

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 298
5329796**

BETWEEN PETER PRIEST
 Applicant

AND JOHNSTONS COACHLINES
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Brian Easton, Counsel for Applicant
 Paul Tremewan, Advocate for Respondent

Investigation Meeting: 18 May and 3 July 2012 at Auckland

Submissions received: 11 July 2012 from Applicant
 16 July 2012 from Respondent

Determination: 31 August 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Peter Priest was employed by the Respondent, Johnstons's Coachlines Ltd (JCL) as a full-time coach driver from 24 October 2006 until his employment terminated on 8 November 2010.

[2] Mr Priest claims that he has been unjustifiably constructively dismissed by the actions of JCL.

[3] Mr Priest further claims that JCL failed to pay him serious illness leave entitlement in accordance with clause 23 of a collective agreement between the NZ Tour Drivers Union (NZTDU) and JCL (the Collective Agreement); that he is entitled to outstanding unpaid wages, and that he has been unjustifiably disadvantaged through a decision to suspend him.

[4] JCL denies that it constructively dismissed Mr Priest, and claims that Mr Priest voluntarily terminated his employment when he returned his uniform, the company Airbus float and sought his outstanding holiday pay.

[5] JCL further denies that Mr Priest is entitled to serious illness leave in accordance with clause 23 of the Collective Agreement; or to outstanding unpaid wages; or that Mr Priest was unjustifiably disadvantaged in his employment by suspension on the basis that Mr Priest was not suspended.

Issues

[6] The issues for determination are whether:

- Mr Priest has been constructively dismissed by JCL
- Mr Priest is entitled to a payment in respect of serious illness leave in accordance with clause 23 of the Collective Agreement
- Mr Priest is entitled to outstanding unpaid wages
- Mr Priest has been disadvantaged through a decision to suspend him

Background Facts

[7] JCL operates a bus and coach service with three areas of operation: tourism coaches, providing coach tours and commentaries to clients, the Airbus service taking passengers to and from Auckland airport to central Auckland, and an airport shuttle bus service taking passengers to and from the Auckland airport car parks to Auckland airport.

[8] Mr Priest commenced employment with JCL in October 2006 as a full-time driver and his employment was covered by the terms of the Collective Agreement. Mr Priest subsequently resigned from NZTDU and became employed subject to an individual employment agreement based on the terms of the Collective Agreement.

[9] In addition to his driving duties, Mr Priest had completed tour commentaries for JCL for which he was remunerated. During November and December 2009 Mr Priest underwent surgery to remove kidney stones, and as he was unable to drive a passenger service vehicle following the operation, he worked to complete the tour commentaries he had agreed to create for JCL.

Depressive illness incident

[10] Mr Priest said he had experienced an emotional breakdown on Christmas Day 2009 and on 29 December 2009 he had visited his general practitioner, Dr Janet MacDonald, who had diagnosed him as suffering from a serious depressive illness and who had prescribed antidepressants.

[11] In January 2010 Mr Priest said he had contacted Mr Philip Manning, Managing Director of JCL, to inform him of his depressive illness. Mr Manning said Mr Priest had told him that he needed additional time off work to deal with some personal circumstances.

[12] Mr Manning explained that Mr Priest had informed him that he had experienced a breakdown following an affair with another woman of which his wife had become aware. This woman had also been an employee at JCL.

[13] Mr Priest said Mr Manning had reassured him he was not to worry about his job, and that he would continue to be paid. Mr Manning agreed that he had informed Mr Priest that he was not to worry, and that he would continue to be paid until it was decided what should happen in the long-term. Mr Manning said he and Mr Priest had agreed options would be discussed later that week.

[14] Mr Manning said he had offered Mr Priest additional personal support for his rehabilitation, and, Mr Priest having advised him that he would require 'some months' off work, had requested to be involved in consultation with Mr Priest's doctor in order that JCL would not have to obtain a second medical opinion.

[15] Mr Manning said Mr Priest had informed him that he had subsequently spoken to Dr MacDonald his doctor, and she had refused to become involved with JCL and had advised Mr Priest not to allow further consultation with the company.

[16] Dr MacDonald gave evidence at the first Investigation Meeting on 18 May 2012 and stated that she had not been asked by Mr Priest if JCL could contact her, and said that if the request had been made of her, she would have spoken to JCL.

[17] Dr MacDonald denied she had advised Mr Priest not to be involved in consultations with JCL.

[18] Mr Manning said that he had advised Mr Priest that JCL could not continue paying him due to his having refused to allow JCL to contact his doctor. Mr Manning explained that

he had not telephoned Dr MacDonald himself because he considered that she would not speak to him based on what Mr Priest had told him of her response to JCL's request to contact her.

