

and resolve the employment relationship problem. The matter has remained unresolved and it now falls on the Authority to determine the matter.

The Issues

[4] There are a number of factual matters that require determination, and general issues of principle have emerged on the law and approach to this matter.

[5] Was the final warning dated 6 September 2007 accepted by Mr Winnie?

[6] Was there a settlement of a personal grievance, before Mr Winnie's dismissal?

[7] What was the content of the message Mr Winnie left at work? What time did he telephone work? Did he change his mind that he was not going to attend work on 7 February 2008?

[8] Did Mr Winnie say on 12 February 2008 that his partner's injury was a matter of "*life and death*" in a discussion with Mr Nunan, Fairfax's human resources manager?

[9] How was the time for the validity of the final warning to expire put in place?

[10] What did the employer take into account in making its decision to dismiss Mr Winnie?

[11] Would a fair and reasonable employer have rejected the applicant's 'explanation'?

[12] Was it open to a fair and reasonable employer not to accept Mr Winnie's explanation for his non-attendance and non-reporting of his absence? Was his explanation an excuse? Would a fair and reasonable employer have dismissed the applicant for serious misconduct for the reasons provided?

The Facts

[13] Mr Winnie was employed at the Dominion Post as a press assistant. He commenced his employment on 12 February 2001 and accepted that his employer was Fairfax Limited. A collective employment agreement applied to the parties. The parties have a disagreement on whether or not Mr Winnie was given a copy of the company's Introduction and Guidelines for New Employees. The copy produced by the company was a 2007 version. There is a letter dated 2001 referring to such documents being attached but no proof that Mr Winnie actually received them given that he has denied receiving them.

[14] The employment relationship problem arises from a final written warning dated 6 September 2007 written by Mr Tim Nunan, Human Resources Manager. On 12 September 2007 a personal grievance was raised over the warning.

[15] However, in the background there was an earlier warning issued on 19 April 2007 for allegedly abusing his supervisor. This reads verbatim as follows:

19 April 2007

Dear Carl

Thank you for meeting with Plant Manager [name withheld], your Afternoon Shift Supervisor [name withheld] and me at 2.00pm on Monday 16th April 2007.

As advised both verbally and in writing on 12th April, the purpose of the meeting was to investigate an incident on Thursday 5th April 2005 during you were alleged to have refused to carry out reasonable instructions and verbally abused your supervisor.

As this was a disciplinary meeting held under the Staff Disciplinary Code you were invited to bring a support person but chose not to.

To begin the meeting I explained that we would all have an opportunity to talk without interruption and that discussions were intended to be positive.

I asked [name withheld] to go over the alleged incident before asking you to respond.

[name withheld] detailed the lead up to the incident, how he had approached you after hearing that you would not carry out certain duties. He had earlier reviewed your medical certificate and found that it did not state that you were not able to carry out particular duties. When he discussed this with you, in his words you gave him a 'gob full'.

We appreciated that you told us that your actions were unacceptable, uncalled, that you were ashamed and that you apologised to [name withheld] who accepted your apology.

During related discussions you told us that should have not come to work as you were still unwell.

[Name withheld] went on to say that if he had known you were unwell he would have made allowances.

We then discussed your absenteeism and you told us about your illness over the past few years. I explained that there was a distinct pattern to your sick leave with your annual entitlement being used each year within 3 months of being granted. We discussed the impact of your frequent absences had on your colleagues and that at the current rate of use your balance would soon be exhausted.

You indicated that you were thinking about having a flu jab and taking steps to improve your health.

I asked if there was any further assistance I could offer you.

At this point I thanked you for your explanations and said that we would now fully consider your explanations before deciding what further action would be taken. I indicated that given the seriousness of the matter, some form of written warning was likely but that no hasty decisions would be made. I indicated we would meet again later in the week to advise our decision but you should talk to me or [name withheld] if you had any related queries or matters to discuss.

We have now fully considered your explanations and found that they are unacceptable. However we have taken into account your sincere apology to [name withheld] and your good work record. It is our decision that you are issued with a formal written warning that your refusal to carry out reasonable instructions and verbally abusing your supervisor amounted to unacceptable behaviour as per the Staff Disciplinary Code. Should there be any further behaviour or performance issues, following investigation, further action will be taken.

For the future, as already advised by me verbally and in writing, abusive or threatening behaviour has no place in the work environment and will not be tolerated by the Dominion Post.

The following guidelines are intended to be of assistance to you:

- *If you have any concerns about carrying out your duties you are to arrange to discuss these with your supervisor in a constructive manner.*
- *Due to excessive sick leave patterns, you are still required to provide a medical certificate in support of absences. (my emphasis)*
- *When returning from a period of leave due to ill health, you are to meet with your supervisor at the beginning of the shift to discuss any duties you are not able to carry out due to documented medical reasons.*
- *If you are concerned about comments from, or the behaviour of your colleagues you are to report these to your supervisor or Plant Manager.*

Please contact me if you would like to discuss the contents of this letter.

Yours sincerely

*Tim Nunan
HUMAN RESOURCES MANAGER*

[16] There is also a letter dated 16 August 2007 sent to Mr Winnie from the plant manager at the time with his concerns about Mr Winnie's absences, and the letter reads verbatim as follows:

16 August 2007

Dear Carl

As briefly discussed with you on Tuesday 14th August, I am extremely concerned and frustrated over your ongoing absenteeism.

Your frequent absences continue to have a significant impact on your colleagues and workflows.

In the 6½ years you have been with us you have taken 70 days paid sick leave plus another 37 unpaid. This does not include days taken under ACC.

When you were issued with a formal written warning in April 2007 you were reminded of the requirement to provide a medical certificate in support of any future sick related absences. Yesterday you advised me you did not have a medical certificate.

You were also required to meet with your supervisor when returning from sick leave. I understand this did not occur.

In order to discuss further, you are required to meet with me and the Human Resources Manager at 2:30pm on Monday 20th August 2007 in the Board Room.

The matter is being treated very seriously as per the Staff Disciplinary Code. Please feel free to invite a support person to assist you.

During the meeting we will review your extremely high level of absenteeism to date, seek your explanations for this latest absence, the lack of medical certification and the lack of contact with your supervisor.

Following the meeting we will fully consider your explanations and any related matters before deciding what further action will be taken. Given the recent written warning, a final written warning or some other action as per the staff disciplinary code may result.

Please advise me if you require any further information prior to the meeting.

Yours sincerely

PLANT MANAGER

[17] The warning dated 6 September 2007 referred to Mr Winnie's absence from work and provided guidelines for him to follow. The same warning required Mr Winnie to follow proper procedures by providing a medical certificate and to meet with his supervisor when returning to work. This reads verbatim as follows:

6 September 2007

Dear Carl

Thank you for meeting with Plant Manager [name withheld], your supervisor [name withheld] and me on Wednesday 29th August 2007 at the Plant.

This was a disciplinary meeting as previously advised in writing on 16th August. We had been happy to delay the meeting to enable John Kerr from the EPMU to attend as your representative.

The meeting commenced at 2.35pm and following introductions I went over the purpose of the meeting which was to discuss your extremely high level of absenteeism, seek your explanation for not supplying a medical certificate in support of your absence from Monday 30th July to Friday 3 August and why you did not meet with your supervisor on your return.

I had previously provided John a copy of the formal written warning letter dated 19th April 2007. At the start of this meeting I also provided a summary of all paid and unpaid leave recorded as illness related.

Following questions from John I expanded on the history of the recent warning, the continuous absenteeism since your appointment in 2001, the impact the frequent absences had on your shift colleagues and confirm that although we would continue to offer all practical health support, the focus of this meeting was the lack of a medical certificate and why you did not meet with your supervisor on your return.

At John's request we adjourned at this point and reconvened approximately 10 minutes later.

John advised us that you had asked him to speak on your behalf. He advised that you had not thought it necessary to meet with [name withheld] as there were no medical restrictions to the work you could do.

In regard to the medical certificate, you had not obtained one as you were not at your own home when you were ill and couldn't see your own GP. When [name withheld] asked for a medical certificate when you returned from annual leave, you confirmed that you did not have one but were prepared to obtain one. Adrian declined at that time and confirmed during the meeting that such a retrospective certificate would not have been appropriate or useful.

There was related discussion and following a question from John I confirmed that the company did not consider sickness as misconduct

That said, I explained that in my capacity I worked with many staff with serious medical issues and also reported on absenteeism across the entire company. As I had done so in the past to you both verbally and in writing, I again detailed how your level of absenteeism was incredibly high and had been so since your appointment in 2001.

You spoke of your nervous breakdown and the foot infection earlier this year, the fact that you had taken the flu jab and also confirmed that there were no ongoing health issues.

Related discussion following during which I provided further feedback to the requirement contained in the written warning to actually meet with your supervisor on return from any absences due to ill health.

Toward the end of the meeting I thanked both you and John for your comments and explanations, and indicated that [name withheld] and I would now fully consider these and matters discussed before deciding on further action. There would be no hasty decision and it would be next week before a decision was advised. John asked if he could make a submission before any decision was advised. In this regard I rang John on Monday 3rd September and we discussed the likely disciplinary outcome, related matters and future support.

It has now been weeks since the meeting and we have fully considered your explanations, all matters discussed with John's comments and submissions to me on your behalf on Monday.

It is our decision that you are issued with a final written warning for failing to provide a medical certificate and not meeting with your supervisor on your return, requirements clearly detailed in the written warning dated 19th April 2007. Should you not supply a medical certificate in support of future absences and also meet with your supervisor, or if there are any future performance issues, following investigation your employment may be terminated (my emphasis).

All company and Holidays Act paid sick leave entitlement has been exhausted until February 2008. So that there is no doubt as to your responsibilities, our requirements are further explained as follows:

- **If you not able to attend work due to illness you are to ring and actually speak with your supervisor.** (my emphasis) Do not leave a text message. Alternatively you may speak with the Plant Manager or delegated Deputy.
- Due to excessive absenteeism patterns, far in excess of company or legislative entitlements, you are required **to supply a medical certificate in support of future ill health related absences** (my emphasis). This should not be seen as a penalty, the company wants to ensure prompt medical advice and assistance.

- *On your return from any future ill health related absences, you are to meet with your supervisor at the beginning of the shift and confirm that you are fit to carry out all duties or alternatively discuss those duties you are not able to undertake for documented medical reasons.*

The company continues to have significant concerns over your level of absenteeism, and these concerns have been regularly discussed and recorded in writing, without improvement. As offered previously, the company is more than willing to assist you in any practical way possible to improve your health. Please contact our Health Nurse in this regard and keep your supervisor or me informed of any health issues you may face in future. We are all willing to assist.

Yours sincerely

Tim Nunan
HUMAN RESOURCES MANAGER

[18] There was a meeting held on 9 October 2007 to discuss the personal grievance raised on 12 September. Mr Winnie says that issue was not resolved. Mr Nunan says he was left in no doubt that Mr Winnie knew exactly what was expected of him and why (Nunan para: 23). An email dated 1 November 2007 was produced by the respondent that says Mr Winnie accepted the respondent's explanation. John Kerr wrote the email and it reads verbatim as follows:

Hi Tim

I've run your letter past Carl and he's happy with that. If you could send a signed copy to Carl and copy me in that will resolve matters. Thanks for your assistance in this matter.

John Kerr
Organiser

[19] Further a letter produced dated 2 November 2007 from Mr Nunan confirming his position on the situation reads verbatim as follows:

2 November 2007

Dear Carl

On 9th October 2007 we met at the plant to discuss your personal grievance relating to the final written warning issued to you on 6th September 2007. In addition to you and me, Plant Manager [name withheld] and John Kerr from the EPMU also attended.

On your behalf John had earlier lodged a notification of Personal Grievance and the purpose of the meeting was to resolve.

Rather than revisit the circumstances surrounding the final warning, John instigated a useful and positive discussion about the future. Both you and he made it clear that you were now very clear over concerns about your absenteeism and what is required in future. John also sought on your behalf clarification on the impact or life of the final warning.

We all agreed that we wanted to avoid any repetition. I indicated that although there is no hard and fast rule of law, six months is usually regarded as the typical life of a final warning and that a minor transgression on another matter could not really then result in the next step in the disciplinary process, dismissal.

For the future I offered to provide some guidance and suggest the following to resolve your concerns.

The final written warning issued on the 6th September 2007 relates solely to not providing a medical certificate and not meeting with your supervisor. The company would regard the final warning as cleared if there had been no similar occurrences by the end of February 2008. I hope this clarification allows us all to put the matter behind us.

Yours sincerely

Tim Nunan
HUMAN RESOURCES MANAGER

[20] The next development was that Mr Winnie says he left a message at work on 7 February 2008 by telephone shortly after 1pm with a receptionist/the executive assistant. Mr Winnie says that he informed the person he spoke to that he was looking after his sick partner who had injured her leg during a basketball game, and that he would not be at work for the day. He was due to start his shift at 2.00 pm and he says he spoke to the receptionist because both his supervisor and plant manager would not have been available to speak to. He says he needed to take his partner to the hospital for ankle treatment and look after her after her release from hospital. He says he requested the receptionist to pass his message on.

[21] The executive assistant deposed that the telephone call was made by Mr Winnie at 8.30 am and Mr Winnie said he did not think he would be in for the day, and she says he changed his mind, then to say he would not be in at all. She deposed that he did not ask that the message be passed on to his supervisor.

[22] However, the executive assistant deposed that she did mention Mr Winnie's absence to Lawrence Vibert the production and scheduling manager, and he made sure Mr Winnie's absence was put on the whiteboard, to inform Mr Winnie's supervisor that the team would be a person down. Mr Vibert later confirmed with Mr Winnie's supervisor that he had got the message, and he had obtained it from the whiteboard.

[23] Mr Winnie returned to work on 8 February 2008 without reporting to his supervisor. He was asked for an explanation for his absence and asked for a medical certificate. He acknowledged he had not spoken to his supervisor. Mr Vibert consulted the respondent's human resources

manager, Mr Tim Nunan who decided to investigate further. Mr Nunan asked Mr Vibert to meet with Mr Winnie and ask him if he had phoned in and find out if Mr Winnie had actually spoken to his supervisor that day and whether Mr Winnie had met with his supervisor on his return to work. It is common ground that Mr Winnie had not, but Mr Vibert already knew that Mr Winnie had phoned in and a message had got to his supervisor.

