

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 26/10
5157355

BETWEEN NORMAN TANE
 Applicant

AND SECRETARY FOR JUSTICE
 Respondent

Member of Authority: K J Anderson

Representatives: S Grice, Counsel for Applicant
 A Sherriff, Counsel for Respondent

Investigation Meeting: 20 November 2009 at Tauranga

Determination: 25 January 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Tane, claims that he was unjustifiably dismissed effective from 22nd October 2008. Mr Tane also claims that he suffered an unjustified disadvantage in his employment in that his employer had tolerated his absence from work due to injury; then changed its position and was no longer prepared to accept his absence. Finally, Mr Tane says that the actions of his employer constitute a breach of s.56 of the State Sector Act 1988. Mr Tane seeks that the Authority uphold his personal grievances and award him various remedies, but he no longer seeks reinstatement.

[2] The respondent, The Secretary for Justice, denies all of Mr Tane's claims and says that due to the long term absence of Mr Tane, his dismissal was justified and that as his employer, it acted in a fair and reasonable manner at all times. Note: While the correct legal entity for the purposes of the proceedings is The Secretary

for Justice, as Mr Tane was employed by the Ministry of Justice (“the Ministry”), this reference will be used throughout this determination. The Ministry has a counterclaim. It claims that Mr Tane received an overpayment of wages in the net sum of \$978.42 and seeks the repayment of this amount.

[3] In addition to that of Mr Tane, there was evidence for him from Mrs Colleen Tane. The Authority heard evidence for the Ministry from Ms Beth Bowden, the Local Courts Manager – Tauranga, and Ms Susan Little, Regional Manager – Central. The parties also provided a number of relevant documents along with written submissions. All of the available evidence has been closely considered, albeit it is not all specifically identified or referred to in this determination.

Background Facts

[4] Mr Tane was employed as a Court Attendant at the Tauranga District Court. He commenced his employment in June 2004 and at the material times was working 56 hours per fortnight. The evidence of Ms Bowden is that Mr Tane had some intermittent health issues which impeded his reliable attendance.

[5] On Saturday, 21st July 2007, Mr Tane had an out-of-work accident, injuring his knee to the extent that he was not fit to attend work. He notified his line manager, Ms Lynda Lambert, of this via a fax on 22nd July, indicating that he would be on crutches for 7 to 10 days. The evidence of Ms Bowden is that given that the medical certificates for Mr Tane were “*minimally informative,*” by the end of July 2007, Ms Lambert had expressed some concern that she would have some difficulty with the daily operation of the Criminal Courts, if Mr Tane’s absence was to be long term. Ms Bowden consequently took over the administrative details of Mr Tane’s sick leave absence. The further evidence of Ms Bowden is that, in addition to Ms Lambert’s concerns about Mr Tane’s absence, she had also received expressions of concern from the Senior Security Officer at Tauranga, regarding the “*attitudes and methods*” of Mr Tane in dealing with people in the public foyer of the Court.

[6] Mr Tane duly returned to work, albeit, as I understand it, for a brief period of time, though I note that the medical certificate dated 23 August 2007, informs that Mr Tane was medically unfit for work from 23rd August to 2nd September 2007. Ms Bowden says that she met with him on 24th August 2007 in an attempt to identify the

nature of his “*various conditions*” and how they affected his ability to function in the job. The evidence of Ms Bowden is that Mr Tane became agitated and walked out of the meeting, saying that he could not carry on with his Court duties and needed to go home. Ms Bowden was taken aback by the “*vehemence*” of Mr Tane’s reaction.

[7] On 27th August 2007, Ms Bowden wrote to Mr Tane inviting him to a meeting on 10th September to discuss:

- *Communication with your colleagues, in particular, with the Security staff*
- *Sick leave*
- *Stress*
- *Customer service difficulties that lead to risky behaviour with members of the public*

[8] Mr Tane never responded to this letter. While it seems that Mr Tane was aware that Ms Bowden was managing matters relating to his absence from work, he continued to make contact only with Ms Lambert. Mr Tane says that his understanding was that: “... *my first obligation in respect of my absence from work was to follow the correct chain of command and to report to my immediate controlling officer, Lynda Lambert.*” On 30th August, he sent a fax to Ms Lambert with a medical certificate that indicated he would be fit for work from 10th September.

[9] Mr Tane failed to attend work and the meeting on 10th September. He provided no reason for his absence, though I note that an ACC medical certificate dated 7th September, was faxed to Ms Lambert on that date. This indicated that Mr Tane would be unable to work until 16th September. Mr Tane also requested leave for four days from 24th to 27th September, indicating that he was on a list for; “*orthopaedic referral Reconstruct knee surgery.*” Mr Tane also sought leave for a further three days for a matter relating to a Maori Land Court Hearing. But reasonable behaviour, would have been for Mr Tane to have made his intentions known in regard to the meeting that Ms Bowden was anticipating on 10th September, albeit it seems that there may also have been a lapse in communication between Ms Lambert and Ms Bowden in regard to Mr Tane’s absence status, and the reporting expectations of Mr Tane were never made clear.

[10] Ms Bowden rang Mr Tane on 11th September to ask why he had been absent and to ask the name of his ACC case manager. Ms Bowden says that Mr Tane refused

to answer his questions and hung up on her. Consequently, Ms Bowden wrote to Mr Tane on 13th September 2007. She referred to a number of matters, including:

- (a) Mr Tane's behaviour in hanging up on her on 11th September;
- (b) The importance of communication relating to Mr Tane's absence from and return to work;
- (c) The failure of Mr Tane to respond to her letter of 27th August and the absence of Mr Tane from work when he was expected to return on 10th September; and
- (d) An urgent request for the name of Mr Tane's ACC Case manager.

The letter concluded:

If you are unable to return to work on 16 September 2007 and do not provide me with a diagnosis and prognosis of your return to work, I will advise you that I will not consider it reasonable to continue payment of sick leave to you and will be recommending to the Regional Manager that it cease, effective from that date. Norm, I am very concerned that you appear not to be willing to engage in communication in relation to your employment. It is important for you to understand that if this continues you could ultimately place your ongoing employment in jeopardy. I am available to discuss any queries you may have and I look forward to hearing from you.

[11] Mr Tane did not respond and on 26th September Ms Bowden wrote to him again. Ms Bowden informed that she had made contact with the ACC and had been advised that they have not had any contact from him. Mr Tane was advised to contact ACC. Ms Bowden informed that:

In my view it is unacceptable for you to remain absent from work from an apparent accident and not to undertake rehabilitation as prescribed by ACC. Your latest medical certificate states that you will be returning to work on 1 October. I will arrange to meet with you on your return. If you do not return to work on 1 October 2007, the Ministry will discontinue your pay from that date. If I receive formal advice from your ACC case officer that you are undertaking rehabilitation with them, including a written plan for your return to work and a date for that return, your pay will resume. Unless I get this information, and have a meeting with you, your continued employment with the Ministry will become a matter requiring consideration.

[12] Mr Tane did not respond to Ms Bowden but he did send a fax to Ms Lambert on 26th September, informing that he would not be reporting for work on 1 October, but had an appointment to see an ACC case manager that day, the name of whom he provided. On 1 October 2007, Mr Tane was certified as being unfit for work for a further 56 days from 28th September. From 1 October, Mr Tane was on leave without

pay.¹ On 4th October, a workplace assessment was carried out by Accomplish Vocational Services with Ms Lambert in attendance. Mr Tane says that he participated also. The report dated 8th October, indicates that Mr Tane was to have “*recovery surgery*” on 14th November 2007 and then concluded that:

... no option to graduate Norman back to work has been identified. Therefore alternate options to support physical rehabilitation and build functional mobility are outlined above. As no further need for Occupational Therapy has been identified at this time, Accomplish Vocational Services now consider this referral complete and the case closed unless otherwise notified by ACC.

[13] Ms Bowden wrote again to Mr Tane on 17th October asking for information from his specialist in order to; “*assess ongoing business needs.*” She provided a consent form for Mr Tane to sign. Ms Bowden informed that when she received the information, she would meet with Mr Tane; “*to discuss the content and details relating to the prognosis.*” Ms Bowden’s letter concludes:

If you have any questions about anything in this letter, or you need any clarity please contact me urgently on [phone number]. It is important we discuss matters relating to the likelihood of your return to work, as one such outcome could be that you may be unable to continue in your employment. In that case other options may need to be considered, including medical retirement.

[14] The evidence of Ms Bowden is that she did not receive any response from Mr Tane to the above letter, but because she was aware that he was scheduled for an operation in November, she assumed that it would be likely that Mr Tane would return to work after the Christmas/New Year statutory holidays. However, Ms Bowden says that she became aware in January 2008 that Mr Tane had not had an operation. Apart from some contact on the part of Ms Bowden with the ACC case manager, the evidence for the Ministry as to what occurred in the next six months is sparse. The evidence of Mr Tane is that on 10th March 2008, he attended an appointment with Dr Douglas, an occupational health physician. Mr Tane says that he attended Dr Douglas on the instructions of his employer. Ms Bowden attests that the Ministry did not instruct Mr Tane to visit Dr Douglas and that she had not heard of this person until some time after the termination of Mr Tane’s employment. Indeed, in his evidence in reply, Mr Tane accepts that he was mistaken and that it was ACC that required him to visit Dr Douglas. But, more importantly, while it is now established

¹ On 17th December 2007, it was subsequently acknowledged by Ms Bowden that the cessation of payments to Mr Tane was incorrect and that he should be paid 80% of his income as accident compensation.

that Mr Tane's condition was assessed by Dr Douglas on 10th March 2008 and a report (undated) was compiled, this report was never made available to the Ministry until one week before the investigation meeting (13th November 2009); attached to Mr Tane's brief of evidence in reply. In his report, Dr Douglas informs that:

Before proceeding with this assessment I discussed the purposes of this assessment with the claimant. I made it clear that I was not the treating doctor, but a non-treating assessor providing information and making recommendations to assist ACC in the management of this claim. Consent was given for the assessment and for a report to be sent to ACC.

The evidence of Mr Tane is that he understood that his ACC case manager was discussing his situation with Ms Bowden and he assumed that ACC would have given the Ministry a copy of the report provided by Dr Douglas.

[15] On 19th May 2008, Mr Tane attended his GP, Dr Matson. The medical certificate of this date indicates that Mr Tane was fit to return to work on a restricted basis: two 8 hour days per week for 4 weeks. The certificate also reveals that Mr Tane was to have a further review by the orthopaedic surgeon, Mr Dawe, on 6th June 2008. It seems that there was some contact between Ms Bowden and Mr Tane's ACC case manager, Ms Eason, about the possibility of Mr Tane returning to work on a restricted basis. However, in a letter dated 3rd June 2008 Ms Bowden informed Ms Eason that the Tauranga District Court, as a workplace; "... *is not conducive to the light, mainly sedentary work suggested by Dr Matson.*"

[16] Following a visit to Mr Dawe on 6th June, Mr Tane faxed Ms Lambert and informed that he would be scheduled for surgery in mid-September 2008. He also mentioned the restricted return to work proposed by Dr Matson and proposed work options to allow this to occur. Ms Bowden wrote to Mr Tane on 10th June indicating that while she appreciated the suggestion that Mr Tane could return to work on a restricted basis, the scope of the duties that Mr Tane proposed created some "*operational problems.*" Ms Bowden proposed a meeting with Mr Tane and his representative to discuss these. Ms Bowden invited Mr Tane to contact her to arrange a suitable time and place to meet. Mr Tane did not respond to Ms Bowden. Rather, he sent a fax to Ms Eason indicating that he did not see any point in meeting with Ms Bowden, given she had indicated there would be operational problems with his proposed restricted return to work. Mr Tane says that he assumed that Ms Bowden

and Ms Eason would discuss his view of things. It seems that Mr Tane had something of a problem with communicating directly with Ms Bowden.

[17] Following the provision by Mr Tane of a further medical certificate dated 11th June 2008, which indicated he could carry out restrictive duties, Ms Bowden again wrote to him on 18th June referring him to her earlier invitation to meet. Given his failure to contact her after the letter of 10th June, Ms Bowden was more forthright:

I expect you to arrange, and attend, a meeting with me, at the Court, between 30 June and 3 July. You may bring a representative to this meeting. Should you fail to make the required contact, I am advised that the Ministry will have no option but to consider retiring you on medical grounds. The operational problems I have referred to are real, but you may be able to offer some insights into your condition that are not apparent from the medical certificate you have supplied. I hope you will see your way clear to making time for a discussion with me. Given that so much time has gone by, it is now imperative that you do so.

[18] A meeting took place with Mr Tane and Ms Bowden on 9th July 2008. Also in attendance were Ms Eason, Ms Butt, the occupational therapist who did the workplace assessment, and Ms Lambert. It was established that the regime that had been adopted by ACC to rehabilitate Mr Tane's injury had not been successful and that ACC funded surgery would be required; possibly in mid-September 2008. This would involve a replacement knee joint, an absence from work for six weeks and a six month recovery period including physiotherapy as post-operative care. The possibility of a restrictive return to work for Mr Tane, leading up to his operation, under a plan prepared by the occupational therapist, was discussed. Mr Tane indicated a willingness to conform to a plan but also informed that while his knee was prone to dislocate, he generally got some warning and could avoid the risk of falling and further injury. The evidence of Ms Bowden is that she recalls Mr Tane saying that he was "neutral" about returning to work and that she particularly remembers him saying that: "*I don't care if I don't have a job. You can decide – I can go or I can stay.*"

[19] The evidence of Ms Bowden is she and Ms Lambert could see some "shortcomings" in the proposal for Mr Tane to return to work and they wished to consider these. These concerns largely, but not exclusively, involved the restricted mobility of Mr Tane and the possibility that he might have another accident. Mr Bowden took advice from a human resources advisor and the Ministry concluded that the Tauranga Court was under too much operational pressure to have the capacity to

support Mr Tane in a restricted return to work as proposed, both up to his operation, and after, when they would be without his services while he recovered, and while he attended physiotherapy.

[20] On 14th August 2008, Ms Bowden wrote to Mr Tane indicating that she had now discussed his situation with Ms Little, the Regional Manager. Ms Bowden set out the concerns that the Ministry had in regard to Mr Tane's situation and her understanding of it:

Based on the advice from your most recent medical certificate, the surgery on your knee is now not likely to occur until 2 October 2008. It will involve joint replacement and physiotherapy for post-operative care. You would be absent from work for six weeks and after that further rehabilitation requires light duties for six to nine months after the operation before your knee has recovered. My present view is that this is a longer period of time than can reasonably be covered by interim arrangements until you return to work at full capacity.

Ms Bowden proposed a further meeting on 26th August to discuss "what other reasonable options may be available."

[21] Mr Tane did not attend this meeting. His evidence is that it was an "oversight" and a lack of focus on his part, and that he had become depressed due to the possibility of losing his job and the uncertainty of the forthcoming surgery. However, Mr Tane's letter of 28th August does not suggest that there was any absence of focus and he gave quite different reasons for his failure to attend the meeting. Nonetheless, his apology was accepted by Ms Bowden.

[22] Via a letter dated 26th August 2008, Ms Bowden informed Mr Tane that:

I am now advised that under clause 6.3.4 of the Collective Employment Agreement I am unable to hold your position open any longer. Accordingly I will be recommending to the Regional Manager that you be retired on medical grounds, effective from 1 September 2008.

[23] On 5th September 2008, Ms Bowden wrote to Mr Tane and proposed a meeting on 10th September; to give Mr Tane the opportunity to respond to the recommendation of retirement on medical grounds² and that a final decision would be made after this meeting. In response to this letter, Mr Tane sent a fax to Ms Lambert

² It subsequently transpired that retirement on medical grounds was not an option available to Mr Tane.

on 8th September. He informed that due to “*other commitments*” he was unable to meet on 10th September; but in any event:

As I have previously advised at the meeting July 08 and my reply 28 Aug 08, that all the valid points in respect of my medical condition and future forecast rehabilitation prognosis have been fully disclosed.

And further:

Again I do not see any justification in having another meeting about the same matters that have already been fully discussed and agreed to by all parties that were in attendance. All the facts and expected prognosis are before Beth and I have nothing new to add.

[24] At this point, Ms Bowden recommended to Ms Little that, due to Mr Tane being unable to carry out his job because of his medical condition, and because of operational demands, his position could no longer be held open, Ms Little should consider terminating Mr Tane’s employment. Ms Little consequently wrote to Mr Tane on 25th September 2008. She outlined the history of Mr Tane’s situation and advised him that:

... my preliminary decision is that your employment be terminated under clause 6.3.4 of your employment contract, with one month’s notice.

Ms Little advised Mr Tane that he had until 30th September to make any submissions in respect of this preliminary decision. Mr Tane was also reminded of his right to seek legal or other representation.

[25] Via a fax dated 30th September, Mr Tane responded to Ms Little informing that he had not received Ms Little’s letter until 29th September and due to the “*short time frame*” he was unable to meet her request for submissions. Mr Tane also informed that he was in the process of undergoing “*post [sic] operation*” consultation in preparation for surgery on 2nd October. The evidence of Mr Tane is that he had some concerns about Ms Little’s letter in that she referred to the collective employment agreement and as he was not employed under this agreement but under an individual employment agreement, he did not understand the provisions under which Ms Little was considering the termination of his employment. Also, Mr Tane was concerned that Ms Little was asking him to provide submissions immediately before his surgery.

[26] Ms Little responded on 8th October. In her letter to Mr Tane, while she noted that he would have by now had his operation and would be undergoing post-recovery

rehabilitation, Ms Little conveyed that in regard to the matter of his medical condition:

... as this matter has been proceeding for sometime a decision has to be made to enable the Tauranga Court Manager to administer and plan the work in your area. There has been an extensive process of communication and opportunity both with you and for you on this matter. Please note that unless I have heard from you by 17th October 2008 I will have no option but to proceed with terminating your employment on medical grounds. Please note your right to seek representation in respect of this matter.

[27] Mr Tane says that he was “*extremely upset and distressed*” when he received this letter. His evidence is that at the time he was at home, confined to his bed recovering from surgery, with limited mobility and hence was unable to seek advice or assistance in regard to the proposed termination of his employment. The evidence of Ms Little is that given she had not received any response from Mr Tane by 21st October, she phoned him. Ms Little says that she asked Mr Tane if he wished to make any submissions regarding her letter of 8th October and if so, would he be able to do so by 24th October. Ms Little says that upon Mr Tane advising her that he had to go back into hospital on 24th October, she asked him if he might be able to advise her by 23rd October if he wished to make any submissions. The further evidence of Ms Little is that Mr Tane responded by saying:

... do what you will do, he was not going to accept that he was medically unfit, he would challenge it as he thought it was totally unfair, that he didn't see any reason why he couldn't just continue, ACC were paying, and stated that he would be well when he recovered and he would be back then.