[19] Mr Manning said that he had not pursued obtaining a second medical opinion because his understanding, based on Mr Priest's attitude following the request to contact Dr MacDonald, was that Mr Priest would not cooperate with such a request, and that consequently Mr Priest would not be paid for the sick leave absence.

[20] Mr Priest said Dr MacDonald had provided him with medical certificates throughout his illness, and the one provided on 31 March 2010 stated that he would be fit to return to work on 6 April 2010.

[21] A week or so prior to his returning to work, Mr Priest said another driver had mentioned to him that he would probably be entitled to claim serious illness leave in accordance with the Collective Agreement provisions. Mr Priest said he had obtained a copy of the Collective Agreement from the NZTDU Secretary.

[22] Clause 23 of the Collective Agreement was headed 'SERIOUS ILLNESS LEAVE FOR FULL-TIME & PART-TIME DRIVERS' and stated:

a) Subject to clauses 26(b), (c), (e) and (f) Full-time and Part-time drivers are entitled to be paid leave in instances of 'serious illness'.

The entitlement is as follows:

- i) Full-time drivers 12 weeks*
- ii) Part-time drivers 4 weeks*

b) The definition of 'serious illness' is to be determined on a case by case basis but will generally be defined as an illness that is so debilitating that it causes the employee not to be able to attend work for a lengthy period of time. 'Serious Illness' does not cover the instance where an employee is injured due to an accident either work-related or not.

...

e) The company reserves the right to require Full time and Part Time drivers who have sought an entitlement to paid leave in instances of 'serious illness' to undergo a second medical examination as to the extent of the serious illness, before granting this leave entitlement. If the Full Time or Part Time driver who has been requested to undergo a second

medical opinion refuses to do so, the company may refuse entitlement under this clause.

[23] Mr Priest said upon his return to work, he had completed an Absence Notification Form and applied for Serious Illness Leave on the form; however he had been informed by Mr Manning on 20 April 2010 that JCL had rejected his claim for Serious Illness Leave.

[24] Mr Manning explained that when the NZTDU and JCL had negotiated clause 23 of the Collective Agreement the intention had been that serious illness leave was to assist employees meet day-to day expenses on a weekly basis throughout the period of sickness absence, and not that it be taken as a lump sum payment.

[25] Mr Manning explained further that Mr Priest's claim had been declined on the basis that he had refused to cooperate with JCL about obtaining a second medical opinion at the time of his illness in order that it could verify the claim. Consequently he believed that JCL was entitled, in accordance with clause 23(e), to refuse the entitlement.

[26] Mr Manning said NZTDU representatives had met with him on Mr Priest's behalf, and they had informed him that they supported JCL's position in the matter and would not represent Mr Priest any further.

[27] Mr Manning said he believed that Mr Priest would have been aware of the provisions of the Collective Agreement given the fact that upon ratification of a new collective agreement, copies were distributed to all union members and a copy was available in the lunchroom. Further, if a union member requested a copy, one would be provided to him or her.

Unpaid Wages

[28] Mr Priest said he was entitled to be paid a guaranteed 80 hours per fortnight in accordance with clause 5(a) of the Collective Agreement which stated:

a) Full-time Driver

A driver who is available to work year round and who is guaranteed a minimum of 80 hours paid time per fortnight.

[29] Mr Priest said that although he was available to work for the fortnight between 26 April and 9 May 2010, JCL had only paid him for 65 hours.

[30] Mr Manning said he had understood Mr Priest had requested limited duties for the first fortnight following his return from sick leave and that this had been agreed by the then Operations Supervisor Mr Richard Bradley; however Mr Bradley had explained to Mr Priest that he might not achieve the 80 hour per fortnight guaranteed hours.

[31] Mr Priest agreed at the Investigation Meeting that he had requested to work limited hours; however he said that this had been for the first week and not the first fortnight after he had returned to work.

[32] Mr Manning said Mr Priest's application to be paid for 80 hours had been declined on the basis that he had not been available to carry out all duties.

[33] Mr Priest agreed that he had requested to carry out only Airbus work, but stated again that this was for the first week and not for the first fortnight. Mr Priest said that he had contacted Mr Bradley after he had realised he had not been rostered to work on either 28, 29, or 30 April 2010 and Mr Bradley had reassured him there would be work for him on 29 and 30 April 2010. However Mr Priest said there had been no work for him on those days.

Park & Ride duties

[34] The duties of a full-time driver are not specified in the Collective Agreement. Neither a generic position description for a full-time driver nor a specific position description for Mr Priest was produced in evidence.