[24] Mr Winnie says he informed Mr Vibert that he had left a message. He says he told Mr Vibert that his partner had had a serious injury and that he believed that he did not need to speak to his manager and provide a medical certificate considering he was not the one who had been ill. Mr Winnie says he genuinely believed he did not have to meet the guidelines because he was not sick and was looking after his partner.

[25] Subsequently, Mr Winnie was requested by Mr Nunan to attend a meeting to discuss his absence on 12 February. Mr Nunan spoke with Mr Winnie privately to hand him the written request to attend the meeting.

[26] The letter Mr Nunan handed Mr Winnie reads verbatim as follows:

12th February 2008

Dear Carl

Last Friday 8th February 2008 Lawrence Vibert and [name withheld] spoke with you about your absence on Thursday 7th February.

They have advised me that you did not ring in and speak to [name withheld] about your absence or subsequently meet with him on your return. Due to extremely high levels of absenteeism in the past, the company has previously met with you and confirmed in writing the procedures you needed to follow when absent. You were issued with a final written warning on 6th September 2007 for not following these procedures. I am concerned that it appears you have again ignored these company requirements and need to investigate further. In this regard please meet with me, Lawrence and [name withheld] at 2.00pm on Thursday 14th February in the Petone board room.

This is a serious matter and has been investigated under the Staff Disciplinary Code. You are invited to bring a support person to assist you.

During the meeting we will discuss your absence and seek your explanation. Following the meeting we will fully consider all matters discussed before deciding if further action is warranted. Due to the recent final written warning, one possible outcome is termination of your employment. Please confirm to me your availability for the meeting time and advise if you require any additional information to prepare.

Yours sincerely

Tim Nunan
HUMAN RESOURCES MANAGER

[27] Mr Nunan says that Mr Winnie referred to his partner's injury as a matter of "*life and death*". Mr Winnie denied saying that. Further Mr Nunan says Mr Winnie got agitated and started to "*rant*". Mr Winnie denied that, but told me he got angry and upset and did raise his voice. Mr Winnie accepted that he was informed that a possible outcome of the meeting would be the termination of his employment. He says he gave his explanation at meetings held on 12 and 20 February 2008 and on 3 March 2008. Mr Winnie was represented by Mr Kerr at the meeting held on 20 February 2008. The respondent says details of Mr Winnie's partner's injury were provided by Mr Kerr later, including a medical certificate and hospital details. The forms indicate that Mr Winnie's partner was admitted to hospital on 7 February 2008 at 8.58 and discharged the same day. There was no discharge time. However his partner was seen at 9.33am. Mr Kerr's defence for Mr Winnie's behaviour was that Mr Winnie considered he was not the person injured or sick and the terms did not apply. I find that Mr Kerr was genuinely given this explanation by Mr Winnie at the time and he used it as his defence.

[28] Mr Kerr was advised by email dated 28 February 2008 that dismissal was being considered. Mr Kerr replied with one matter of any note, Mr Nunan says. This related to the earlier personal grievance that Mr Nunan says he thought had been resolved and that Mr Kerr must have forgotten. The four month delay in Mr Kerr further raising this matter supports Mr Nunan on coming to a reasonable understanding that that matter had been resolved. I find that the employer reasonably would have concluded that the earlier personal grievance had been resolved because Mr Kerr's email giving notice of it being resolved was very clear (1 November 2007 paragraph 18 above). I find the agreement involved the decision that the final written warning would remain alive for 6 months, that is until the end of February 2008, although the applicant has now contested the start date for the warning. For completeness Mr Nunan's email dated 28 February 2008 that incorporated Mr Kerr's reply on the consideration of the termination of Mr Winnie's employment reads as follows (verbatim):

[The emphasis is John Kerr's reply to Tim Nunan]

Subject Carl Winnie

John

Since our telephone conversation yesterday I've had further discussions with the Petone Managers. We want to make sure we make the right decision.

I haven't sent an email to Carl as yet about the 2.00pm meeting on Monday but will do so today subject to your thoughts on the following.

The company is considering termination of employment and this is no easy decision for either party. I think it beneficial if I could pose a few more questions to Carl especially as we now have additional information; the medical certificate. I have had this interpreted by our health nurse and in her opinion it was not a life and death situation as Carl put it to me.

Carl never put it to you in our meeting on 20 February that this was a life and death situation.

I want to explore this further as treatment was provided by 9.33am that morning, considerable time before Carl was due to commence his shift. (The time that treatment was provided is not relevant: Carl, like you or I has the right to use sick leave to care for a dependent. Is the Employer challenging the whether the reason for taking leave is genuine? We asked the question as this has yet to be put to Carl as an allegation.)

I'd also like to explore further why Carl thought the final warning had expired and why he thought he was being discriminated against. (My understanding is that you invited Carl to a meeting to give him a letter to invite him to a further meeting to address allegations of misconduct and that Carl made comments to you without the benefit of advice or representation. You will be aware that it would procedurally wrong on for the Employer to then use those alleged comments – whatever they may, or may not, have been to inform its decision.)

Again I'd also like him to explain his reasoning behind his thinking that the phone call to his supervisor, medical certificate and catch up with his supervisor didn't apply in this case. At the end of the day the shift was one down and a supervisor was none the wiser as to why. As I explained in our meeting on 20 February, Carl telephoned the receptionist and informed her. The very strict requirements that he speak to his supervisor outlined in the Employer's letter of 6 September 2007 only applied in the event of Carl being sick; not in the event of him having to care for a dependent. For the record, I remind you that these requirements and the warning that was issued are still the subject of a personal grievance raised by the Union on Carl's behalf in our letter dated 12 September. On his behalf during his previous meetings to the latest, you have acknowledged how frustrated the company has become over his absenteeism. The company's frustration is self evident and has accordingly been acknowledged. Whether the frustration is reasonable is questionable in that Carl has always provided documentation to support his absences. The point is important 'absence' and 'absenteeism' are different. The latter is absence without good cause – at no point (to our awareness) has the Employer either put it to Carl, or reached a judgment, that his absence has been without good cause. To introduce the issue of absenteeism at this late stage suggests, at the very least, pre-determination of Carl's guilt. There is also the impact on his colleagues and work flow. We consider that company requirements in regard to absenteeism were fully explained in documented in writing not just to cover his own sickness see my comments above.

Obviously you'll be able to assist Carl but I'd like him to respond to these questions himself. Carl has the right to representation. That means he can choose to have his representative speak on his behalf. To insist that he respond directly would effectively deny him this fundamental right.

We consider these allegations to vexatious and that dismissal or any other sanction as a result of his absence on 7th February would be unjustified.

Regards

Tim Nunan
HUMAN RESOURCES MANAGER

[29] On 3 March 2008 there was another meeting at which Mr Winnie was informed that dismissal was being considered as a result of his conduct. He was given the opportunity to comment before the decision was made. The respondent says that because Mr Winnie was agitated he was granted the rest of the week off work and the period was extended until 11 March 2008 when the next meeting was scheduled. The arrangements for this time off were apparently made by

the acting plant manager with Mr Winnie. There was a plan that the parties would meet on 11 March 2008 and in the meantime Mr Nunan would make a decision, but no meeting took place.

[30] Mr Kerr and Mr Nunan entered into negotiations to try and settle so the next meeting was not held. Mr Nunan says Mr Kerr informed him that Mr Winnie would resign as part of a settlement on terms. A draft settlement was prepared and sent to Mr Kerr and with one change he considered there was a deal done and Mr Winnie would resign. Subsequently Mr Kerr had to advise the company he was no longer acting for Mr Winnie, who went to another representative for advice. Mr Kerr agreed with Mr Nunan that he was embarrassed by this turn of events.

[31] On 24 February 2008 Mr Vibert cleared out Mr Winnie's locker and sent his personal belongings home to the address on Mr Winnie's personal file sometime before 18 March 2008. This was done because Mr Nunan says he understood from Mr Kerr that Mr Winnie had agreed to resign. There was no prior contact with Mr Winnie on this move. Mr Vibert found a piece of cardboard in the locker that had Mr Winnie's writing on it about matters to do with his work and supervisor. Mr Winnie accepted he had written the note and says he wanted to take up the matters later. Mr Vibert did not inform Mr Winnie that he had retained the piece of cardboard, which came to light during the Authority's investigation.

[32] Mr Winnie spoke to Mr Kerr and Mr Kerr informed him that a settlement would involve Mr Winnie resigning on negotiated terms. That is confirmed by the terms being put in writing. The terms were given to Mr Winnie for signature, but he decided to get independent advice, but did not tell Mr Kerr that any deal was subject to him getting another opinion. The employer knew nothing of this because the employer believed, not unreasonably, that Mr Kerr and the union represented Mr Winnie at the time.

[33] On 28 March 2008 at a meeting Mr Winnie and a new representative were advised that he was dismissed on notice. Mr Nunan says he dismissed Mr Winnie because Mr Winnie's excuse was unacceptable and he had not complied with the reporting requirements set down in the final written warning, which was still alive. Mr Nunan made the decision to dismiss Mr Winnie. Mr Winnie says his employer did not want him on the premises and he was required to leave immediately.

[34] The dismissal was verified by letter dated 31 March 2008 as follows:

31 March 2008

Dear Nikkii

The purpose of this correspondence is to confirm that on Friday 28th March 2008 at 10.53am we met to formally advise the decision company representatives had arrived at in relation to a disciplinary matter previously detailed in writing to your client.

During this latest meeting I advised Carl that on 12th February I visited the plant and asked him to attend a disciplinary meeting. The reasons were detailed in writing.

We subsequently met on 20th February and again on 3rd March to discuss the matter and to provide opportunities for Carl to provide an explanation.

We adjourned to fully consider Carl's explanations and were to meet again on 11 March to advise a decision. No meeting was held at the company as the company was advised by Carl's then representative that he had resigned.

Following advice that you were now representing Carl we arranged to meet to advise a decision. I advised Carl during the meeting that after fully considering his explanations and matters discussed during two meetings, company representatives had decided that his explanations were unacceptable. We did not accept his arguments amongst others that the final warning and requirements detailed in the final warning did not apply as he was not personally ill.

I subsequently advised Carl that he was dismissed on notice for failing to following company requirements as previously detailed in writing. I undertook to arrange payment of the notice period plus any unused accrued leave.

Yours sincerely

Tim Nunan

HUMAN RESOURCES MANAGER

Mr Winnie's Position on the Matter

[35] Generally Mr Winnie says he did not breach his final written warning because his absence was not due to his ill health.

[36] He says the final warning had no expiry date for removal from his personal file. He says he was informed that the final warning would remain valid for 6 months.

[37] He accepted that while these meetings were being conducted he was not required to remain at work and has discovered that the time has been called "special leave" and deducted from his sick and annual leave entitlements without his approval.

[38] He wants his job back and rejects any suggestion he was at fault because of his genuine belief that the warning requirements did not apply.

The Employer's position

[39] The dismissal involved a fair process and the dismissal was justified for misconduct.

[40] The respondent wants the Authority to consider the history of the matters between the parties and not to pay undue attention to the technicalities and microscopic procedure. The problems with Mr Winnie's absences go back to 2005 when Mr Nunan says he became involved. Mr Nunan says Mr Winnie was first put on notice of the company's requirements in May of 2005 at a meeting, and in writing dated 26 May 2005.

[41] Mr Winnie had taken unexplained time off work. Since starting he had used 108 days for sick leave. Seventy days were paid and 38 days were unpaid. In addition Mr Winnie has had 66 days on ACC or special leave. The company has been critical of Mr Winnie's use of his contractual leave and how quickly he exhausted it (Nunan paragraph 4).

[42] Reporting requirements had been put in place to manage Mr Winnie's absences.

[43] Mr Winnie admitted he did not report his absence on 7 February 2008 and had not provided a medical certificate.

[44] Reinstatement has been opposed by the employer because the company has concluded Mr Winnie will continue to absent himself from work, provide no reasonable excuses, cause discord amongst other staff that will have to cover for him and he will create difficulties. Furthermore the respondent says he is not well liked and can not adequately manage his employment and his own safety.

Determination of the Employment Relationship Problem

[45] The employer did not resolve any credibility issues at the time especially over the timing of Mr Winnie's phone call on 7 February 2008 and what was said by Mr Winnie. It seems any credibility issues, particularly over the timing and content of Mr Winnie's telephone call made on 7 February 2008 was lost because of the focus taken by Messrs Nunan and Vibert on what they considered was the real issue about Mr Winnie's absence and failure to report properly in terms of the final written warning they relied upon.

[46] Nothing really turns on determining that credibility issue because the employer accepted that Mr Winnie did telephone in and report that he would be absent and his supervisor had found out about it because it was written on the whiteboard. The employer says Mr Winnie breached the terms of the warning that he had to notify his supervisor and report to his supervisor upon returning to work and produce a medical certificate.

[47] The real issue focussed on Mr Nunan's reason for his decision, made on 10 March 2008, that he would dismiss Mr Winnie for serious misconduct on notice because Mr Winnie: "...*had breached the reporting requirements set down in the final written warning letter (at that time unexpired) without reasonable excuse and I had no confidence he would improve if further warned*": (Nunan: paragraph 48 of Mr Nunan's statement of evidence) (underlining my emphasis). Furthermore Mr Nunan confirmed the dismissal was for serious misconduct during the Authority's investigation. His reason for the decision was supported by his written statement: "*failing to follow Company requirements as previously detailed in writing*" (document 24). The requirements must be those set out in the final written warning dated 6 September 2007 (document 12) that referred to "*failing to provide a medical certificate and not meeting with [his] supervisor on your return, requirements clearly detailed in the written warning dated 19 April 2007. Should you not supply a medical certificate in support of future absences and also meet with your supervisor, or if there are any future performance issues, following investigation your employment will be terminated*". The significance of this is whether or not Mr Nunan had made an unreasonable interpretation of the requirements.

[48] Mr Nunan relied upon the following terms of that warning:

- **If you not able to attend work due to illness you are to ring and actually speak with your supervisor.** (my emphasis) Do not leave a text message. Alternatively you may speak with the Plant Manager or delegated Deputy.
- Due to excessive absenteeism patterns, far in excessive of company or legislative entitlements, you are required **to supply a medical certificate in support of future ill health related absences** (my emphasis). This should not be seen as a penalty, the company wants to ensure prompt medical advice and assistance.
- **On your return from any future ill health related absences, you are to meet with your supervisor at the beginning of the shift** and confirm that you are fit to carry out all duties or alternatively discuss those duties you are not able to undertake for documented medical reason (my emphasis).

[49] The 19 April 2007 warning letter (document 8) required the applicant to provide a medical certificate in support of absences. However, it appears that there was no agreement and or arrangement by the respondent to meet any expenses in obtaining a medical certificate. The

applicant's representative raised this issue. This is not a central issue in the matter, I hold. Also I hold that there has been no clear statement anywhere that the respondent believed the applicant's sick leave was anything other than genuine, including the applicant's partner's injury. Where Mr Nunan believed that the applicant had not acted in accordance with written instructions he accepted that the applicant truly believed that he had acted in accordance with the 19 April letter (document 8) and 6 September 2007 letter (document 12). That leaves the question of whether or not the applicant was guilty of serious misconduct for breaching the requirements.

[50] A fair and reasonable employer would not have related the previous matter (giving rise to the 19 April and 6 September letters) and the latest incident involving an absence that was about his partner's injury (7 February) and escalating the incident to one of serious misconduct. Mr Winnie raised a defence that he genuinely considered he did not have to follow the procedure because the injury related to his partner and he did report in and the message did get to Mr Winnie's supervisor. Mr Kerr considered that Mr Winnie was being genuine and I have accepted that. However, a fair and reasonable employer would expect an employee to report an absence upon returning to work, especially considering the background. The requirement was put in place to enable the employer to monitor Mr Winnie's ability to work after any illness. The fact that he was not ill should also have been reported by him upon returning to work, especially as his supervisor knew he had been absent. That is entirely reasonable at the very least because of Mr Winnie's absences and ACC. Mr Winnie's failure or omission to do that has left him open to some criticism. I will return to this point later because it will be considered for any impact on any remedies.

[51] I conclude that Mr Nunan's interpretation of the warnings has been somewhat narrow and strictly applied, albeit he had a genuine concern about Mr Winnie's acts and omissions. In this regard where Mr Winnie had a genuine explanation that he did not think the warning applied in the circumstances a fair and reasonable employer would have accepted that given the reason why Mr Winnie was absent and sufficiently proved it later with the production of the injury details. In such a situation it is therefore very difficult for the employer to be able to justifiably say Mr Winnie: "*...had breached the reporting requirements set down in the final written warning letter (at that time unexpired) without reasonable excuse and I had no confidence he would improve if further warned*": (Nunan: paragraph 48 of Mr Nunan's statement of evidence) (my emphasis). It was also accepted that Mr Winnie did phone in to work, albeit there is a difference over the time and content of that call. The fact is that his absence was brought to the attention of his supervisor. As such there was an alternative open to the employer to treat the matter with a further warning and clarify all the circumstances that the employer expected Mr Winnie to comply with.

[52] I hold that there has been insufficient reason provided by the employer that the employer would have concluded that Mr Winnie's alleged breach was *without reasonable excuse and I had no confidence he would improve if further warned*. This is especially so considering Mr Winnie had had no absences immediately prior to his absence on 7 February. He was never put on proper notice that the employer was even considering a confidence issue about Mr Winnie not improving in regard to using his leave. Mr Winnie's reasons for using his leave had not been questioned.

[53] Furthermore, I find that the employer has been influenced by what it has considered was Mr Winnie's excessive leave and the genuineness of the reasons for taking such leave during his employment when the reasons have never been found wanting and subject to disciplinary proceedings.

[54] Mr Winnie has a personal grievance.

The Remedies

[55] Mr Winnie is genuinely seeking reinstatement. The background of his employment is relevant to this claim. Also, he has given evidence of looking for alternative employment and applied for at least two positions elsewhere. He therefore understands that there is no guarantee of getting his job back. His track record on the use of his sick leave has not been good, although he is entitled to use his leave and the genuineness of him using his leave has not been the subject of any scrutiny, only the amount of the leave taken. He did not reasonably report to his supervisor upon returning to work. It would have been reasonable to expect him to have reported to his supervisor given the past issues and even although he thought that the warning did not apply because his absence involved his partner's injury. It is also not unreasonable to read in to the warning that the requirement to provide a medical certificate applied to all situations. Mr Winnie could have been more active in providing details of his partner's injury from the hospital instead of waiting some 18 days before Mr Kerr submitted it on his behalf. Mr Winnie could have helped himself by reporting to his supervisor and, if he was not able to get the details immediately to at least have informed his supervisor that he was making arrangements to get them. His omission raises the real prospect that there is some animosity between him and his supervisor that in my opinion Mr Winnie deliberately acted and failed to report. Also, I hold that Mr Winnie must have fully understood there was some risk in the situation and that he raised a risky defence, despite my finding that the defence was genuine only because of Mr Kerr's evidence, and I find Mr Winnie not absolutely remorseful and

plausible given with his attempt to re-litigate a personal grievance that was reasonably considered as being settled.

[56] I hold that the warning had been settled, despite Mr Winnie saying he had not agreed. Mr Kerr's involvement is enough in my opinion to have settled that matter given his e-mail which would have resulted in the employer reasonably believing the matter had settled. The four month delay in pursuing it supports my conclusion. Even although there is some dispute over the expiry of the warning I hold that six months was a reasonable time for such a warning to apply and that it was still alive until the end of February.

[57] There is some evidence of some discord between Mr Winnie and his supervisor given the previous warnings. Mr Vibert told me that he had no personal experience of any alleged threats or intimidation involving Mr Winnie towards his supervisor, although the employer has raised the matter concerning Mr Winnie's supervisor's unwillingness to attend the Authority and give evidence. I have given credit to Mr Winnie on this evidence because there was no reason that could be supported for the supervisor's non-attendance when the employer could have summonsed that person. Further I am told the supervisor may well resign. I have no direct evidence of the veracity of this assertion when Mr Vibert could not corroborate his evidence that the union is against Mr Winnie's return, Mr Vibert could only say that one person, instead of "some", was prepared to leave if Mr Winnie was reinstated and his opinion after getting views from the crew that there was not one positive comment about Mr Winnie, including that Mr Winnie was disruptive.

[58] There was no direct evidence from Mr Vibert to support his assertion. There is no evidence of any formal complaints and nothing was raised with Mr Winnie before the dismissal. Moreover, Mr Winnie had not taken any other leave after September 2006 and before 7 February 2007. This was not given adequate weight by the employer at the time, I hold.

[59] I have also considered the timing of Mr Winnie's phone call. I find that it was more than probable that since Mr Winnie's partner was first admitted to hospital at 8.58 am the deposed evidence from the executive assistant is more likely to be correct and his phone call occurred in the morning. This was supported by Mr Vibert's evidence of him being advised and to write the absence on the whiteboard and then check that the supervisor had got the information. If Mr Winnie left it until shortly after one o'clock he has left himself open to being considered mischievous, and he has not been able to account for the timing and content of his telephone call, and he has omitted to talk to his supervisor when he could have been reasonably expected to do so.

Mr Winnie is either forgetful or has deliberately failed to give accurate evidence and I hold it is likely that Mr Winnie is wrong given the above findings.

[60] Mr Winnie's failure to report to his supervisor upon returning to work and his failure to have some details or put in place arrangements to get details of his partner's injury at the time, and having regard to the culmination of absences and process put in place by the employer to monitor Mr Winnie's absences and his attitude and responses to his employer on the issues, mean that reinstatement is not practicable as a remedy in this case. I have reached the decision not to reinstate Mr Winnie, on balance.

[61] Mr Winnie is entitled to consideration of other remedies for a personal grievance including compensation, lost wages and costs. I am required to assess his contribution in the situation giving rise to the personal grievance. As such his omission to report to his supervisor upon returning to work and failing to reasonably make direct contact with his supervisor on his absence means he has contributed to his personal grievance. I assess this only at a third of the remedies he has established he is entitled to because his attempt to get a message through was successful and a fair and reasonable employer would not have interpreted the warning so narrowly.

[62] Mr Winnie's lost wages date from the date of his dismissal until the date of the Authority's determination. Mr Winnie's loss of wages is from 28 March 2008 until 21 May 2008 when final submissions were received. In addition he was not paid for two weeks 14-28 March. Mr Winnie has started to look for alternative work, thus meeting his obligation to mitigate his loss. His hourly rate was \$21.30 and he worked approximately 42 hours per week. The total loss of wages amounts to 10 weeks at \$8,946. The notice of not less than 2 weeks notice under the collective employment agreement (\$1,789.20) must be deducted and this leaves remaining \$7,156.80 lost wages, but has to be further deducted by a third for contribution.

[63] I now turn to compensation for humiliation, loss of dignity and injury to feelings. Mr Winnie has established a claim for a sum of compensation. I am satisfied he has been humiliated and his feelings were affected by the impact of his dismissal. I award him the sum of \$12,000, but this has to be deducted by a third for contribution.

[64] I make the following orders that Fairfax Limited is to pay Carl Winnie:

- \$4,771.20 lost wages
- \$8,000 compensation.

[65] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority