

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 435/09  
5163169

BETWEEN                      SARAH LLOYD  
   Applicant  
  
AND                                NEW ZEALAND FIRE  
   SERVICE COMMISSION  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Gary Pollak, Counsel for Applicant  
   Peter Churchman, Counsel for Respondent  
  
Investigation Meeting:        21 September 2009 at Auckland  
  
Determination:                7 December 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Ms Lloyd) complains that the respondent employer (the Commission) has failed to comply with a mediated settlement that the parties reached between them on 20 April 2007.

[2]     Ms Lloyd was a qualified and operational firefighter based at the Whangarei Station. During the course of that employment, Ms Lloyd raised employment issues which were resolved in the mediated settlement I have just referred to. The terms of that settlement deal essentially with a resolution of the employment relationship problems between the Commission and Ms Lloyd and, with immediate effect, granted Ms Lloyd 12 months' leave without pay. However, and critically, the record of settlement proceeds on the footing that at the end of that time, Ms Lloyd wished to return to duty as a serving firefighter but in another district, and the agreement specifically provides in that regard as follows:

*The New Zealand Fire Service agrees to this provided that there is a position available and Sarah [Ms Lloyd] is judged by the Fire Service to be fully fit to return to work.*

[3] The nub of Ms Lloyd's grievance is that, at the end of her period of leave without pay, the Commission obstructed her return to duty.

[4] It is clear from Ms Lloyd's own evidence that she made a number of attempts to apply for positions in the Commission's service and was directed to the Commission's human resources director who, in pursuit of a medical assessment of Ms Lloyd's fitness to act as a firefighter, sought to get Ms Lloyd assessed. That assessment, according to the Commission, was not an assessment done in the abstract and for form's sake alone, but rather was done in the context of the Commission having genuine concerns about Ms Lloyd's fitness to act as a professional firefighter.

[5] In particular, the Commission's human resources director (Ms Richards) had herself experienced some unusual behaviours from Ms Lloyd and had also been advised of unusual behaviour from Ms Lloyd by other Commission staff members.

[6] An appointment was made for Ms Lloyd to see Dr Peter Dean, a forensic psychiatrist based in Hamilton. By letter dated 21 August 2008, Ms Richards instructed Dr Dean on behalf of the Commission. Amongst other things, Ms Richards sets out in that letter the behaviours which Commission staff members had observed from Ms Lloyd, and which gave the Commission concern. Ms Lloyd objected to those remarks in Ms Richards' letter, indicating that she felt they biased Dr Dean against her.

[7] In the result, Dr Dean issued his report dated 9 October 2008 which concluded that he was unable to make any diagnostic statement because Ms Lloyd had refused to engage with him. Dr Dean referred to Ms Lloyd's odd behaviour at the interview in his rooms and prior to that in his reception area. Based on that report, the Commission reached a provisional conclusion that Ms Lloyd was not fit to return to operational duty as a firefighter and it wrote to her by letter dated 23 October 2008 setting out that provisional conclusion. There was a subsequent meeting between Ms Lloyd and Ms Richards at which Ms Richards heard Ms Lloyd's response to the provisional conclusion and the parties still being some way apart, the Commission decided to exercise its options and terminate Ms Lloyd's employment.

[8] A formal detailed personal grievance was raised on Ms Lloyd's behalf by letter dated 16 February 2009.

### **Issues**

[9] It will be helpful to analyse the issues in the present case under the following headings:

- (a) What is the appropriate test to apply?
- (b) What aspects of the Commission's behaviour are contested?
- (c) Has the employer met the test?

### **What is the appropriate test to apply?**

[10] The test to apply is the test set out in s.103A of the Employment Relations Act 2000. The issue is about the justification for the Commission's decision and while it is clear that the fundamental objection Ms Lloyd has is about an alleged breach of a mediated settlement agreement and not, for instance, an alleged unjustified dismissal, the test for justification remains the same.

[11] It is appropriate to comment at this point that the test requires the Authority to consider whether the action complained of is what a fair and reasonable employer would do in the particular circumstances of the time and after the completion of appropriate inquiries: see for instance *Air New Zealand Ltd v. Hudson* [2006] 1 ERNZ at 415.

[12] Moreover, it is not for the Authority to put itself in the place of the employer by purporting to substitute its opinion for that of an employer. Nor is it appropriate for the Authority, in considering an employer's behaviour, to impose a standard which is unrealistically high. There are numerous decisions of the Employment Court which confirm such a principle. The decision-making process required of an employer then is not a council of perfection.

### **What aspects of the Commission's behaviour are contested?**

[13] Ms Lloyd focuses on her contention that the Commission effectively obstructed her return to work after a period of leave without pay, in breach of the relevant provision in the mediated settlement agreement. While that is the essential

claim made in the statement of problem (and never resiled from), Ms Lloyd wishes to somewhat extend the ambit of her complaint by alleging bad faith and/or unfair and unreasonable treatment by the Commission and by contending that she has been disadvantaged by unjustifiable actions of the Commission and thus has a personal grievance.

[14] Notwithstanding those glosses to the nexus of her claim, the focus of the investigation meeting, in terms of the evidence Ms Lloyd brought before the Authority, was on the alleged breach of the mediated settlement and the supposed consequences of that alleged breach.

[15] The only issue in the record of settlement about which there is any dispute is the following sentence from clause 4:

*The New Zealand Fire Service agrees to this [Ms Lloyd's return to work in principle] provided there is a position available and Sarah [Ms Lloyd] is judged by the Fire Service to be fully fit to return to work.*

[16] It follows that there are two conditions precedent to Ms Lloyd returning to duty as an active firefighter. The first is that there is a substantive position available for her to fulfil and which she is ready, willing and able to fulfil, and the second is that she is *fully fit* to return to work as that fitness is *judged by the Fire Service*.

[17] It is for the Commission to determine whether Ms Lloyd is *fully fit* or not to return to active duty. That determination must be made by the Commission, I hold, on reasonable grounds and having regard to all the circumstances of the case and all the evidence properly available to it.

[18] The Commission formed the view that Ms Lloyd was not *fully fit* and therefore declined to allow her to return to duty and thus it is the Commission's contention that there has, in truth, been no breach of the settlement agreement at all.

[19] It is common ground that Ms Lloyd is physically fit. For her part, she maintains that that is all that is necessary. She told me in evidence (and I accept) that she had kept herself physically fit while she was on leave without pay and she invited me to conclude, in consequence, that she ought to have been allowed to return to duty and in failing to allow her to return to duty, the Commission breached its legal obligations to her.

[20] For its part, the Commission, while agreeing that Ms Lloyd was physically fit, maintains that her mental and emotional state was such as to preclude a finding that she was *fully fit*. In particular, my attention was drawn to the requirement that firefighters work in a team situation and frequently work in dangerous and stressful environments where good interpersonal skills and collaborative relationship structures, were important for emotional, physical and psychological wellbeing of all firefighters in a particular team. The evidence before the Authority strongly supported the contention that judgement of individual firefighters was a critical determinant, as was the ability of one firefighter to rely on his or her colleagues in dangerous or stressful situations. The Commission quite properly emphasised its obligations to provide a workplace that was as safe as an inherently dangerous workplace could be and that to achieve that obligation, it had to insist on the highest standard of emotional and psychological health and balance in each and every one of its operational staff.

[21] A number of issues arose in respect of Ms Lloyd's fitness to return to her obligations as a practising firefighter. Those issues began almost immediately that the settlement agreement was signed. The Commission gave evidence (and Ms Lloyd accepted in questioning from me) that the day after the settlement agreement was signed, she attended at the office of the Mediation Service and attempted to tear up the agreement. Then, about a third of the way into her period of leave without pay, she wrote to her region commander at Whangarei and indicated to him that she did not agree with the record of settlement.

[22] I accept the Commission's view that both of these behaviours were odd. I am also clear that Ms Lloyd cannot be heard to argue, as she does, albeit faintly, that she did not feel bound by the settlement agreement. Such a claim made by implication some two years after the document was signed, and when it is clear that the document was signed with the assistance of very able advocacy provided to her, is simply fanciful.

[23] In Ms Richards' brief of evidence filed for the Commission, she details her involvement with Ms Lloyd. That involvement commenced prior to the mediated agreement between the parties and I accept Ms Lloyd's view that it is not proper for me to consider matters called into evidence prior to the mediation. The mediation was expressed to be in full and final settlement of issues between the parties at that time,

and I think it proper to hold that matters which the Commission seeks to call in aid prior to the mediated settlement ought not properly to be considered by the Authority in this determination.

[24] However, Ms Richards details her own association with Ms Lloyd and those contacts did nothing to re-establish in Ms Richards' view that Ms Lloyd was in a fit and proper state to return to active duty as a firefighter. Ms Richards told me that the only way that she became aware that Ms Lloyd wished to return to active duty was because she began receiving requests from various district commanders who had had applications for employment from Ms Lloyd. Ms Richards had no contact address for Ms Lloyd and so was quite unable to engage with her until on one of the applications for work that Ms Richards received from a district commander, there was a cellphone number belonging to Ms Lloyd and Ms Richards was able to access Ms Lloyd through that.

[25] As a consequence of that initial contact, Ms Richards was able to write to Ms Lloyd by letter dated 14 May 2008. In that letter, Ms Richards referred to the settlement agreement and the relevant terms of it, noted that Ms Lloyd had wanted to work in Wellington, noted that there were no vacancies in Wellington and noted that in the Commission's view, Ms Lloyd was not yet fit to return to work but that a specialist consultation could be arranged to re-assess that issue of fitness. There was then an exchange between the two women about whether the medical assessment could be done before a suitable vacancy was identified and it was eventually agreed that was the sensible course of action.

[26] Ms Richards' evidence is that, from about this point on, she started to get *unusual* calls from Ms Lloyd wherein Ms Lloyd would ask one question, get that answered, and then go silent for a period whereupon Ms Richards would have to insist that she was going to hang up. Ms Richards' evidence is that this pattern was repeated on many occasions, and was also experienced by a co-worker in the human resources directorate. I accept that evidence as truthful.

[27] It was also at about this time that Ms Richards' evidence is that she started to get *reports about unusual behaviour (from Ms Lloyd) at the motel in Rotorua where the New Zealand Fire Service Trainers stayed ... the Regal Palms Motor Lodge*. Contemporaneously with that, Ms Richards got a report from the Rotorua Brigade about Ms Lloyd's involvement in a fire call-out.

[28] The evidence of Ms Lloyd being involved in a fire call-out was made available to the Authority. In essence, the Rotorua Brigade were called to a small fire alongside a garage and on attending, discovered Ms Lloyd there in the process of putting the fire out. It transpired that Ms Lloyd lived in an adjoining property and her evidence before the Authority was that she had seen the fire, dealt with it herself, reassured a passer-by and was not in any need of assistance from the Rotorua Brigade. Nonetheless, the Rotorua Brigade filed a report on the issue and by email dated 22 July 2008, the Acting Chief Fire Officer of the Rotorua/Taupo Brigade makes it clear that in his judgment Ms Lloyd was lighting fires herself and then putting them out. If this is true, this would be a very odd behaviour set for an operational fire fighter and would justifiably cause the Commission concern. Ms Lloyd's objection to the reference to this particular matter is that she says she was never confronted with it and never asked to comment on it. She says her involvement was innocent. She denies creating the fire or fires herself. She says only that she put out a fire started by her neighbour.

[29] The significance of the reliance that the Commission places on this incident and on a group of other incidents I will refer to next, will be seen shortly.

[30] The other group of incidents that the Commission was particularly concerned about was the alleged behaviour of Ms Lloyd in and around the Regal Palms Motor Lodge in Rotorua. One of the Commission's principal training facilities is in Rotorua and the Commission trains its fire fighters at that facility using senior fire fighters seconded from around the country. When those senior fire fighters travel to Rotorua they stay at this particular motel complex.

[31] Ms Richards became aware that Ms Lloyd had stayed at the same complex for a period that seemed to span about two months. The reason that that length of time can be reasonably accurately estimated is that the senior fire fighters who gave evidence before the Authority were able to confirm when they were in residence at the same motel complex and of course for what length of time. Station Officer Hoogenraad for example delivered training for two courses, the first of four weeks duration beginning in March 2008 and the second of three and a half weeks duration which commenced ten days after the first course finished. In that ten day break, Station Officer Hoogenraad returned to his duties in Timaru. His evidence is quite clear that Ms Lloyd was already there when he arrived on the first occasion and that

she remained there throughout his stay. Station Officer Hoogenraad catalogued Ms Lloyd's behaviour for me as did a number of other senior fire fighters who gave evidence at the investigation meeting. I am satisfied that Station officer Hoogenraad's evidence is representative of the evidence of the other senior fire fighters. Mr Hoogenraad said that he and his fire fighter colleagues felt they were being *stalked* by Ms Lloyd and that as their stay at the accommodation went on, her behaviour became *more bizarre*. Instances described included Ms Lloyd peering in to the windows of the senior fire fighters accommodation, taking her top off in public and the pool area so that she could sun bathe, appearing to spend large amounts of time simply keeping an eye on the senior fire fighters rather than getting on with her own life and sitting in her car outside the training centre itself, peering in.

[32] Ms Lloyd's evidence is that while she accepts that she did stay at the motel complex, she denies that her stay there had any particular significance. It was just a place to stay, she maintained. More importantly, Ms Lloyd denied absolutely that she behaved in a strange and bizarre fashion, denied stalking the senior fire fighters, denied spying on them and looking in their rooms and denied deliberately making herself visible to the fire fighters when they were about.

[33] Faced with this flat denial, I heard a parade of senior fire officers at my investigation meeting all of whom had been present in various capacities at Rotorua and stayed at the same motel and all of whom had the same of similar experiences with Ms Lloyd. It would be difficult for any reasonable person to conclude that Ms Lloyd was there by accident and that her behaviour was anything other than most unusual.

[34] However, the real issue for Ms Lloyd was that these two matters, the allegation about her involvement in fire setting and the group of allegations about her odd behaviour at the Rotorua motel, were both referred to by Ms Richards in the letter of instructions sent to Dr Peter Dean the Forensic Psychiatrist. Ms Lloyd protests that those observations are *disparaging* of her and therefore in breach of clause 6 of the Record of Settlement in the mediation which precluded either party from making disparaging comments about the other. In the same context, Ms Lloyd protested that she was never given an opportunity to respond to those allegations and that she saw them for the first time in the copy of the letter that was sent to her after it had been provided to Dr Dean. The Commission acknowledges that Ms Lloyd was not given as

early an opportunity to comment on the allegations as the Commission would have liked and that was because the Commission had no ability to direct Ms Lloyd, while she was on leave without pay. The Commission maintained that Ms Lloyd did in fact comment on the issues to Ms Richards just as soon as she saw the letter Ms Richards had written to Dr Dean. Moreover, the Commission's expectation was that, had she objected to the matters complained of in Ms Richards' letter, Ms Lloyd would have taken those matters up with Dr Dean and provided a vigorous defence of her position. The Commission also contended that those matters were not reported as opinion or findings of fact as such but were simply matters that had been reported to the Commission by its other staff. Furthermore, Ms Richards' evidence is that there was a lengthy gap from the point at which the offending letter dated 21 August 2008 was made available to Ms Lloyd and the eventual appointment with Dr Dean which did not take place until 3 October 2008. Ms Richards' evidence is that during that period she had an extended number of these peculiar telephone calls with Ms Lloyd in which the subject matter in her 21 August 2008 letter was well and truly canvassed. She points out that given Ms Lloyd was on leave without pay and not therefore under the direction of the Commission, it was not available to her to call Ms Lloyd to a meeting or to even reasonably suggest that a meeting take place, if Ms Lloyd wished to have a formal setting for discussing those issues.

[35] Indeed, the Commission's view is that the first *formal* opportunity that Ms Lloyd would have had to discuss the issues was with Dr Dean in the context of his assessment. And of course the Commission says that rather than engage with Dr Dean and seek to disabuse him of any suggestion that her behaviour was bizarre, Ms Lloyd simply adopted a defensive and non-engaging mode which virtually ensured that the psychiatric report would not deal positively with those behavioural aspects.

[36] From the Commission's stand point, they say (and I accept) that if they had not alerted Dr Dean to the matters of concern to them, they would have been failing in their duty. After all, these concerns came from members of the Commission's own staff and went to the root of the anxiety that the Commission had about whether Ms Lloyd was *fully fit* to take up again the role of operational fire fighter. It cannot be the position that the Commission is precluded from identifying the very things of concern to it in seeking a report on the fitness of a person to recommence duties as an operational fire fighter. I am satisfied that Ms Lloyd had ample opportunity to quarrel

with the material put before Dr Dean both by tackling that at the source (dealing with Ms Richards) and by addressing it with Dr Dean himself. In the result, Ms Richards says that she did have more than one discussion with Ms Lloyd about the matters in the letter (and I accept that evidence as truthful) but that nothing Ms Lloyd said encouraged Ms Richards that the material not be provided to Dr Dean.

[37] I have to say that having heard the testimony of the Commission's witnesses in my investigation meeting, I reach the same conclusion. On the one hand, there are a succession of senior fire fighters who make observations about odd behaviour from Ms Lloyd and there are Ms Richards' own comments about the curious telephone discussions. That evidence itself is supported by the evidence of the Commission's Regional Commander in Whangarei who was also the recipient of these odd telephone calls from Ms Lloyd. Faced then with clear corroborative testimony of the two patterns of behaviour which seem to be at best unusual set against Ms Lloyd's flat denials of anything other than entirely ordinary behaviour, it is difficult not to reach the conclusion that the behaviour in question is odd and that in principle, it calls into question Ms Lloyd's ability to serve appropriately in a safety conscious environment such as fire fighting.

#### **Has the employer met the test?**

[38] I am satisfied the employer has indeed met the test required of it by the application of s.103A of the Employment Relations Act 2000. That test requires me to judge whether the Commission was justified in concluding that Ms Lloyd was not fully fit to return to duties in active fire fighting. I am satisfied that the Commission conducted proper inquiries and took into account all appropriate evidence about the state of Ms Lloyd's health before reaching its conclusion. I conclude that when looked at objectively, any fair and reasonable employer, confronted with the same factual matrix as the Commission, would reach a similar conclusion.

[39] The nexus of the issue from the Commission's perspective was the question of whether Ms Lloyd was in truth fully fit or not. There is no issue about her physical fitness and that much is common ground. The issues of concern to the Commission revolved around her mental and emotional wellbeing, an aspect of her health which Ms Lloyd sought to minimise. However, the Commission quite properly drew my attention to the nature of fire fighting as a vocation and its emphasis on team work and reliance on others in circumstances which are intrinsically stressful and either

potentially or actually dangerous. Concerns or doubts about the emotional balance of a fire fighter in my opinion entitle the Commission to proceed with caution and I hold that is what they did in this particular case.

[40] The Commission formed a provisional view that Ms Lloyd was not fully fit to return to duty and that view was conveyed (despite Ms Lloyd's evidence to the contrary) promptly after the end of her period of leave without pay. There was then a sensible agreement between the parties for an assessment by an appropriate medical practitioner as to the level of fitness.

[41] Ms Lloyd had the opportunity to assertively engage with the Commission at this point and seek to inform that assessment process by her own involvement. She did not do that; indeed, her total contribution to the process was a one line letter committing to the medical assessment. In the end, the terms of clause 4 of the Mediated Settlement Agreement required the Commission to be satisfied that Ms Lloyd was *fully fit*. There was argument before me about whether this was a subjective test or an objective test. I do not think it helpful to analyse the test in that way; I think it more useful to consider it simply as a test which requires the employer to reach a conclusion on the matter. I have already made clear my view that in order to reach its conclusion, I consider the Commission must look at all relevant evidence and must make a reasonable decision on the basis of that evidence. In my opinion, the Commission have looked at all relevant evidence and have made a reasonable decision based on that evidence.

[42] I have referred at length to the two groups of behaviours which the Commission became aware of and which gave it cause for anxiety in relation to Ms Lloyd's possible return to duty. The first of these was the curious telephone calls directed to more than one employee of the Commission and the second was the odd behaviour at the Rotorua Motor Lodge again directed at a number of senior employees. I hold that the Commission would have been failing in its obligations to other fire fighters and in its obligation to adopt a fair and transparent process if it had not considered those matters as part of the basis for an assessment about whether Ms Lloyd was fit to return to duties.

[43] For her part, Ms Lloyd could have taken more assertive steps to mitigate the negative effects of that material or potentially to explain herself in a more fulsome way than she did either to the Commission to indeed to me. Nothing before me

suggests that Ms Lloyd did anything of the sort. Indeed, the evidence before me suggests that she failed absolutely to confront any of the Commission's anxieties about these peculiar behaviours.

[44] If, knowing about these behaviours, the Commission had referred Ms Lloyd to a psychiatrist and not drawn his attention to those matters, in my opinion the Commission would have been failing in its obligations and would have run the risk that the eventual report from Dr Dean might not have been able to appropriately reflect anxieties about Ms Lloyd's behaviour. In the result of course Dr Dean's report actually highlighted similar curious behaviour of Ms Lloyd when she was in Dr Dean's rooms.

[45] The eventual report which issued arguably raised more questions than it answered. As Ms Lloyd was quick to remind me, the report did not say that she was not fit to return to duty as a fire fighter, but it did refer to her unusual behaviour as observed by Dr Dean and the difficulty that Dr Dean had in engaging with Ms Lloyd. In addition and critically, Dr Dean referred to ... *the difficulty (Ms Lloyd) has appeared to have with interpersonal relationships*. In my opinion, a proper reading of the four page report from Dr Dean would not and could not reassure an anxious employer that the subject of the report was capable of undertaking work as a professional fire fighter. Moreover, I conclude that the opportunity was available to Ms Lloyd to engage directly with Dr Dean, to reassure him that the anxieties of the Commission were misplaced but that opportunity was not taken.

### **Determination**

[46] Ms Lloyd has failed to satisfy me that she has any justiciable complaint about the actions of her employer, the Commission. I think the Commission took all reasonable steps to deal appropriate and fairly and in good faith with Ms Lloyd's issues and I think any fair and reasonable employer confronted with the facts before the Commission would have resisted the temptation to agree to Ms Lloyd returning to duty as a serving fire fighter.

### **Costs**

[47] Costs are reserved.