[35] JCL's evidence was that all full-time drivers were expected to undertake all duties, and Mr Priest accepted at the Investigation Meeting on 3 July 2012 that Park'n'Ride duties were part of a full-time driver's normal duties.

[36] Mr Priest said following his return to work in April 2010 he had been allocated to carry out Park'n'Ride duties on at least 12 occasions, including on 2 August 2010.

[37] Mr Priest explained he had found the Park'n'Ride duties stressful because the drivers were required to complete one circuit from the airport car park to domestic and international terminals and return in 15 minutes. As a result it was often difficult to maintain the timetable which had been set and the drivers faced abuse from passengers.

[38] Mr Priest said on 28 October 2010 he had telephoned Mr Richard Marshall who had been the Operations Manager at that time, to find out what work he had been scheduled to undertake the following day. Upon being informed that he was to carry out Park'n'Ride

duties, Mr Priest said that he had told Mr Marshall he would take a day off without pay rather than do Park'n'Ride duties.

[39] Mr Marshall said he had been told by another employee that Mr Priest had refused to do the Park'n'Ride duties and he was to telephone him. Mr Marshall said he had been quite shocked at this information, and he had subsequently telephoned Mr Priest and asked him if he had a medical reason for not undertaking the Park'n'Ride duties.

[40] Mr Marshall said he had been informed by Mr Priest that he was not prepared to undertake the Park'n'Ride duties and as he had not experienced this situation before, he had spoken about it to Mr Gary Fitzsimons who was at that time General Manager.

[41] Mr Priest said Mr Marshall had telephoned him on 29 October 2010 and told him that he was suspended on full pay for not carrying out the Park'n'Ride shift that day.

[42] Mr Marshall expressly denied that he had used the expression 'suspended' and said he had explained to Mr Priest that as he had refused to attend work, he was not required to attend work until JCL could meet with him and his representative.

[43] Mr Priest said that Mr Fitzsimons had telephoned him later that morning. Mr Fitzsimons said he had contacted Mr Priest to ask why he would not carry out the Park'n'Ride duties as advised, and had warned Mr Priest that a failure to carry out duties as required could lead to him facing disciplinary action.

[44] Mr Fitzsimons followed up this telephone conversation by sending Mr Priest a letter dated 29 October 2010 which stated:

Dear Peter,

This letter serves to confirm that you will not be required to work until further notice. This will allow you time to seek appropriate representation.

We have set a meeting for Tuesday 2nd November 2010 at 9am and strongly suggest you bring a representative to this meeting.

The meeting relates to your refusal by phone on Thursday 28th November 2010 to perform assigned work that you were scheduled to perform on Friday 29th November 2010.

This is a serious matter and the outcome of the meeting could result in disciplinary action, which may lead up to and including dismissal.

[45] Mr Priest had responded by way of a letter to Mr Fitzsimons dated 2 November 2010 in which he had written:

Stress problems with Park & Ride have been complained about before by many staff members but ignored. A four hour duty would be more acceptable.

*I feel this is a temporary request but I won't know until I am off my present medication.
I am able to produce a medical certificate if necessary.*

Please treat this letter as notice of my raising a Personal Grievance against Johnston's Coachlines Ltd for unlawfully suspending me from work therefore causing unjustified disadvantage.

Meeting 2 November 2010

[46] Mr Priest was requested to attend an investigation meeting on 2 November 2010 by Mr Fitzsimons. Mr Fitzsimons said he had explained at the commencement of the investigation meeting that Mr Priest was not suspended but stood down on full pay while the investigation was in process.

[47] Mr Priest said he had explained that he found the Park'n'Ride stressful and had given the reasons for this. Mr Priest said he had been asked by Mr Fitzsimons to provide a medical certificate.

[48] Mr Priest subsequently provided a medical certificate from Dr MacDonald dated 3 November 2010 and stating:

Mr Priest is currently finding the Park and Ride duties are too stressful and is affecting his psychological health. He is however fit for other driving duties.

[49] Dr MacDonald said Mr Priest had told her that the Park'n'Ride duties were not part of his core duties, however she agreed when questioned at the Investigation Meeting on 18 May 2012 that she had not made a full enquiry of Mr Priest concerning the nature of his work.

[50] Mr Fitzsimons said he and Mr Manning had been concerned when they had received the medical certificate because in their opinion Park'n'Ride was one of the easiest tasks within the company. Mr Fitzsimons explained that Park'n'Ride duties involved:

- driving a small vehicle
- around the airport local roadways

- no collection of monies or fares
- no commentaries
- handling of passenger luggage
- adherence to a timetable

This contrasted with the tour bus duties which included having to provide a commentary, no collection of monies or fares (as these were normally pre-paid), dealing with accommodation and getting the 49 passengers to attractions at the right times; and Airbus driving which involved driving from Auckland airport to the city centre on Auckland metropolitan roads, collection of monies and fares, no commentaries, no handling of passengers' luggage, but adherence to a timetable.

[51] Mr Fitzsimons explained that the 15 minute 'turnaround' time specified in the original Park'n'Ride contract had been maintained because Johnstons had provided extra buses during peak times which had eased any stress on the Park'n'Ride drivers.

Meeting 4 November 2010

[52] Mr Priest was asked to attend a further meeting on 4 November 2010 with Mr Manning and Mr Fitzsimons. Mr Priest said he had been informed at the meeting that he would have to reduce his agreed minimum hours from 80 to 60 per fortnight on the basis that he was not fit to carry out Park'n'Ride duties.

[53] Mr Fitzsimons said he and Mr Manning had explained to Mr Priest that JCL had concerns that he might not be able to carry out all the duties required for full-time drivers, and that there was the potential for him to have an accident which could seriously undermine JCL's reputation as a transport provider.

[54] Mr Priest said on the following day, 5 November 2010, he had received `a unsigned letter from Mr Fitzsimons dated 4 November 2010. In the letter Mr Fitzsimons had written:

As acknowledged, the full-time obligations as covered in the terms and conditions of your employment state that you may be scheduled by the company to work any and all duties as required.

As this medical certificate indicates you are currently unavailable for a particular duty (being Park'n'Ride). As such it is agreed that a change will be made, effective immediately, to your current guarantee on hours reducing this from 80 hours a fortnight to 60 hours a fortnight. It is also agreed that this will remain in place until such time as an unreserved full medical certificate is received. This will

then allow full resumption of all duties and reinstatement of an 80 hours per fortnight guarantee.

As noted in our discussion it is expected that this will only be an interim measure. It is agreed a review of this agreement will take place in two months time unless the aforementioned medical certificate has been received prior which would make this agreement void.

[55] Mr Priest said he had responded to this letter the same day stating he had not agreed to vary his guaranteed hours and that he was prepared to carry out other duties for up to 80 hours per fortnight. Further that he anticipated his medical condition was only temporary and that he would be able to resume full duties in due course.

[56] Mr Priest said Mr Fitzsimons had telephoned him and informed him that the reason JCL had wanted him to sign a variation of his employment agreement was that it was concerned at the possibility of other drivers refusing to do Park'n'Ride duties.

[57] Mr Priest stated that he had received an email from Mr Fitzsimons later that day, 5 November 2010, in which Mr Fitzsimons had pointed out that it was unlikely he would be doing less hours after he had agreed the variation, and in which he agreed to look at the concern Mr Priest had expressed over the Park'n'Ride area, in particular Mr Fitzsimons agreed to look at the length of the day worked.

[58] Mr Priest responded to this email stating that he did not agree to the variation request.

Meeting 8 November 2010

[59] Mr Priest said Mr Fitzsimons had telephoned him on Monday 8 November 2010 and asked him to attend a meeting that day. Present at the meeting were Mr Manning and Mr Fitzsimons, Mr Priest, and Mr Michael Andrews, a JCL driver, who had attended as Mr Priest's witness.

[60] Mr Priest said he had been informed at the meeting that unless he signed a variation to the employment agreement by that evening he would no longer be employed by JCL.

[61] Mr Andrews said Mr Fitzsimons stated JCL had taken advice which precluded Mr Priest being employed by JCL unless he agreed to change his minimum guaranteed hours from 80 to 70 per fortnight. Mr Andrews said Mr Manning and Mr Fitzsimons had made it clear that unless Mr Priest agreed to vary the terms of his employment agreement, he would be dismissed.

[62] In the handwritten notes taken by Mr Andrews during the meeting Mr Andrews had noted: “Gary ... *accept – or we must part our ways as far as employment goes*”.

[63] Mr Fitzsimons said Mr Priest had been offered a reduced working week to allow him the time to recover at the meeting on 8 November 2010, and it had been agreed that this would be reviewed monthly to ensure that Mr Priest was getting better. Mr Fitzsimons said Mr Priest had been advised that as soon as he was fit, the situation would revert to his original contractual terms.

[64] Mr Fitzsimons also explained that it had been made clear to Mr Priest at the meeting that he had not been suspended from duties.

[65] Mr Manning denied that Mr Priest had been informed that he either accept the variation or he would be dismissed at any time.

[66] Following the meeting Mr Priest said he had handed in his Airbus float to Mr Kinnaird, at that time the National Training Manager. Mr Kinnaird confirmed that Mr Priest had given him his Airbus float, and asked him to count it and sign it back in. Mr Priest said he had not returned his locker key or uniform at that time.

[67] Mr Kinnaird explained that drivers were provided with a float at the commencement of employment which they retained until the termination of their employment.

[68] As Mr Priest was handing his float in, Mr Kinnaird said he had asked him if he was “*out of here*” by which he had meant leaving JCL permanently, and Mr Priest had responded that he might be leaving on the Thursday unless he signed a variation to his employment contract. Mr Kinnaird said Mr Priest had not told him he was resigning.

[69] Mr Fitzsimons stated he had been informed by Mr Kinnaird that Mr Priest had handed back his float. Mr Fitzsimons said that he had also understood from what Mr Kinnaird had told him that Mr Priest had handed in his locker key and told Mr Kinnaird he was “*out of here*”.

[70] Mr Fitzsimons said that on this basis it had been his understanding that Mr Priest had terminated his employment, and he informed Mr Manning accordingly.

[71] Mr Priest said after 8 November 2010 letters had passed between his solicitors and JCL, and that he had asked to return to work and carry out other driver duties excluding Park'n'Ride but JCL had refused.

[72] Mr Priest explained that he had ceased to be paid by JCL on 22 November 2010, and although he had requested that he return to work on a number of occasions, JCL had refused to let him return.

[73] In December 2010 Mr Priest said he had applied to JCL to be paid 10 days outstanding annual leave entitlement but he had received no response to this request, so on 22 December 2010 he had written to Mr Manning. In the letter Mr Priest stated that he understood his application for annual leave had been declined, and had written:

*To date, I have been available for work for the past 55 days and you have decided not to allocate me any work at all.
If I had been working and it was too busy, I could understand a reason for the decline of my application, but as I am not working and I am still employed by Johnston's Coachlines, I cannot understand why my application for leave has been declined.*

[74] Mr Priest explained he had telephoned Mr Manning later that day who had advised him that since he had resigned from JCL, he would arrange for all of Mr Priest's accrued annual leave entitlement to be paid out to him.

[75] Mr Priest said as it was not correct that he had resigned from his employment with JCL, he had emailed Mr Manning on 23 December 2010. The email dated 23 December 2010 had concluded:

I can assure you that I have not resigned, and consider myself still employed by Johnston's Coachlines Ltd, as I have had no official notification that I have been sacked either.

[76] Mr Priest said on the basis that JCL had not provided him with any driving work since 29 October 2011, had ceased to pay him wages and as mediation had not been successful, he had instructed his solicitors to notify JCL that he was resigning, which had been done by letter dated 14 April 2011.

Determination

Was Mr Priest constructively dismissed by JCL?

The Law

[77] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[78] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*¹ the Court of Appeal said regarding the correct approach to constructive dismissal:²

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 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.

[79] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. secondly if there was such a breach was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

Breach of duty on the part of the employer

[80] Mr Priest accepted at the Investigation Meeting on 3 July 2012 that the Park'n'Ride duties were part of a full-time drivers duties, and that on 28 October 2010 he had refused to carry out his scheduled work duty for that day which had been a Park'n'Ride duties. Mr

¹ [1994] 1 ERNZ 168

² Ibid At p 172

Priest stated that he had told Mr Marshall that he: “*would rather take a day off without pay rather than do park’n’ride*”.

[81] I note that at this point Mr Priest had no medical certificate in support of this refusal to carry out his scheduled duties. Pursuant to clause 29 of the Collective Agreement entitled ‘Disciplinary Procedures’ “*..refusing to perform assigned work ...without permission of the Operations Manager*” was considered to be serious misconduct which “*might result in instant dismissal*”.

[82] Further, although Mr Priest was taking medication in relation to his earlier depressive illness, which Dr MacDonald stated in her evidence had: “*... proved to be effective*”, he had satisfactorily carried out approximately 12 Park’n’Ride duties since his return to work on 6 April 2010 when he had been certified by Dr MacDonald as fit to do so. Significantly this certification did not exclude Park’n’Ride duties.

[83] Moreover Dr Culpin, a specialist in Occupational Medicine, having assessed the medical information and records supplied by Dr MacDonald, stated: “*...it would be my opinion that this illness (the depressive illness) was predominantly and probably totally caused by his marital problems.*” I consider therefore that there is no indication from the medical evidence that the stress situation which had triggered the depressive illness had been related to Mr Priest’s work duties.