[28] Following her conversation with Mr Tane, Ms Little sought further advice from Ministry staff. Ms Little says that given Mr Tane's refusal to engage with her regarding making any submissions, she felt “*an added pressure*” to ensure that all possibilities and angles were considered. Ms Little was advised by Ms Bowden that alternative duties for Mr Tane had been extensively canvassed pre-operation and although the assessment didn't relate to a post-operation state, the different floor levels, inclines and stairs would be likely to present difficulties.

[29] Ms Little says that she reviewed the information available to her regarding Mr Tane's circumstances. This was that:

- a. Mr Tane had been unable to work for a period of 15 months and the prognosis from the medical profession was that a further 6 months would be required before he could return to full duties;

- b. She had waited almost a month for Mr Tane to make submissions to her preliminary decision of 25th September 2008 and that he had advised her that he had no intention of being prepared to respond to her at any reasonable time in the future; and
- c. Given the operational needs of the Court, the period Mr Tane had already been unable to work and the expected time before he would be able to return, Ms Little felt that the appropriate action was to confirm her preliminary decision to terminate to employment of Mr Tane.

[30] Via a letter dated 22nd October 2008, Ms Little summarised the situation and Mr Tane was advised of the decision to terminate his employment under clause 6.3.4 of his employment contract; with one month's notice.

Analysis and Conclusions

[31] In assessing Mr Tane's claim of an unjustified action by his employer affecting his employment to his disadvantage, and his claim of unjustified dismissal, the test that the Authority must apply is the same. It is provided by s.103A of the Employment Relations Act 2000. The Authority must objectively consider whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time that the respective actions occurred.

[32] In regard to Mr Tane's unjustified disadvantage claim, he says that the Ministry changed its position in June 2008, in that it had previously tolerated his absence, but when faced with a return to work proposal shortly before Mr Tane was due to undergo surgery, the Ministry then decided that his ongoing absence was no longer acceptable. However, it seems to me that this claim is effectively subsumed into Mr Tane's substantive claim of unjustified dismissal in that the scenario referred to, cannot be severed or distinguished from the overall circumstances leading to the termination of Mr Tane's employment.

Was the dismissal unjustified?

[33] The Ministry largely relies on the provisions of Mr Tane's employment agreement which provides that:

The Ministry will actively support employees returning to work following a period of absence for illness. However, where an employee has been unable to attend work for a prolonged period, the employee's manager will assess, in consultation with the employee, whether it remains able to hold the employee's position open. If the employee's manager decides that it can no longer hold an employee's position open, notice of termination will be provided.

Unfortunately, various people within the Ministry appear to have been rather confused as to the source of the above provision. In the respective correspondence to Mr Tane, including the final letter informing him of the termination of his employment, clause 6.3.4 has been consistently referred to. In her letter to Mr Tane of 26th August 2008, Ms Bowden refers to clause 6.3.4 of the *Collective Employment Agreement (CEA)*. Clearly Ms Bowden was mistaken, or possibly misled, on two counts, as firstly, Mr Tane was not employed under the CEA - he was employed under an individual employment agreement - and further, the relevant provision is at clause 11.3(e) of this document. Given the misunderstanding that existed within the Ministry as to the correct contractual source, one must have some empathy for any confusion which arose for Mr Tane. Nonetheless, despite the carelessness of the Ministry in regard to such an important detail, following the letters from Ms Little dated 25th September and 22nd October 2008, both of which had the correct wording, albeit reference to the wrong source, I have no doubt that Mr Tane would have been clear on the contractual provision relied on and why.

[34] A submission has been advanced for Mr Tane that pursuant to the above contractual provision, the Ministry failed to "*actively support*" his return to work. Unfortunately, the problem with this submission is that although Mr Tane's GP cleared Mr Tane for a restricted return to work, and Mr Tane made some proposals as to how this might occur, it remained the prerogative of the Ministry to assess whether it was indeed realistically possible. Given the nature of the Court's operations, the physical layout, and the possibility that Mr Tane may incur a further injury given the weakness that existed in his knee, the Ministry concluded that there were operational problems that made a restricted return to work by Mr Tane unrealistic. I find that this

was a conclusion that the Ministry was fairly and reasonably entitled to come to given the overall circumstances.

[35] Furthermore, apart from the contractual provision, the common law in such circumstances favours the Ministry in that it is well established that there can come a point at which an employer “can fairly cry halt.”³ And in *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585, the Employment Court held:

However, if the employer chooses to dismiss, its actions must be justified at the time in accordance with the jurisprudence set down by the Employment Court, its predecessors, and the Court of Appeal. That is, the employer must have substantive reasons for the dismissal, and must show that the procedure it followed in carrying out this dismissal was fair. This ensures that the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated.

[36] While Mr Tane could have been more helpful in regard to providing the appropriate medical reports prior to his operation, it can be reasonably accepted that he was under the impression that his ACC case manager would have provided such to the Ministry. But in any event, I accept that the Ministry had sufficient information as to Mr Tane’s medical condition and prognosis. It is also regrettable that Mr Tane chose to be less than cooperative in regard to meeting with the Ministry at various times and in making submissions for the Ministry to consider. This is particularly so following his operation, as Ms Little went to some trouble to give Mr Tane an opportunity to provide any further information which may have led to further consideration by the Ministry as to whether the preliminary decision to dismiss was appropriate. However, I suspect that Mr Tane well knew that given the time that he had been absent from work, and the prognosis as to his recovery, there was little that he could have added.

[37] Finally, and for completeness, while some reference has been made to another Ministry employee who was also off work for some time, apparently involving a similar operation to Mr Tane, this was not actively pursued by him. Nor has any evidence relating to a comparison of the circumstances been produced hence the possibility of any disparity of treatment was not open to consideration.

³ *Hosking v Coastal Fish Supplies Ltd* [1985] ACJ 124.

The Counterclaim from the Ministry

[38] The Ministry says that Mr Tane was overpaid wages in the net sum of \$978.42. The overpayment came about due to the Ministry paying Mr Tane his full salary from the period ending 23rd July 2008 to the period ending 29th October 2008, rather than 80% of his salary under the ACC provisions. The details of the total overpayment have been clearly set out for the Ministry along with the payroll records. This is not a belated claim on the part of the Ministry, as Ms Bowden wrote to Mr Tane on 12th November 2008, pointing out the error that had been made and seeking repayment from him. Mr Tane responded on 17th November seeking his pay records and an explanation as to how such overpayment may have come about. Mr Tane also drew attention to an error, which Ms Bowden has acknowledged, in regard to a discrepancy in the amount of cents recorded in Ms Bowden's letter and the attached repayment authorisation form (42 cents/84 cents – the former is correct). Despite Ms Bowden clarifying matters for Mr Tane on 5th December 2008, the repayment has not been made.

[39] Despite the submissions for Mr Tane to the contrary, I can see no good reason why Mr Tane should not repay the sum in question. Applying the equity and good conscience jurisdiction of the Authority under s.157 of the Employment Relations Act 2000, an order will follow.

Determination

[40] I find that given the prolonged period that Mr Tane was absent from his employment on medical grounds, and the prognosis as to his recovery, there were valid and substantive reasons for the Ministry to conclude that it could no longer hold Mr Tane's position open. I also conclude that given the overall circumstances, it was fair and reasonable for the Ministry to terminate the employment of Mr Tane under the terms of his employment agreement and common law precedent. It follows that I also find that there has not been a breach of s.56 of the State Sector Act or s.4 of the Employment Relations Act. I find that Mr Tane does not have a personal grievance and his claims are dismissed.

[41] Mr Tane is ordered to repay to the Ministry the sum of \$978.42.

Costs

[42] The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority