

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 145/10
5157178

BETWEEN NIGEL McFALL
 Applicant

A N D LYTTELTON PORT
 COMPANY LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Nigel McFall, the Applicant in person
 Tim McKenzie, Counsel for Respondent

Investigation Meeting: 2 February 2010 at Christchurch

Determination: 14 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nigel McFall was employed full time by Lyttelton Port Company (LPC) as a maritime security officer from September 2007 until March 2009 when he was dismissed for medical incapacity following accidents on 5 April 2008 and November 2008.

[2] Mr McFall says that he was unjustifiably dismissed and he is claiming reimbursement of lost wages, compensation for distress, an apology and costs.

[3] LPC says it justifiably dismissed Mr McFall.

[4] To resolve the problem I must outline what happened following Mr McFall's accidents and canvass LPC's investigation that lead to the dismiss him. There are a number of conflicts in the evidence that I will resolve. Finally I will apply the established law about justification for a dismissal.

The first accident

[5] Mr McFall was punched in the head while playing rugby on 5 April 2008. There followed a sequence of medical certificates of varying duration certifying Mr McFall as fully unfit for work between 7 April and 10 December 2008. There was contact between Mr McFall and LPC about various issues over this time which it is not necessary to set out. Mr McFall actually worked part of a shift at the expiry of the medical certificate on 29 April but I do not accept that LPC breached any obligation owed to him as a result. Also during this time, a graduated return to work programme (GRTWP) was developed but not implemented because it was inconsistent with the medical certificates.

Return to work

[6] By October 2008, Mr McFall's medical advisers considered he was sufficiently recovered so as to participate in a GRTWP. That included a review by a specialist occupational physician who is also an advisor to LPC (Dr Mark Floyd). It appears that Mr McFall worked limited hours over three days to start and then worked two hours per day over five days in the first week of November. Under the GRTWP he was due to increase his working hours to four per day over five days starting 10 November 2008. By 7 November Mr McFall was reporting the return of head pain and a resumption of some medication.

[7] Mr McFall's evidence is that during the GRTWP he was put in positions where no assistance was provided, found it difficult to take the necessary breaks and found the work environment to be very negative towards him. In response to questions during the investigation meeting, Mr McFall told me that he had done nothing at the time to bring any of these issues to LPC's attention. Contrary to Mr McFall's assertions, I find that LPC took appropriate steps to assist with his participation in the GRTWP. There is an email sent by Mr McFall's manager (Paula Allen) to his shift supervisors setting out arrangements for his return to the workplace. I will not set out the email here, but it demonstrates the steps taken by LPC to assist Mr McFall under the GRTWP.

The second accident and resumption of GRTWP

[8] On 8 November, Mr McFall injured his finger in a non-work accident. After his days off he initially attended work under the GRTWP but left work to go to

hospital where he was diagnosed with and treated for a broken finger. It appears that Mr McFall then continued work to a limited extent under the GRTWP but was then certified fully unfit for work through to 16 December 2008. Mr McFall was seen again by Dr Floyd who confirmed that he would be fit to resume the GRTWP as of 17 December, subject to some restrictions arising from the finger injury. As events transpired, Mr McFall resumed work on Friday, 19 December under an amended GRTWP which involved alternating shorter and longer shifts at different times with a view to the resumption of normal duties on 9 January 2009.

[9] Mr McFall's evidence is that it felt really good being back at work and contributing to the team but he also found it mentally and physically taxing. He says he got the distinct impression that Ms Allen had somehow, perhaps inadvertently, turned the staff against him. He says that another staff member conveyed to him a message from Ms Allen in words that indicated that she thought he was lazy. I prefer Ms Allen's evidence that she did her utmost to accommodate Mr McFall's return to LPC over this time. The tone of her email communications with Mr McFall, his ACC service providers and others supports her evidence. There is no evidence that Mr McFall raised any concern at this time, either directly or through his Union representative. To the contrary, there is an email dated 23 December which records Mr McFall telling his physiotherapist that he was managing well. The physiotherapist was also told by Mr McFall's supervisor that he was happy with Mr McFall's performance to that point. Further emails dated later in December and in January 2009 indicate that Mr McFall struggled to cope with the changing shift patterns and alternating shift duration. However, this is not proof of any improper conduct by LPC.

The development of LPC's concerns

[10] When Ms Allen returned to work after some leave, she learned that Mr McFall had been absent from duty for three separate days on sick leave with it being proposed to extend his GRTWP by two weeks. Ms Allen sent an email dated 5 January 2009 to Mr McFall's ACC case manager seeking assurances that he would regain full capacity within an acceptable timeframe. Ms Allen received a response from one of the rehabilitation specialists giving some answers to her queries. Following that, Ms Allen met with Mr McFall on 7 January and the extension to the GRTWP was agreed between them, including a review on 21 January 2009 or earlier if required.

[11] Mr McFall was sick and not at work on 8 January. He worked his next three shifts in accordance with the amended GRTWP but was then sick and not at work on 14 January. Mr McFall apparently had not returned messages left by his rehabilitation specialist who arranged to meet with Ms Allen at the workplace on 14 January 2009 during Mr McFall's rostered work time so as to allow his participation. The specialist apparently left a message for Mr McFall to that effect. On the morning of 14 January, LPC received an email from Mrs McFall advising that Mr McFall was *very unwell due to his concussion*, was on medication again, would not be at work and was going to his GP that day. Ms Allen and the rehabilitation specialist nonetheless met with Ms Allen expressing frustration with Mr McFall's lack of participation in the GRTWP and the specialist recommending a case conference.

[12] In his evidence, Mr McFall says that he is upset and angry at LPC's frustration about him not fully participating in the GRTWP as recorded in the rehabilitation specialist's report to ACC. He goes on to say that the unusual shift patterns changing from days to nights with various duties was causing him to struggle. At least implicit in this is a criticism of LPC and its approach to the GRTWP. I do not accept that there is any validity to the criticism. The GRTWP was developed and approved by Mr McFall's ACC and medical advisers in conjunction with LPC. No blame can attach to LPC for the fact that Mr McFall's injury meant that he struggled to cope with the GRTWP and that his condition seemed to worsen rather than improve.

[13] There is a dispute in the evidence about whether Mr McFall's last work at LPC under the GRTWP was on 11 January 2009 (Ms Allen's evidence) or during the week ending 23 January 2009 (Mr McFall's evidence). By 16 January, it was known to LPC that the medical advice from Mr McFall's GP's visit on 14 January was that he should work four hours day shift Monday to Friday. I have reviewed the emails and other documents carefully. While not conclusive, the better view is that Mr McFall did work several days in the week ending 23 January 2009. What is certain, is that Mrs McFall advised Ms Allen by email on Monday, 26 January that Mr McFall would not be in for work that week as he was very sick and would be going to see his GP again. Mr McFall did see his GP on 27 January who certified him as being unfit for any duties (including the GRTWP) until 24 February 2009.

[14] In his evidence, Mr McFall says he found it a difficult environment to work in upon his return and that he was not given an ability to take sufficient breaks or have

the support he required. He believes that LPC contributed to his set back and sickness. There is no evidence to support this view and I reject it. The documents and evidence indicate that LPC properly engaged with Mr McFall and his advisers about developing and implementing the GRTWPs.

[15] These developments regarding Mr McFall's progress under the GRTWP caused LPC to question when and whether Mr McFall would be fit for full duties. There are emails between Ms Allen, ACC and Dr Floyd about this. It is clear from these emails that there was also a discussion between Dr Floyd and Mr McFall's GP following the GP's 27 January consultation with Mr McFall. In his email to Ms Allen, Dr Floyd says:

Hi Paula,

Rose returned my call yesterday after seeing Nigel. She has placed him completely off work for one whole month! Like me she believes that this all relates to his head injury. She indicated that it is unlikely that Nigel would be open to supported psych input and rest alone. This further set back is diminishing the prognosis for a return to full duties in the near future. It would appear that the gusto that Nigel returned with has not come through.

Reviewing the progress to date I can offer no reassurance to the Port that on return in one month Nigel will smoothly progress to full time work.

I agree a case conference would be of benefit.

[16] Mr McFall is critical of these views and points out that the email was never disclosed to him for his comment. He also says that he does not recall that Dr Ford saw him before writing this email. The evidence is that Dr Floyd saw Mr McFall on 20 January and it is also clear that he discussed Mr McFall's condition with the GP after her consultation. As noted Dr Floyd had also been involved in October and December 2008. Dr Floyd's observations, although general in nature, must be accepted as well-informed. I do not read into the comment about *gusto* any criticism of Mr McFall's willingness to return to work. Indeed, Dr Floyd explicitly accepts that the situation related to the head injury. Mr McFall knew about Dr Floyd's views and was aware of the discussion between his GP and Dr Floyd because that is all referred to in an email exchange between Mr McFall and his ACC case manager on 23 January 2009.

[17] While there were email exchanges in late January about organising a case conference to review Mr McFall's situation, on 3 February 2009 Dr Floyd reported

that Mr McFall had missed a review appointment with him that day. On 4 February Dr Floyd opined in an email to Ms Allen and Mr McFall's ACC providers:

Hi,

Spoke with Rose Chambers who was clearly of the opinion that he needed a month off ...

From there it would be a GRTWP ... how that will progress I am now uncertain ... Nigel certainly presented with minimal symptoms early on and his severe regression is not typical ... a small set back with increasing demands is not unusual but complete regression is unusual and the reasons for this are most probably multi factorial. If this continues he should have full formal specialist assessment.

Considering his progress to date, as company doctor, I am unable to provide any certainty to the Port with regard his GRTWP.

I would be happy to dial in by phone if possible to the case conference.

Mark

[18] Mr McFall is critical of these comments and points out that they were never conveyed to him so he had no opportunity to respond. He says that Dr Floyd made him feel that he was not trying hard enough to get better. Contrary to Dr Floyd's views, Mr McFall says that he was making good progress towards full fitness in the near future. I will return to these points. Later, on 10 February 2009, Mr McFall asked ACC to refer him to a different specialist who was not also contracted to LPC. ACC did this.

LPC decides to meet with Mr McFall

[19] Mr McFall's worsened situation, reflected by his GP certifying him as unfit until 24 February, resulted in LPC writing to him on 5 February 2009 requesting his attendance at a meeting scheduled for 11 February to discuss the impact of his injury on his ability to continue working as a security officer. The letter makes it clear that LPC was considering terminating Mr McFall's employment.

[20] Mr McFall contacted his Union and sought some advice about the situation on or before 9 February. Then, on 10 February, Mr McFall sent an email to Ms Allen as follows:

I will be unable to attend the meeting tomorrow due to my health. I am unsure when I will be next available.

[21] Ms Allen rang Mr McFall and then sent a brief email to him referring to their discussion and confirming that she would ring on the following Monday to try and reschedule the meeting. Also on 10 February, there were communications between LPC and Mr McFall's Union about rescheduling the meeting. These emails refer to Ms Allen phoning Mr McFall after receipt of his email. I do not accept Mr McFall's evidence that he contacted Ms Allen by telephone before sending her the 10 February email. Since it was known to Ms Allen before their telephone discussion that Mr McFall had involved his Union, it is also unlikely that Ms Allen's tone to Mr McFall during their discussion was *aggressive*. I therefore reject Mr McFall's evidence on this point. In any event, LPC deferred the 11 February meeting in response to Mr McFall's circumstances.

[22] Mr McFall arranged to meet his Union representative on 13 February but that was interrupted by the onset of his wife's labour. It also interrupted tentative arrangements for the rescheduled meeting with LPC. Ms Allen wrote to Mr McFall on 20 February scheduling a meeting for 26 February. Because that date was several days after the expiry of Mr McFall's medical certificate, Ms Allen advised him that she did not expect him to return to work before their meeting. On 23 February, Mr McFall sent an email to Ms Allen saying that he would be unavailable for the rescheduled meeting, but that he had rearranged to meet his Union representative on 3 March so he would be in contact to reschedule the LPC meeting after then. That drew a response from Ms Allen to the effect that she was concerned about further delay and intended to proceed with the meeting scheduled for 26 February. A little later, on 23 February, Mr McFall sent Ms Allen a copy of a medical certificate of that date. The certificate, on its face, is ambiguous. Mr McFall's GP was unavailable so he saw another doctor who recorded his work capacity as follows:

*Hours to be worked Hours per day days per week for 8 weeks
Describe limits ...
Fit for slower graduated return to work programme, starting today.
Claimant unable to resume any duties at work from 24-02-2009 for
90 days.*

[23] On 24 February, Ms Allen responded again saying that she expected Mr McFall to attend the scheduled meeting. Mr McFall replied as follows:

Good morning Paula,

The main reason I do not wish to be part of your meeting is that it adversely affects my health. In fact it is in best interests not to be

there as it puts too much pressure and stress on my already painful injury not to mention it slows down my recovery.

I do not think you really understand the magnitude of my injury and how it affects me. I am unable to think clearly, understand half the time what people are saying to me, or able to sit in an office having questions fired at me.

It seems to me that you are taking advantage of me at a time when I am unable to defend myself appropriately.

I presume you will go ahead with the meeting although I do not agree with it, you seem to be looking for answers no one can provide you with – my injury did not come with an expiry date!

I really just want to rest and not worry about all this at the moment.

Nigel

PS I will not be attending your meeting on Thursday.

[24] A little later, Ms Allen received an email from the Union challenging LPC's intention to proceed with the meeting in Mr McFall's absence and before he had met and fully briefed the Union representative. In the face of this challenge, Ms Allen agreed to defer the meeting until soon after Mr McFall's scheduled meeting with his Union representative.

[25] Mr McFall is very critical of LPC pressuring him to meet at this time. His evidence is that it caused his condition to worsen greatly. I will return to this point later.

[26] In the midst of the foregoing communications, Ms Allen copied some of this information to Dr Floyd asking for advice. It is also apparent from that information that Ms Allen did have a discussion with Mr McFall's GP. The email to Dr Floyd records the following:

Mark,

Please can you assist? As you are aware we have been trying to organise for Nigel to have a meeting with LPC to discuss his case. This morning I received a medical certificate from Nigel's GP which I have attached for you to review. The certificate provides conflicting information – on the one hand it states "fit to start a graduated return to work programme today" and on the other states unfit to work for 90 days starting 24th Feb. So I contacted the doctor this morning to clarify the issue. Her response was that in her opinion Nigel was fit to start a graduated return to work programme, although his condition had not changed, but that as we (his employer) were not interested in participating in a GRTW programme and were looking at terminating him she had booked him unfit for any duties for 90

days to cover him with ACC otherwise he would be unsupported. This latter fact is factually incorrect as we have not had the opportunity to discuss this with Nigel. Anyway I again contacted Nigel to request his attendance at the meeting on Thursday to which I have received this response:-

[27] In evidence, Mr McFall's GP says that there is no file record of a telephone call from Ms Allen about the medical certificate and that she has no recollection about such a discussion. The evidence now is that a mistake was made certifying Mr McFall as unable to resume duties for 90 days on the medical certificate but there is no evidence that such an explanation was ever given to LPC at the time. It is unlikely that Ms Allen would have referred to the details of the phone conversation in her email to Dr Floyd unless it had happened. I therefore accept that Ms Allen was given the explanation for the medical certificate as recorded above.

[28] Dr Floyd replied to Ms Allen's email on 26 February as follows:

Hi Paula,

I am unable to fully explain Nigel's behaviour. There are elements that would surely not be related to head injury.

I have suggested that he had further specialist head injury assessment.

His progress and responses have been very unpredictable. His GP Rose was very clear that he needed a month off ... while I had other thoughts, she was very clear about that. I am now confused that he is able to commence GRTWP ... but is signed off fully unfit and write such a letter to yourself.

This is a very muddled picture and while we may have been able to explain some slight ups and downs with the GRTWP such a retreating action, such dramatic ups and downs and aggressive letter to the port (that has been very supportive) makes me think that there are other issues or illness which I would suggest that he needs specialist head injury review.

Mark

[29] The meeting requested in LPC's letter of 5 February actually occurred on 9 March. Before then, ACC advised Ms Allen that Mr McFall had instructed it not to release to LPC any of Mr McFall's medical reports. Ms Allen sought clarification and was told by the Union that medical certificates would be provided as a matter of course but specialist reports would not be released to LPC without discussion with and consent from Mr McFall.

[30] Present at the 9 March meeting were Ms Allen and Sally Garters (LPC's HR adviser), Brian Cronin and Libi Carr for the Union and Mr McFall. I have evidence from Sally Garters, Ms Allen who concurs with Ms Garter's evidence and Mr McFall. I also have Ms Garter's typed notes and handwritten notes made by Ms Carr. With one exception, Ms Garters accepted that Ms Carr's notes were accurate. Ms Garters' typed notes were made soon after the meeting from the handwritten notes made during the meeting. These handwritten notes cannot now be located. I accept that a reasonably balanced account of the meeting emerges from reading both sets of notes together. Except for what follows, it is not necessary to convey the exact sequence of events at the meeting.

[31] Ms Garters disagreed with Ms Carr's note that had her saying that Mr McFall had to return to his full shift and full duties or not at all. Ms Garters' note has her saying they wanted to discuss Mr McFall's ability to return to work *full time full shifts full duties* and indicating that LPC was no longer willing to have Mr McFall back on a GRTWP. I note LPC's 5 February 2009 letter which at least implicitly makes it clear that LPC was no longer prepared to engage in a GRTWP. On balance, I find that Ms Garters' disagreement in evidence with Ms Carr's notes is more a point of semantics than substance. Whatever exact words were used, LPC made it clear during the meeting that it was not prepared to resume a GRTWP.

[32] For Mr McFall, it was said during the meeting that the medical reports indicated that his condition and outlook was improving. There was some discussion about what reports LPC had access to. LPC expressed its view that the reports it had indicated that Mr McFall's condition was deteriorating. Mr McFall attributed his difficulties to the pressure he was put under by LPC such as the 5 February letter requiring the meeting. After a brief adjournment, Mr McFall was advised that his employment was being terminated on notice due to medical grounds. There was then some discussion about final arrangements. Later that day, Ms Allen wrote to Mr McFall confirming the reason for the dismissal and the final arrangements.

Justification

[33] Whether LPC's decision to dismiss Mr McFall was justifiable must be determined, on an objective basis, by considering whether LPC's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[34] Mr McFall was employed under the terms of the LPC Combined Unions Collective Employment Agreement. It provides for dismissal on two weeks' notice. There are no specific provisions in the agreement about medical incapacity although the agreement provides for limited paid sick leave after six months' service and the possibility of extended further paid sick leave for serious injury on a case-by-case basis.

[35] LPC has published policies and procedures including one called *Safe return to work programme*. I have been given a copy marked *Version 1.0* and printed on 12 March 2004. Ms Allen says that this policy is outdated but LPC has not given me a more recent version. I will take the version 1.0 text as applicable. Ms Allen also says that the policy did not apply because Mr McFall was not injured as a result of a workplace accident. The policy does not distinguish between workplace and non-workplace accidents. In any event, Ms Allen concedes that LPC would not discriminate between those two situations in terms of its own practice. However, I do accept Ms Allen's last point about the policy. LPC, at ACC's initiative, did engage in GRTWPs for Mr McFall even though it did not generate any of the forms contemplated by its own policy. There is nothing of significance in the policy that was not addressed by the GRTWPs developed for Mr McFall. I therefore do not accept that there was any material breach by LPC of its own policies. What remains to be considered is whether LPC's actions in not agreeing to a further GRTWP was what a fair and reasonable employer would have done in the circumstances.

[36] Counsel for LPC distilled a number of principles from previously decided cases. The following extract from *Barry v. Wilson Parking New Zealand (1992) Ltd* [1998] 1 ERNZ 545 helpfully sets out relevant considerations:

... the employer had to act with justice in a way that was fair to the employee. What this amounts to, speaking generally, is that the employer has to wait a reasonable time to give the injured employee an opportunity to recover (what is reasonable being a question of fact in each case) and after that it has to inquire in a fair and open-minded way whether the employee has any realistic prospects of returning to work within a further reasonable time. This necessarily has to include seeking information from the injured employee, making it known at the time that the information may be used for the purposes of a decision to discontinue the employment relationship. This is to ensure that the employee understands the seriousness of the issue and will have a motive to ensuring that the information is as full and accurate as he or she can make it be. It would not be reasonable to expect so diligent a response to a mere casual inquiry after the employee's health. Sometimes an employer can safely act on

information volunteered by the employee such as periodic medical certificates but, in general, will need to inquire from the employee in case there have been any recent developments, especially if the information held is stale. Once armed with all the necessary information, the employer has to consider whether (balancing fairness to the employee and the reasonable dictates of its practical business requirements) it is prepared to keep the employee's position open for the indicated period of time. Reconsideration of this question might need to be undertaken more than once from time to time.

[37] In the present case, I accept that LPC had waited a reasonable time to give Mr McFall an opportunity to recover from his two accidents. Mr McFall was absent from early April until the end of October 2008, a period of about seven months. In early November Mr McFall commenced a GRTWP but that was interrupted by the second accident. About five weeks' later, Mr McFall recommenced the GRTWP. Over the next four weeks during the GRTWP, Mr McFall was sick intermittently and was then off work from about 14 January 2009 until 5 February 2009 (except for the part days worked in the week ending 23 January 2009) all attributable to the first accident. Overall, by the time that LPC wrote to Mr McFall wanting to meet, he had been unable to perform his normal duties for nearly 10 months. As at 5 February 2009, the situation facing LPC was Mr McFall's certain further absence from work until 24 February, the prospect of him starting a slower graduated return to work programme for 8 weeks and the uncertainty of his capacity to meet even that timeframe.

[38] More must be said about whether LPC inquired in a fair and open-minded way about Mr McFall's prospects of returning to work in full capacity. I have mentioned two emails from Dr Floyd that contained Dr Floyd's views about those prospects. Part of Mr McFall's complaint is that he only saw these emails after his dismissal. The essential point conveyed in the emails is that Dr Floyd could offer no reassurance that Mr McFall would progress smoothly to full time work upon his return at the end of the period covered by the 27 January 2009 medical certificate and that the way in which Mr McFall's condition had deteriorated was atypical. These communications were copied to Mr McFall's ACC providers but there is no evidence that they in turn specifically alerted Mr McFall to Dr Floyd's views apart from the 23 January email exchange between Mr McFall and his ACC case manager. However, it is clear from Ms Garters' notes that during the March meeting, LPC specifically mentioned that it had received this information from Dr Floyd. It no doubt would have been better if Mr McFall had been provided with the emails. However, he was given an opportunity

to respond to the points which he took by criticising Dr Floyd. Mr McFall also knew about LPC's concerns so he could have arranged for other medical information to address those concerns. As a result, I find there was no unfairness about the way LPC used Dr Floyd's information.

[39] Mr McFall is critical of the tone of LPC's 5 February 2009 letter. There is no merit in this criticism. In its letter, LPC briefly set out why it felt it needed to consider whether to terminate Mr McFall's employment for medical reasons and proposed a meeting time. The letter appropriately advised Mr McFall what was at stake. In doing this, LPC simply met its legal obligations as described in *Barry v. Wilson Parking*.

[40] Mr McFall says that he was getting better and that he would have progressed to working full hours and duties if he had been allowed to return to the GRTWP. There are some difficulties with Mr McFall's position. Objectively, the evidence demonstrates that Mr McFall's condition deteriorated rather than improved when he recommenced the GRTWP following his finger injury. In emails to LPC, both he and his wife described a dramatic deterioration in his condition. That led on to Mr McFall providing a medical certificate dated 14 January 2009 certifying him fit for four hours per day five days per week, day shifts only for a two week period – thus restricting the existing GRTWP. However, Mr McFall was then sick for at least some of that period. Mr McFall then worked several days under the amended GRTWP before he was again sick. He saw his GP on 27 January who certified him fully unfit for four weeks. The final medical certificate provided on 23 February 2009 was ambiguous but on clarification permitted his participation in a slower GRTWP. That was not given effect to pending the meeting between Mr McFall and LPC. At that time, Mr McFall was saying that his injury did not come with an expiry date and he *really just want[ed] to rest and not worry about all this at the moment*. From all this, it is clear that Mr McFall was not getting better and there was no substantial reason for LPC to think that he would progress smoothly to working full hours and full duties if he had returned to work.

[41] At the end, the picture that faced LPC was that of an employee who had been away from full duties for about 11 months; whose absence significantly exceeded the duration of his active service; for whom there was no confidence that he would resume full duties shortly; and whose absence was causing some cost and disruption

to that aspect of LPC's business. Having made Mr McFall aware of its increasing concerns over his absence, and having given him an opportunity to respond, LPC decided it was time to cry halt. That was a decision open to a fair and reasonable employer in the circumstances.

Conclusions

[42] LPC justifiably dismissed Mr McFall and he does not have a sustainable grievance.

[43] Costs are reserved. Any application for costs should be made within 28 days in the usual way and Mr McFall may then have a further 14 days to lodge and serve any response.

Philip Cheyne
Member of the Employment Relations Authority