[84] Mr Fitzsimons had telephoned Mr Priest on 29 October 2010 and advised him that his actions in refusing to carry out his allocated duties could result in disciplinary action, information which was confirmed in a letter to Mr Priest that same day. The letter also advised Mr Priest that he was suspended from duty and not required to work until further notice.

[85] At the disciplinary meeting on 2 November 2010 Mr Priest had provided an explanation as to why he found the Park’n’Ride duties stressful, and had been requested to provide a medical certificate.

[86] Mr Priest subsequently provided a medical certificate, which had been accepted by JCL and the serious misconduct issue had not been pursued.

[87] The medical evidence of Dr MacDonald is that she had issued the medical certificate on 3 November 2010 based on accepted Mr Priest’s representation that the Park’n’Ride duties were not part of his core duties.

[88] Following the meeting of 4 November 2012 JCL had confirmed in its letter of the same date that because Mr Priest was: “*currently unavailable for a particular duty (being Park’n’Ride)*” he was being asked to sign a variation to employment agreement in respect of the guaranteed 80 hours of work per week. Mr Priest contended that he was not prepared to do so on the basis that he was prepared to carry out other duties than Park’n’Ride for 80 hours per week.

[89] At the meeting on 8 November 2010 I accept in light of Mr Andrew’s evidence that Mr Priest was advised that unless he accepted the variation to the guaranteed 80 hours a fortnight contractual term in his employment agreement, his employment could not continue. JCL’s letter of 12 November 2010 to Mr Priest’s solicitors also made it clear that unless Mr Priest was to resume full-time duties, his employment would be in jeopardy.

[90] Clause 5(a) of the Collective Agreement which guaranteed full-time drivers a guaranteed 80 hour paid time per fortnight specified that to qualify the driver had to be available to work, but not however that the driver had to be available to work all duties including Park’n’Ride duties.

[91] In these circumstances I find that this stipulation by JCL, which had accepted the medical certificate from Dr MacDonald, that Mr Priest accept the proposed variation to his employment agreement or his employment could not continue was a breach of duty on the part of JCL.

[92] Following on from this initial breach of duty, JCL concluded that Mr Priest had resigned his employment on the basis that he had returned the Airbus float, but had made no attempt to confirm this with Mr Priest.

[93] Further Mr Priest’s evidence was to the effect that he had continued via his solicitors to request that he be allowed to return to work and carry out driver duties excluding Park’n’Ride duties, however JCL had refused these requests.

[94] Additionally I consider a letter to Mr Priest’s solicitors dated 18 November 2010 which stated: “*Peter will be rostered work when he provides us with a medical certificate that states he is fit to return to work ...*” to indicate that JCL still considered Mr Priest to be an employee

[95] Given these factors I cannot accept that JCL reasonably believed that Mr Priest had resigned his employment on 8 November 2010.

[96] In the email to Mr Manning dated 23 December 2010 Mr Priest had stated that he had not resigned, but considered himself to be still employed by JCL. However by April 2011, faced with the situation in which JCL had not provided him with any driving work since 29 October 2011, and had ceased to pay him wages, he had instructed his solicitors to write to JCL advising it of his resignation.

[97] I determine that these actions on the part of JCL constituted breaches of duty towards Mr Priest which caused his resignation on 14 April 2011.

Was the breach sufficiently serious so as to make it reasonably foreseeable by the employer?

[98] Mr Priest maintained the stance throughout the meetings on 4 and 8 November 2010 that he did not agree to the variation of his guaranteed contractual hours. I have found that Mr Priest had been advised by Mr Fitzgerald at the meeting on 8 November 2010 that unless he agreed to the variation his employment could not continue.

[99] Following the meeting on 8 November 2010 Mr Priest had continued, via his solicitors, to request driving work from JCL, but these requests had been refused.

[100] Coupled with the refusal to provide Mr Priest with any work, JCL had ceased to pay Mr Priest his wages with effect from 22 November 2010

[101] I consider that the breaches in the duty JCL owed Mr Priest were sufficiently serious as to make it reasonably foreseeable to JCL that Mr Priest would resign.

[102] I determine that Mr Priest was constructively dismissed by JCL.

Is Mr Priest entitled to a payment in respect of serious illness leave in accordance with clause 23 of the Collective Agreement?

[103] In accordance with clause 23 of the Collective Agreement Mr Priest was entitled to paid leave in instances of *serious illness* defined as: *an illness that is so debilitating that it causes the employee not to be able to attend work for a lengthy period of time.*

(i) Second medical opinion requirement

[104] Mr Priest said he had not been aware of this contractual entitlement until after he had returned to employment, however I consider that Mr Manning was aware that Mr Priest might qualify for the entitlement to serious illness leave. I am supported in this view by Mr Manning's reference to JCL having consultation with Dr MacDonald in order to avoid the requirement to obtain a second medical opinion.

[105] In accordance with clause 23 e) of the Collective Agreement, JCL had the right to require Mr Priest to undergo a second medical opinion before granting the serious illness leave entitlement.

[106] Mr Priest said that had JCL asked him to obtain a second medical opinion, he would have cooperated. However Mr Manning explained it was his opinion that if he had made such a request, Mr Priest would not have cooperated on the basis that Mr Priest had at the relevant time informed him that Dr MacDonald had refused company involvement and had advised him not to allow further consultation with the company.

[107] I find that this was a reasonable opinion for Mr Manning to hold in the circumstances, which was supported later by the fact that at the Investigation Meeting on 18 May 2012 Dr MacDonald denied she had provided the advice of non-cooperation as claimed by Mr Priest.

[108] Moreover Mr Manning said in evidence that he had advised Mr Priest that the consequence of his not co-operating with a request for a second medical opinion would be that he would not be paid for his sickness absence.

[109] At clause 23 e) the Collective Agreement stated that

.... If the Full Time or Part Time driver who has been requested to undergo a second medical opinion refuses to do so, the company may refuse entitlement under this clause.

[110] Although JCL had not directly asked Mr Priest to undergo a second medical opinion, it had asked that it be allowed to consult with Dr MacDonald in order to avoid the necessity for such a second medical opinion, and this had been refused by Mr Priest on what he had untruthfully claimed was Dr MacDonald's advice.

[111] I have found that it was reasonable for Mr Manning to conclude that had he requested Mr Priest to provide a second medical opinion, Mr Priest would have refused to cooperate. On this basis I consider that Mr Priest's attitude in respect of JCL obtaining further medical

information constituted a refusal for the purposes on clause 23 e) of the Collective Agreement and on this basis I find that JCL were entitled to refuse the entitlement.

[112] In the circumstances I determine that Mr Priest is not entitled to a payment in respect of serious illness leave in accordance with clause 23 of the Collective Agreement.

Is Mr Priest entitled to outstanding unpaid wages?

[113] The evidence given by Mr Priest and Mr Manning on this issue was contradictory and it is unfortunate that Mr Bradley was not available to give evidence. Although Mr Priest stated that he had spoken to Mr Bradley about not having been scheduled to attend work on 3 days, I am not convinced that Mr Priest's evidence is reliable.

[114] Clause 5 (a) of the Collective Agreement guarantees 80 hours per fortnight on the basis that a driver is available to work and I find that it credible that Mr Priest had requested that he work a reduced workload after his return to work to ease himself back into the job. Having considered the evidence I consider that it is more likely than not that JCL understood Mr Priest to have requested a reduced workload for the first fortnight rather than the first week on the basis that:

- The guarantee of 80 hours in clause 5 of the Collective Agreement was tied to a fortnightly period rather than a weekly period;
- Mr Priest's evidence that he had not considered part-time work during his period of sick leave had been made on the basis that how he felt varied from day to day; and
- Mr Priest had been on sick leave for over three months when he returned to work, which would have made the immediate adjustment to full-time working a significant consideration.

[115] I determine that Mr Priest is not entitled to outstanding unpaid wages for the period 26 April to 9 May 2010.

Was Mr Priest disadvantaged through a decision to suspend him?

[116] Although Mr Marshall told Mr Priest he had been suspended for refusing to undertake the Park'n'Ride duties, Mr Fitzsimons had explained at the meeting on 2 November 2010 that

Mr Priest had not been suspended but ‘stood down on full pay’. I do not accept that there is a differentiation to be made between suspension and being ‘stood down on full pay’. I find that Mr Priest had been suspended by JCL

[117] There was no express contractual power of suspension in the Collective Agreement; consequently it is necessary to consider whether it was fair and reasonable to suspend Mr Priest in the circumstances.

[118] In *Sefo v Sealord Shellfish Ltd*³ Chief Judge Colgan stated:

Section 4 (“Parties to employment relationship to deal with each other in good faith) requires an employer contemplating possible suspension to be active and constructive, responsive and communicative : s4(1A)(b). If a suspension decision is one that will or is likely to have an adverse effect on the continuation of employment of an employee, the employer must provide the employee with access to appropriate and relevant information about the proposed decision and an opportunity to comment on the information before the decision is made: s4(1A)(c).

[119] A fair and reasonable employer would have followed a fair process in which Mr Priest was provided with an opportunity to have an input into the decision prior to its being made. I find that Mr Priest was not given an opportunity to persuade JCL not to suspend him in accordance with the dictates of natural justice.⁴ I determine that a fair and reasonable employer would not have suspended Mr Priest.

[120] Having determined that a fair and reasonable employer would not have suspended Mr Priest, it follows that the act of suspension is an unjustifiable action. As such it constitutes a disadvantage pursuant to s 103A of the Act.

[121] I determine that Mr Priest was unjustifiably disadvantaged in his employment as a result of the suspension.

Remedies

[122] Mr Priest has been unjustifiably constructively dismissed and unjustifiably disadvantaged in his employment and he is entitled to remedies.

³ [2008] ERNZ 178 at para [37]

⁴ *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice* [1993] 2 ERNZ 546

Reimbursement of Lost Wages

[123] Mr Priest is to be reimbursed for lost wages from the date he ceased to be paid by JCL on 22 November 2010 until the date of his resignation on 14 April 2011.

[124] JCL is to pay Mr Priest the sum of \$21,516.44 gross in lost wages for the period 22 November 2010 to 14 April 2011.

[125] JCL is also to pay Mr Priest the sum of \$13,604.50 gross in respect of 3 months salary from the date of his resignation pursuant to s 128 (2) of the Employment Relations Act 2000 (“the Act”).

Interest

[126] Mr Priest has applied for interest on the remedies awarded in respect of lost wages.

[127] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum⁵.

[128] I consider that it is appropriate that JCL is ordered to pay interest on the amounts awarded in respect of lost wages.

[129] JCL is to pay interest of 5% on the sums due in respect of lost wages.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[130] Mr Priest is also entitled to compensation for humiliation and distress. I find that in respect of both matters giving rise to a personal grievance, these being the disadvantage grievance and the dismissal grievance, Mr Priest suffered distress.

[131] In respect of the disadvantage grievance, JCL is to pay Mr Priest the sum of \$3,000.00, pursuant to s 123(1) (c) (i) of the Act.

[132] In respect of the dismissal grievance, JCL is to pay Mr Priest the sum of \$8,000.00, pursuant to s 123(1) (c) (i) of the Act..

⁵ Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

Contribution

[133] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[134] An employee is required to act in good faith towards the employer. Mr Priest was under a duty in accordance with s 4(1A) of the Employment Relations Act 2000 (the Act) to be 'active and constructive, responsive and communicative' in his dealings with his employer.

[135] I consider that Mr Priest did not behave with the requisite degree of good faith towards JCL.

[136] Mr Priest agreed that JCL had been supportive during his depressive illness absence in early 2010 and had offered him additional personal support. Despite this, Mr Priest had refused to allow JCL to consult with Dr MacDonald and had represented this refusal as being based on advice received from Dr MacDonald, which she categorically denied at the Investigation Meeting on 18 May 2012 having provided to Mr Priest.

[137] Although Mr Priest was still on medication for the depressive illness at the time he had refused to undertake the rostered Park'n'Ride duties, he had been certified as fit to return to work in April 2010.

[138] There was no evidence provided that substantiated Mr Priest's depressive illness as being caused by his work duties, or indeed work-related, other than the fact that the extra marital affair which had triggered the depressive illness had involved another JCL employee. There was no information provided to JCL that this depressive illness was in any way caused by, or connected to, the Park'n'Ride duties.

[139] On 28 October 2010 when Mr Priest had refused to attend work and carry out his rostered Park'n'Ride duties, he had not been certified as unfit medically to carry out these duties and he had in fact carried them out on approximately 12 occasions since his return to work on 6 April 2010.

[140] A medical certificate had not been produced until after the meeting on 2 November 2010 when one had been specifically requested by JCL.

[141] The requested medical certificate had been provided by Dr MacDonald who had relied on the information provided by Mr Priest that Park'n'Ride duties were not part of his core duties, a representation I consider to be misleading, even disingenuous, given that Mr Priest accepted at the Investigation Meeting on 3 July 2012 that Park'n'Ride duties were part of a full-time driver's normal duties.

[142] I find that Mr Priest failed to act in good faith towards JCL who had been supportive during his depressive illness in early 2010 and who had prior to the events after 28 October 2010 acted in good faith towards him.

[143] I find contributory fault on the part of Mr Priest and reduce the remedies awarded in respect of lost wages and the dismissal grievance by 65 % pursuant to s 124 of the Act.

Costs

[144] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority