it had targeted Mr Jones because of dissatisfaction with Jones Electrical, I am not convinced that any duty exists in the other direction.

[87] I have no doubt that Mr Jones felt very angry when he formed the belief that the respondent had chosen to stop using his son's business. However, even if it had, the respondent was under no obligation to Mr Jones to continue to engage Jones Electrical. This issue certainly does not assist Mr Jones in founding a constructive dismissal claim.

Mr Jones was intimidated and targeted in the roster meeting, that was in effect a meeting raising performance issues

[88] I have already considered part of this allegation in addressing Mr Wilson's comment. The other elements are that the respondent imposed conditions on Mr Jones for agreeing to change the roster, and Mr Gray's comment that "the bullsh*t stops from this point on".

[89] I do not find that the respondent imposed unreasonable conditions upon Mr Jones in return for agreeing to change the roster. My finding is that it was anxious, on reasonable grounds, to ensure that there was effective communication between staff for operational reasons during overlapping days, but that Mr Jones took umbrage at mention of this. Mr Jones believed that he was being unfairly targeted, but I accept Mr Dawson's evidence that he was not. I also find that the issue of communication was directly relevant to the discussion about the rosters that staff worked.

[90] Furthermore, I infer that the bullsh*t comment from Mr Gray arose out of frustration at Mr Jones pushing back on being asked to ensure there was communication. It was not a helpful comment, and it caused Mr Jones to lose his temper. A more measured way of expressing his frustration would have been less inflammatory. However, I do not believe that this comment was enough, on its own, to justify Mr Jones resigning, as it does not amount to a repudiatory breach of Mr Jones' contract. In any event, as I have found above, I do not believe that Mr Jones had formed an intention to resign at this point.

Mr Jones was unjustifiably suspended in a procedurally defective manner

[91] I accept that there does not appear to have been any discussion with Mr Jones before he was suspended, or stood down, as Mr Gray characterised it.

[92] As Ms Thomas concedes in her submissions, "there is no immutable rule requiring that an employee must be told of the employer's proposal to suspend...".3

Ms Thomas asserts that the Court in *Graham* stated that the test is whether there is "imminent danger to the employee or others and an inability to perform safety- sensitive work". However, it is necessary to read this extract in the context of the overall passage, which is:

Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from *Tawhiwhirangi* set out at para 90 of this judgment confirms the case by case, flexible and

3 *Graham v Airways Corporation of New Zealand Ltd* [2005] NZEmpC 70; [2005] ERNZ 587.

sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.

[93] Therefore, the particular circumstances will dictate what is reasonable. In this case, Mr Dawson said that Mr Green had been so upset at Mr Jones' conduct towards him that he was crying and tried to resign on the spot. His upset was triggered by Mr Jones' behaviour towards him on 25 June against the background of the earlier email sent on 31 May.

[94] I find, by the way, that the email of 31 May was plainly capable of being construed as a threat. It was sent without any context and was not obviously a joke. I find that it was completely reasonable for Mr Green to have felt fearful when he had the encounter with Mr Jones on 25 June, after he had received the email of 31 May.

[95] Consequently, once Mr Green had conveyed to Mr Dawson and Mr Gray his concerns on 25 June, it was entirely reasonable for Mr Dawson to have removed Mr Jones from the workplace immediately, without consultation, given the conduct complained of, the email of 31 May and the references to "revenge" and "taking people down" that Mr Jones had made the day before.

[96] Mr Jones said at that point that he had no-one else to turn to and did not know why he had been suspended. However, I strongly suspect he knew full well why he had been suspended; namely, his intimidating and/or provocative conduct towards Mr Green.

[97] When Mr Jones was suspended, he was not told how long the suspension was to last. This was a procedural defect, and the respondent should have communicated with Mr Jones as soon as practicable to let him know for how long he was to be suspended, the reasons and the circumstances under which he was to return. However, Mr Gray called Mr Jones on Tuesday 28 June to discuss his situation and find out why Mr Jones was so unhappy. Mr Jones essentially refused to engage on any substantive level, saying it was too late, and ended up hanging up on Mr Gray. I am satisfied that Mr Gray tried on several occasions to engage with Mr Jones on

28 June.

[98] If Mr Jones had resigned prior to Mr Gray calling him, there may have been a case for saying that an immediate suspension without any further word from the respondent amounted to a repudiatory breach of contract by the respondent, entitling Mr Jones to resign. However, Mr Jones did not resign until after the contact that had been made. He cannot, therefore, rely upon a lack of communication by the respondent.

Determination

[99] I have found that there were three actions by the respondent which were not fair and reasonable. The first was the email sent by Mr Gray dated 8 April 2016 regarding his decision not to change the rosters. The second was Mr Gray saying "the bullsh*t stops from this point on". The third was the suspension of Mr Jones without explaining to him how long he was to be suspended for and how he was to return. Other actions complained of by Mr Jones were not unreasonable actions by the respondent in my view.

[100] Were these three actions enough for the respondent to reasonably foresee that Mr Jones would resign? I do not accept that any of the three were separately sufficiently serious as to make it reasonably foreseeable that Mr Jones would resign. Can they cumulatively amount to a breach sufficient to entitle Mr Jones as having been constructively dismissed?

[101] On standing back, taking into account all the evidence, I conclude that Mr Jones was angry at a number of issues that were occurring in the workplace. This started with dissatisfaction with his roster, and developed into a belief that he felt that he and his son had been targeted by Mr Gray. He was also angry at Mr Green, although it is not clear why this is.

[102] Unfortunately, Mr Jones was venting his frustrations in the workplace in an aggressive manner towards his co-worker, Mr Gray and Mr Green. This aggression was both overt (swearing at his co-worker and at Mr Gray) and more nuanced (sending the email of 31 May to Mr Green and acting provocatively towards him on

25 June). He was also un-cooperative when asked to provide information about the health and safety issues he had complained of. This conduct led to a disciplinary investigation being undertaken, although no disciplinary action was taken.

[103] By the time of the meeting on 24 June, Mr Jones was very sensitive to what he saw as unfair targeting, and Mr Gray was sensitive to what he saw as Mr Jones' poor attitude. Whilst Mr Dawson maintained a level headed approach during that meeting, the combined frustration and mutual distrust between Mr Jones and Mr Gray led, almost inevitably, to the clash referred to above. However, Mr Dawson dealt with it quickly, and attempted to calm Mr Jones down after Mr Gray and Mr Wilson had left the room. Mr Jones asked that Ms Giddens become involved, and it is clear that Mr Dawson acceded to that request.

[104] The actions of Mr Dawson the following day in suspending Mr Jones were justified, as I have already examined, in light of Mr Jones' provocative conduct towards Mr Green. Mr Jones was then uncommunicative when Mr Gray called him on 28 June.

[105] This unfolding of events does not, in my view, amount to repudiatory acts by the respondent, cumulatively or otherwise. Indeed, Mr Dawson and Mr Gray both tried to engage with Mr Jones on 24 and 28 June in good faith.

Did Mr Jones suffer unjustified disadvantage in his employment by the actions of the respondent?

[106] Section 103(1)(b) of the Act provides that:

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

...

c. that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[107] Section 103A of the Act provides:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could

have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations

against the employee before dismissing or taking action against the

employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the

employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing

or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the

employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[108] As I have already found, there were three actions by the respondent which were not fair and reasonable. The first was the email sent by Mr Gray dated 8 April

2016 regarding his decision not to change the rosters. The second was Mr Gray saying “the bullsh*t stops from this point on” at the roster meeting. The third was the suspension of Mr Jones without explaining to him how long he was to be suspended for and how he was to return. A personal grievance was raised on behalf of Mr Jones on 6 July 2016. In this, reference was made, inter alia, to Mr Gray’s email of 8 April, Mr Gray’s conduct during the roster meeting and Mr Jones’ suspension.

[109] Mr Gray’s email of 8 April was sent without attempting to rearrange the meeting which Mr Wilson was unable to attend. Whilst Mr Gray did leave the door open for further discussion, his principal message was that there would be no change to the roster. Mr Jones had asked for the roster to be changed and had been told that a meeting would occur to discuss his request. When this did not happen, he suffered a disadvantage in his employment, as he was deprived of the chance to discuss his request, having been led to believe that he would be able to.

[110] I find that this disadvantage was unjustified as no fair and reasonable employer could have failed to have rearranged the roster meeting in all the circumstances. Mr Jones’ evidence is that he was upset by this decision, and it led to him taking 36 days sick leave.

[111] Mr Gray’s outburst at the roster meeting also caused Mr Jones a disadvantage as Mr Jones was entitled to expect a manager to speak to him in a measured way, rather than angrily, characterising his conduct as “bullsh*t”. Although Mr Gray was evidently frustrated, his conduct was not justified, given his position. I find that no fair and reasonable employer could have conducted itself, through its manager, in the way that Mr Gray did in all the circumstances. Mr Jones was also upset by this conduct.

[112] Finally, being suspended without being told how long the suspension was to last, or what was to happen next, was a disadvantage to Mr Jones, for obvious reasons. Suspending an employee without making this information known is not what a fair and reasonable employer could do in all the circumstances. Mr Jones said he was “dismayed” by being suspended with no explanation at all.

Conclusion

[113] It is my conclusion that Mr Jones resigned before any repudiatory action had occurred. Furthermore, the actions taken by the respondent were for the most part entirely reasonable. Mr Jones was not, therefore, unjustifiably constructively dismissed.

[114] However, he has suffered three instances of unjustified disadvantage in his employment.

Remedies

[115] Mr Jones is not entitled to recover any lost wages, as he did not lose any as a result of the instances of disadvantage, but he

is eligible to be considered for an award under s 123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to his feelings.

[116] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[117] In respect of Mr Gray's email of 8 April, although Mr Jones immediately took

36 days' sick leave, it is not clear that this was entirely as a result of the contents of the email. I infer that Mr Jones was also stressed because of the roster itself, which is a separate issue. I believe that an award of $7,500 is appropriate.

[118] Although Mr Jones' outburst to Mr Gray seems to have partly prompted Mr Gray to send the email declining to change the roster, and that outburst was blameworthy, I do not consider it just to reduce the award because Mr Gray should not have let that outburst influence him in refusing to change the roster.

[119] In relation to the "bullsh*t" comment at the roster meeting, whilst it triggered an objection from Mr Jones, other features of the meeting which I have found were not unreasonable also angered him. It is not possible to separate out the effects of these different actions, but I do recognise that Mr Gray's comment was a catalyst for Mr Jones' anger. I shall assess the award for this at $2,500. I do not reduce this sum as it is not clear that Mr Jones' conduct in the meeting contributed directly to Mr Gray's outburst.

[120] In regard to the suspension, Mr Jones said he felt dismayed and "quite alone". It was approximately two and a half days before he was contacted by Mr Gray. His feelings were therefore short lived. They did, however, appear to cement his decision to resign. I believe that an award of $5,000 is appropriate in respect of this disadvantage.

[121] I am satisfied that Mr Jones directly contributed to his suspension by his actions towards Mr Green. I reduce the award by $1,000 in recognition of this.

Orders

[122] I order the respondent to pay to Mr Jones within 14 days of the date of this determination the sum of $14,000 pursuant to s 123(1)(c)(i) of the Act.

Costs

[123] I reserve costs. I direct the parties to seek to agree how costs are to be dealt with. However, if they are unable to do so within 14 days of the date of this determination, then the respondent may serve and lodge a memorandum within a

further 14 days, and Mr Jones may serve and lodge a response within a further 14 days.

David Appleton

Member of the Employment Relations Authority
