Attention is drawn to the order prohibiting publication of any names or information that identifies the applicant

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 7
5555022

	BETWEEN	A Applicant
	A N D	R Respondent

Member of Authority:	Peter van Keulen
Representatives:	Both parties represented by Counsel
Investigation Meeting:	27 October 2016
Submissions Received:	Oral submissions on 27 October 2016 and written submissions on 28 October 2016 from the Applicant Oral and written submissions on 27 October 2016 from the Respondent
Date of Determination:	10 January 2017

DETERMINATION OF THE AUTHORITY

A. **The applicant did not raise her personal grievance for unjustified action causing disadvantage in connection with the alleged failure of the respondent to allow her to return to work from 9 June 2014, within the requisite 90 day period. The Authority does not have jurisdiction to investigate the personal grievance for unjustified action causing disadvantage as it relates to the refusal to allow the applicant to return to work.**

B. **The respondent did not act in an unjustifiable manner causing disadvantage to the applicant in the course of investigating and**

determining the appropriate sanction for the alleged failure to disclose material information in the course of her recruitment. I decline the applicant's personal grievance for unjustified action causing disadvantage.

C. The respondent did not unjustifiably dismiss the applicant. I decline the applicant's personal grievance for unjustified dismissal.

D. Costs are reserved with a timetable set for submissions if required.

Employment relationship problem

[1] The applicant, A, alleges that she has personal grievances against the respondent, R, for unjustified actions causing disadvantage and unjustified dismissal arising out of constructive dismissal.

[2] R employed A from 1 July 2013. She worked 20 hours per week.

[3] On 9 April 2014 A had an accident at work and hit her head. As a result, A was taken to hospital, but was discharged later that day. A did not return to work on 9 April 2014.

[4] From 11 April 2014 through until 12 March 2015 there were various communications and discussions between A and R about A's return to work.

[5] In the course of this process, R became concerned that A had not disclosed material information to it during the recruitment process, concerning her health. It issued a final written warning for this.

[6] This process, of discussing A's return to work, was not resolved to A's satisfaction. On 19 February 2015 A raised a personal grievance for unjustified action causing disadvantage and then subsequently, believing that R did not intend to ever allow her to return to work, she resigned on 12 March 2015 and raised a personal grievance for unjustified dismissal.

[7] The unjustified action causing disadvantage grievances relate to three matters:

a. R failed to provide A with a safe work environment and this failure led to the accident on 9 April 2014.

b. R carried out an inadequate investigation pertaining to an allegation that A had failed to disclose material information in her employment recruitment process and that the warning issued by R against A for this failing was unjustified.

c. R unjustifiably refused A's request to return to work when she had received a clearance from her doctor to return to work on 9 June 2014.

[8] A's claim for unjustified dismissal arises because she says R unjustifiably refused to allow her to return to work and continued to create or raise issues regarding her return to work which she says had been resolved. She says R had no intention of ever allowing her to return to work and she had no choice but to resign.

[9] R claims that there is only one grievance in relation to unjustified action causing disadvantage which has been validly raised by A within the requisite 90 day period commencing from the date that the action complained of occurred[1]. R says that the unjustified action causing disadvantage grievances pertaining to the refusal to allow A to return to work and the alleged failure to provide a safe work environment, were not raised in the personal grievance letter of 19 February 2015 and not raised within 90 days of the events complained of. R says the Authority does not have jurisdiction to hear these two unjustified action causing disadvantage grievances.

[10] R also says that A has failed to raise her personal grievance for unjustified dismissal within the requisite 90 day period. R says this is so because in a letter of 12 March 2015 written by A's lawyer at the time, A resigned from her employment with R giving two weeks' notice of resignation and claiming constructive dismissal on that day. R says a personal grievance cannot be raised in advance of an event happening and as A had given notice of resignation her termination of employment did not occur for a further two weeks. As A did not subsequently raise a grievance for unjustified dismissal within 90 days of the dismissal she has not raised a grievance within the requisite 90 day period.

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1 Section 114 of the Employment Relations Act 2000

[11] R's conclusion, therefore, is that it only has one personal grievance that it needs to answer, for which the Authority has jurisdiction. That grievance pertains to the allegation that R failed to investigate adequately the allegation it raised with A concerning her failure to disclose material information in her interview for employment and that the subsequent sanction was not justified.

[12] In relation to this personal grievance, R says its actions did not cause any disadvantage to A's employment and, in any event, its actions were justified and there is no valid grievance.

Preliminary matter

[13] A has applied for interim and permanent name suppression.

[14] In the course of carrying out my investigation, I granted interim name suppression and now make that name suppression permanent.

[15] A makes the application in connection with an order made by the District Court on 23 December 2015. At that time, A was convicted of an offence and in addition to a sentence, she was also granted name suppression in relation to this criminal charge. Pursuant to the order of the District Court, publication of the applicant's name and association with any details of the acts subject to the criminal conviction would be a breach of the District Court order. Some of those acts as they pertain to the criminal conviction form part of the factual matrix, which I have investigated. Therefore, I conclude that it is appropriate for the interim name suppression order to be made permanent in respect of this matter.

[16] Accordingly, pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) I order that the name of the applicant in the application before the Authority and any information which may lead to her identification is subject to a permanent non-publication order.

[17] Pursuant to clause 10 of Schedule 2 of the Act this means that the name of applicant, the respondent and any of the relevant parties in this matter are not to be published. I also prohibit from publication the name of counsel, the venue of my investigation and any other matters which may identify the applicant. The applicant and the respondent are to be referred to as "A" and "R" respectively and the witnesses who gave evidence at the investigation meeting will not be named.

[18] As a result of the non-publication order, I have also limited some of the detail of the facts and evidence that I heard in my investigation. For the purposes of my investigation I received written witness statements from various relevant parties. Each of those witnesses confirmed their statements under oath or affirmation and gave further oral evidence in answer to questions from me and the parties' representatives. The parties' representatives also provided written and oral submissions on the facts and law. As permitted by s 174E of the Act, this determination does not record all of the evidence and submissions received, but states findings of fact and law, expressed conclusions on issues necessary to dispose of this matter and as necessary to protect the identity of the applicant as indicated above.

The issues

[19] There are three sets of issues for me to consider. First, I must decide what grievances, if any, have been raised within the 90-day period such that I have jurisdiction to determine them. The second and third steps require an analysis of the personal grievances of unjustified action causing disadvantage and then unjustified dismissal, if I determine that such grievances have been raised within the requisite period.

[20] To decide what grievances I have jurisdiction to determine I must consider:

a. On what date did the action or actions, which constitute any unjustified action causing disadvantage, occur or on what date did A become aware of such action;

b. When did A raise her personal grievances for unjustified action causing disadvantage and was this 90 days after the date in sub paragraph (a) above;

c. On what date did A's dismissal occur;

d. When did A raise her personal grievances for unjustified dismissal and was this 90 days after the date in sub paragraph (c) above?

[21] If any personal grievances for unjustified action causing disadvantage have been raised in time the issues pertaining to those grievances are:

a. Was A's employment, or a condition of her employment, affected to her disadvantage by an action of R;

b. If so, was that action by R justified;

c. If not, what remedies is A entitled to?

[22] If the unjustified dismissal grievance was raised in time the issues pertaining to that grievance of unjustified dismissal are:

a. Was there a dismissal;

b. If so, was the dismissal justified;

c. If not, what remedies is A entitled to?

What grievances do I have jurisdiction to determine?

Unjustified action causing disadvantage

[23] In the course of the investigation meeting counsel for A conceded that the unjustified disadvantage grievance relating to the alleged failure to provide a safe work environment was not raised within the 90 period and advised that A no longer wished to pursue that aspect of her claim.

[24] The second allegation to support an unjustified action causing disadvantage grievance, that R carried out an inadequate investigation pertaining to an allegation that A had failed to disclose material information in her employment interview and that the warning issued by R against A for this failing was unjustified, is not controversial. R acknowledges that A raised this grievance in the letter of 19 February 2015 and that this was within 90 days of the action complained of.

[25] As to the other allegation forming an unjustified action causing disadvantage grievance, the allegation that R failed to allow A to return to work from 9 June 2014, following clearance from her Doctor, I must decide when the act complained of occurred or when A become aware of the alleged unjustified action[2]. I can then determine whether A raised this grievance within 90 days of that date.

[2] Section 114 of the Employment Relations Act 2000

[26] Although there were limited instances when R specifically denied A the right to return to work the allegation is that R's actions amount to a continuing act from 9 June 2014 until A resigned. That is, it covers the period during which A and R discussed her possible return to work after her doctor certified her as fit to return to work.

[27] A could have raised this personal grievance for unjustified action causing disadvantage from 9 May 2014 until 90 days after her notice of resignation.

[28] The only communications that purport to raise personal grievances are the letters dated 19 February 2015 and 12 March 2015. I am not satisfied that either letter raises a personal grievance for unjustified action based on a continuing failure by R to allow A to return to work.

[29] The grievance letter of 19 February 2015 is a long letter that sets out a detailed narrative of the events that had occurred to A in connection with her accident at work and the discussions around her possible return. In terms of articulating the grievance raised the letter stated:

> 53. You have offered to pay [A's] loss of earnings back to the date of [Consultant Psychiatrist's] report. While this is appreciated, it does not cover the loss of earnings for the period of time [A] has not been permitted to work.
>
> 54. To the extent that her condition arising from the head injury was the basis of your refusal to permit her to return to work, that is extremely unfair given the background events to the injury and the deficiencies in the safety planning that was clearly required to manage….
>
> 55. She is entitled to reimbursement of her wages over the whole period, and may also be entitled to ACC cover as well. We ask that you address this latter issue as a matter of urgency. There are issues of health and safety that we are in the process of addressing.
>
> 56. We dispute there are any grounds to issue [A] with a final warning any notion of this should be abandoned as unreasonable and unjustified.

[30] So the grievance raised by this letter can only relate to:

a. a failure to pay loss of earnings for the period of time A has not been allowed to work;

b. a need to assist with any ACC issues;

c. some un-particularised "issues of health and safety"; and

d. the decision to issue a final written warning on the non-disclosure issue.

[31] The grievance letter of 12 March 2015 only addresses the issue of constructive dismissal claiming:

> You now are not only refusing to allow [A] to return to work but saying she will not be remunerated either, as well as giving regular (self serving) reminders that her employment is at risk. It is clear that you have no intention of allowing [A] to return to work . [A] therefore has no option but to resign and this letter can be treated as notice of resignation. She now raises a further personal grievance for constructive dismissal.

[32] This grievance letter complains that A has no choice but to resign as R has no intention of allowing A to return to work. This does not meet the standard required to raise a personal grievance for unjustified action causing disadvantage based on a purported unjustified continued failure to allow A to return to work[3].

[33] In the circumstances I find that A's personal grievance for unjustified action causing disadvantage based on the assertion that R unreasonably refused to allow her to return to work was not raised within the requisite time frame. I do not have jurisdiction to determine that grievance.

Unjustified dismissal

[34] Counsel for R says that the letter of 12 March 2015 that gives notice of termination and raises a personal grievance for unjustified dismissal is flawed. This is because the letter gives notice of resignation, that being a reference to the contractual requirement to give two weeks' notice, and therefore effects a termination of employment two weeks later. Therefore, on this basis the dismissal complained of has not occurred when the grievance is raised.

[35] I accept that a grievance for unjustified dismissal cannot be raised prior to the actual termination of employment. In *Poverty Bay Electric Power Board v Atkinson*[4] the Employment Court held that discussions of a grievance which predated dismissal cannot constitute a submission of a grievance.

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[3] *Creedy v Commissioner of Police* [2006] 3 NZELR 293
[4] [1992] 3 ERNZ 413

[36] Therefore, the question is when did the dismissal occur? In cases of constructive dismissal the dismissal is effected by a resignation in response to actions by the employer. So, the date the dismissal occurs is the date of termination of employment arising when the notice of resignation by A takes effect.

[37] The date of termination is a factual assessment that is informed by the notice given but this is not decisive[5].

[38] If I look at the language used by A, through her then lawyer, to resign – "[A] therefore has no option but to resign and this letter can be treated as notice of resignation" – there are two possible interpretations. It could be that this means A is giving notice that she resigns immediately or A gives two week's notice of her resignation. So the words used are not determinative and actually are not particularly helpful.

[39] The reality of what occurred when A gave notice of her resignation is that she did not return to work, she was not paid for any time after the notice of resignation, and based on the evidence she treated herself as having resigned with immediate effect. There is no evidence from R as to how it treated A from 12 March 2015.

[40] In these circumstances I am satisfied that A's resignation took effect on 12 March 2015 as she did not work, was not paid and considered herself that her employment was at an end. On this basis A can and did raise her personal grievance for unjustified dismissal on the day of the termination of her employment and therefore within the required period.

[41] I conclude that I do have jurisdiction to consider A's personal grievance for unjustified dismissal.

Unjustified action causing disadvantage

[42] The unjustified action causing disadvantage grievance that I have jurisdiction to determine is based on the allegation that R failed to properly investigate the allegation that A had failed to disclose relevant medical and other information in the course of applying and being interviewed for the role she was appointed to.

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[5] See discussion of termination of employment in circumstances of dismissal by an employer in *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 and *Gibson v GFW Agri-Products Ltd* [1992] 2 ERNZ 309

[43] In particular counsel for A submits that R failed to properly investigate what occurred in the interview for A's role. This is because there were three interviewers for R yet when Y, a senior manager within R, investigated what occurred in the interview he only spoke to two of the interviewers.

[44] Counsel for A also appears to be saying that Y did not give enough weight to A's explanation of the allegation i.e. that she did disclose the information it simply was not recorded in the interview notes.

[45] And counsel for A says the decision to impose a final written warning is not justified.

[46] The events that give rise to this personal grievance include:

a. In the course of discussing a possible return to work R became aware that A may not have disclosed to it relevant medical information relating to her prior and her then current, mental health issues. This information came to R's attention from a report it received from A's consulting psychiatrist. Specifically, R was concerned that A had failed to disclose to the interview panel, when she interviewed for her current position, her mental health issues and that she had signed statements as part of the recruitment process certifying that she was in good health.

b. Y began an investigation into this matter. As part of the investigation, Y spoke to two members of the interview panel. The third member was not available at that time. It appeared from Y's investigation that A had not disclosed relevant mental health issues and possible epilepsy during her interview despite being questioned about her fitness to work.

c. On 1 September 2014 Y wrote to A outlining R's preliminary view on the non-disclosure issue. The letter stated:

> ***Second issue: whether you have misled [R] about your health issues when you applied for your role***
>
> The second issue for your response, which is separate but not unrelated to the first, concerns the information you provided to [R]

> when you applied for your … role. Information [R] has about that is enclosed.
>
> Specifically, it appears from that information that you did not disclose any health issues, including by failing to disclose any information about what [R] understand to be your long-standing mental health issues, in applying for your employment.
>
> [R] also understands that you have claimed that you did so. What [R] needs to understand is how you can make that statement when it is apparent that the people who interviewed you for the role, and the records arising from your application process, including your own declaration, make no reference to that alleged disclosure having been made. Conversely, the information [R] has suggests that you applied for your role on the basis that you said you were in good health and there were no health issues.
>
> Given all of that, my preliminary view on this second issue is that you have misled [R], and in doing so have also undermined the trust and confidence that [R] must be able to have in you as an employee. As a result, [R's] preliminary view or current thinking on this issue is that your employment ought to be terminated.
>
> **Your response is now sought before final decisions are made.**
>
> As noted above, [R] now wishes to provide you with the opportunity to respond to this letter, and to our preliminary view on each of the issues referred to above, before [R] makes any final decisions.
>
> …

d. On 12 September 2014 A's lawyer responded to R's letter of 1 September 2014.

e. In respect of the non-disclosure issue A's position was that she had disclosed to the panel that she had suffered from mental illness in the past but was not affected at the time of the interview. She could not explain why the interviewers made the notes that they did (which conflicted with her stated position) but she suggested the notes were brief and did not cover all that was said in the interview. In terms of the declaration signed as part of the application for her role A remained of the view that she was well at the time she signed it and she did not believe that her mental health issues could affect her ability to undertake the role.

f. A did not provide any further information on this matter and once other outstanding matters had been discussed with it R concluded its views on the non-disclosure issue. On 30 January 2015 R wrote to A and

> advised on the non-disclosure issue it had decided that A had failed to disclose relevant medical information to it during the application and interview process and that A would be issued with a final written warning.

[47] The first question I must answer is whether these alleged actions by R – failing to investigate adequately, failing to consider A's response appropriately and imposing a final written warning – caused disadvantage to A's employment or one or more conditions of her employment.

[48] Counsel for R says that R's actions did not cause any disadvantage to A's employment or a condition of her employment. This is because the action must adversely affect a current employment relationship or the "on the job situation"[6]. Counsel for R says the actions complained of do not impact A's on the job situation primarily because at the time of the actions A was absent from work. So there was no actual disadvantage to her employment because there was no adverse impact on A's "on the job situation".

[49] I do not accept that because A was absent from work an action by R could not impact on her on the job situation or could not impact on her employment relationship. The issuing of a final written warning makes A's employment less secure regardless of whether she is attending work or not. A was still employed at the time so the action must, at the very least, impact on the employment relationship.

[50] There is, in my view, an action or actions by R that caused disadvantage to A's employment.

[51] The second question is whether the actions that caused disadvantage – R's investigation, R's consideration of A's response and imposing a final written warning – were justified.

[52] The test of justification for an unjustified action causing disadvantage grievance is set out in s 103A of the Act. I must consider whether R's actions and how is acted were what a fair and reasonable employer *could* have done in all of the circumstances.

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[6] *Air Nelson Limited v Nell* [2008] ERNZ 483

[53] In *A Ltd v H*[7] the Court of Appeal considered the test in s 103A particularly in light of the change in wording from "would' to "could". The Court stated at [46]:

> It is apparent that the effect of the statute is that there may be a variety of ways of achieving a fair and reasonable result in a particular case. As the Court in *Angus* observed, the requirement is for an assessment of substantive fairness and reasonableness rather than a "minute and pedantic scrutiny" to identify any failings. ….

[54] My assessment of justification of R's actions in connection with the investigation, the process for informing A and considering her response and the subsequent decision to impose a sanction is to consider the substantive fairness and reasonableness rather than apply a pedantic analysis to identify failings. I must consider the substantive fairness and reasonableness of R's actions against how a fair and reasonable employer in the same circumstances could have acted and decide if a fair and reasonable result was achieved. Put another way, were R's actions justified because a fair and reasonable result was achieved; were R's actions substantively fair and reasonable, evidenced by whether a fair and reasonable employer in the same circumstances could have acted that way?

[55] In the circumstances I am satisfied that R's actions were justified – a fair and reasonable result was achieved and I believe a fair and reasonable employer could have carried out its investigation as R did and put the same amount of weight on A's responses when considering the possible outcome.

[56] R conducted a fair process. A failure to question one of three interviewers for R was not a failing that caused the investigation to become unjust, particularly given that two interviewers gave the same evidence regarding disclosure of information and that was supported by the written notes.

[57] R then provided the relevant information to A, she responded and R considered her responses appropriately before it came to a decision. Based on R's decision as to what occurred a final written warning was substantively justifiable.

[58] A fair and reasonable employer in the same circumstances could have done these actions. I decline the personal grievance for unjustified action causing disadvantage.

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[7] [2016] NZCA 419

Unjustified dismissal

[59] In order to succeed with her claim for unjustified dismissal A must first establish that R dismissed her. If she establishes this then the onus shifts to R to prove that its actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[60] In the case of constructive dismissal, a resignation can amount to a dismissal in certain circumstances. In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*[8] the Court of Appeal set out three non-exhaustive categories of constructive dismissal:

a. Where the employee is given a choice of resignation or dismissal;

b. Where the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign;

c. Where a breach of duty by the employer leads a worker to resign.

[61] The first limb of the *Woolworths* test does not apply in this case as R did not give A the choice of resigning or being dismissed.

[62] I must consider whether the actions by R amount to a course of conduct that had a deliberate and dominant purpose of causing A to resign and/or whether the actions by R amount to a breach of obligation that led A to resign.

[63] I can deal with the second limb of *Woolworths* in relatively short order. I am satisfied that the evidence does not support the contention that R's actions toward A during the period in which she was off work and attempting to return to work, was a course of conduct with the deliberate and dominant purpose of coercing her to resign. There is no evidence to support a finding that R did anything other than attempt to reconcile the concerns it had about A's fitness for work following the accident and its discovery of A's history of psychiatric illness. The evidence from R was, that in fact, it did want A to return to work, it just needed to be satisfied that a return to work was safe for her and those she came into contact with at work.

[64] The real issue for the claim of constructive dismissal is whether R, in carrying out that enquiry, acted in a manner that amounted to a breach of duty to A that supports a finding of unjustified dismissal, i.e. whether the third limb of *Woolworths* is made out.

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[8] [1985] 2 NZLR 372 (CA) at 374-375

[65] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*[9]. The Court of Appeal stated at [172]:

> 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 the 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.

[66] Therefore, in order to determine if A has been constructively dismissed I must consider:

a. Was there a breach of duty by R;

b. Was that breach of duty sufficiently serious that it was reasonably foreseeable that A might resign in response to that; and

c. Did A resign in response to that breach of duty?

[67] I am not satisfied that R's conduct in dealing with A during her absence over her potential return to work amounted to a breach of duty it owed to her.

[68] After the workplace accident on 9 April 2014, on 10 April 2014 A suffered a seizure. One of the results of suffering this seizure was that A was told that she was no longer allowed to drive. This became an important factor for R as the requirement to drive was, it says, a requirement of A's role and this was never properly resolved for it. The early discussions around A's return to work appeared to suggest R could accommodate A's return on a limited basis without her being able to drive.

[69] On 11 April 2014 A spoke to X, a manager within R, to update R about her position. A reported to a team leader and that team leader reported to X, so X was a manager within R who had responsibility for A.

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[9] [1994] 2 NZLR 415 (CA)

[70] On 14 April 2014 A met X to discuss her possible return to work. A agreed a gradual return to work programme with X amounting to 10 hours work per week. X says the lack of a drivers licence at this stage was in his view temporary and the limited return would not be hampered by the lack of licence at that stage.

[71] Despite agreeing this gradual return to work, A did not attend work because of various issues. A referred to these issues as family issues but there was also some suggestion that she may have had lingering side effects from the accident and ongoing seizures.

[72] In early May 2014 A was arrested for an incident that was unconnected to her work. A was remanded in custody as a result of this incident until early June 2014.

[73] To this point I find that R's action were reasonable. It made a decision based on the limited information it had for a temporary return to work but this was overtaken by A's own issues. R cannot be bound by this decision nor can it be criticised for any failure to implement it.

[74] On 5 June 2014 A contacted R and told it that she was back and wanted to return to work but she was waiting for clearance to return to work and for an MRI scan to be undertaken. This MRI scan was in response to the head injury and seizures.

[75] On 6 June 2014 A's doctor certified that she was fit to return to work on 9 June 2014.

[76] Despite this certification of fitness to return to work, A did not return to work.

[77] On 24 June 2014 A spoke to X and requested a meeting to discuss her return to work. The meeting took place on 26 June 2014. In that meeting X and A discussed the fact that A's GP had certified her fit to resume work on 9 June 2014, however, the specialist that A was consulting regarding her head injury and ongoing seizures, could not guarantee that she would not have more seizures in the future. There was some discussion about the seizures and in light of this it appears that X suggested that A may be able to return to work on a limited shift pattern. There was also discussion about the pending criminal charges and the fact that they would have no impact on A's ability to work in the interim period.

[78] In my view R had made it clear by this point that the Doctor's clearance to work was not satisfactory for it and there were issues not resolved by the Doctor's certificate alone. This seems entirely appropriate to me and I have no basis to find R at fault at this stage.

[79] X was still considering A's return to work on a temporary basis, that she would be "supernumerary", that is, A would be an extra worker at a cost to R simply to get her back into the workplace. The "supernumerary" basis was because R still had concerns about A's ability to carry out her role and because A was unable to drive and driving was a requirement of A's role.

[80] However, X wanted to discuss the proposed return to work with his manager, Y. Between X and Y they agreed that R needed a degree of comfort and confidence that if A was at work she was fit to be there and it was safe for her and the people she interacted with.

[81] So X then contacted A later on 26 June and told her that R would require information to address its concerns and support her return to work as discussed. A gave verbal and later written consent for R to obtain information from her treating psychiatrist.

[82] R contacted A's treating psychiatrist and received a report on 8 July 2014.

[83] That report did not provide sufficient information for R to be satisfied that A was safe to return to work. X met with A on 10 July 2014 and advised that R still had concerns and required further information from her consulting psychiatrist in order to be satisfied about her safety at work and those she interacted with.

[84] A further meeting was held between X and A on 24 July 2014. A advised X that she was still awaiting an MRI scan. There was further discussion about a potential return to work and safeguards that might be put in place for A including having a fellow worker available with her at all times. There was no commitment by X or R to a return to work at that stage as R still required further information.

[85] From this point Y took over addressing the return to work matters with A. R's concern remained safety in the workplace and whilst R was open to A returning to work, it still required a level of reassurance of her safety. Those safety concerns were

raised not simply because of the head injury and seizures, but a concern that had arisen from the consulting psychiatrist's report regarding A's mental health.

[86] Y wrote to A on 12 August 2014 and invited her to a meeting to discuss her continued employment in light of the events of the past few months (presumably a reference to the accident at work and ongoing issues around any head injury and seizures) and the circumstances that led to her release pending criminal charges.

[87] A then met with Y and X on 18 August 2014. R raised two concerns in this meeting, the state of A's health and the impact of the pending criminal charges particularly that imprisonment might be a possible outcome.

[88] Following the meeting on 1 September 2014 Y wrote to A outlining R's preliminary views on the issues it had discussed with A and investigated. The letter stated:

> Essentially, there are two issues of concern to [R] at this stage.
>
> ***First issue: whether you are able to safely continue in your role as a …***
>
> The first issue is whether or not, because of what [R] understands are your health issues, you are able to safely continue in your role.
>
> In this respect, the medical and other information available (which is enclosed and which you have already seen, or provided yourself includes reference to your being affected by, variously: seizures, PTSD, depression (variously major), anxiety, personality disorder, paranoia and suicidal ideation.
>
> Further to all of that, and as you know your current role as a … [explanation of why the medical information presents a concern for A's day to day work]… In addition, sole charge work is or can be required of you, as well as driving vehicles.
>
> In this respect, [R's] preliminary view is that you are not in a position to safely continue in that role given your health issues (both seizures and your ongoing mental health issues) and the requirements of your role. In other words, [R] is not at this point confident that your health issues will not (or could not – and risk is something [R] is also conscious of here) impact on your ability to perform your role safely.
>
> ***Second issue: whether you have misled [R] about your health issues when you applied for your role***
>
> ...
>
> **Your response is now sought before final decisions are made.**

> As noted above, [R] now wishes to provide you with the opportunity to respond to this letter, and to our preliminary view on each of the issues referred to above, before [R] makes any final decisions.
>
> ….

[89] On 12 September 2014 A's lawyer responded to R's letter of 1 September 2014.

[90] A's response to the first issue was to reiterate what was recorded by her psychiatrist and to advise R that A believed she was fit and able to work. I have considered her response to the second issue when dealing with the unjustified action personal grievance.

[91] R believed A should have the opportunity to provide further information to it that it believed would assist it in coming to final decision. Therefore, in a letter of 23 September 2014 R requested A provide further input by explaining the status of her ability to drive (reiterating that it is an essential requirement of A's role that she be able to drive) and providing consent for an external specialist medical opinion.

[92] A agreed to the independent assessment. R had some difficulties in finding a suitable expert to undertake a psychiatric assessment of A but eventually instructed a Consultant Psychiatrist on 4 November 2014.

[93] A attended an assessment on 19 November 2014. The Consultant Psychiatrist produced a report for R on 26 November 2014. This report was provided to A on 6 December 2014.

[94] R's view of the report was that it concluded (amongst other things) that:

a. A had a long-standing mental health condition in addition to epilepsy.

b. There was a low risk of criminal conduct occurring by A in the work environment.

c. A would benefit from a return to work.

[95] However, R was of the view that the report did not assist it with understanding A's ability to drive and/or hold a licence.

[96] R continued to refer to the possible seizures as epilepsy. I am aware that this was frustrating for A because she did not have epilepsy. However, I accept R's view

and labelling of the seizures as "epilepsy" as being reasonable given the information it had. Overall the issue wasn't the label put on the condition but rather the fact that there was a concern about past and possibly future seizures and the impact this had on A's safety at work. This remained an ongoing concern for R.

[97] Based on the report and the information provided to it to date R was of the view that there were unresolved issues for consideration:

a. The non-disclosure of relevant health information in the job application and interview process.

b. A's ability to safely do her job.

c. The effect of the criminal charges, once determined.

d. The status of A's ability to drive and hold a drivers licence.

[98] R asked A to meet with Y in January 2015 to discuss matters. In response, A requested an indication of R's position before agreeing to attend any meeting. So, on 23 December 2014 R wrote to A (through her lawyer) and stated:

> [R] is of the opinion that there may be issues surrounding your mental health wellness in particular a longstanding mental health condition which compromises the employment relationship. In addition, although we acknowledge that the events present a low risk of criminal conduct in the work environment, we are enormously concerned about the impact of any unpredictability, faulty judgement and a lack of insight into the matters at hand.
>
> [R] faces the following concerns in arriving at a decision about the resumption of your role:
>
> > 1. Non disclosure of highly relevant information at the pre-employment stage
> > 2. Safety of … [explanation of R's concern]
> > 3. The vulnerability of …[explanation of R's concern]
> > 4. Our obligation to …[explanation of R's concern]. The summary report states that [A] will benefit from structured employment however it is not our role to provide employment but to provide safe and competent and appropriate…
> > 5. Our responsibility to provide a work environment to all staff which is safe and healthy
> > 6. The question of your suitability given all the circumstances.
>
> We are grappling with the above, which severely compromises the trust and confidence in the employment relationship. I acknowledge that this has been a really difficult time for you and the circumstances

> that you are dealing with and we want to reach a conclusion of this matter as soon as possible for the benefit of all concerned.
>
> Before we can advise our final decision we need to hear your response to the above. I am returning from annual leave in late January 2015 and I would like to meet you and [A's lawyer] and your support person on Wednesday 21st January at 11 am in the HR offices to hear your response. ….

[99] On 14 January 2015 A responded to R thorough an email from her lawyer stating:

> 1. It is our view that the report of [Consultant Psychiatrist] is most favourable to [A] returning to work.
> 2. You have raised in your letter (point 1) the non-disclosure of information at the pre-employment stage. This has already been addressed. Please refer to our letter of 12 September 2013 [sic]
> 3. It is our view that [A] has provided you with all the information you have requested and that a meeting to reiterate everything is not required. If there is anything specific you would like [A] to address please ask for this, otherwise could you please let us know when you will have made your decision by.

[100] On 30 January 2015 R wrote to A advising her that it was disappointed that she was not prepared to meet with them as it wanted to clarify certain points around the pending criminal charges, A's epilepsy and the status of her driver's licence. Notwithstanding that, R was able to make a decision on A's return to work and the non-disclosure issue. R informed A that it had decided that she could return to work subject to it receiving satisfactory information about her epilepsy and confirmation that she is able to drive and subject to a review if any issues arose from the pending criminal charges. R also addressed the non-disclosure issue.

[101] A's response to this letter was to raise a personal grievance for unjustified action causing disadvantage. This was set out in a letter dated 19 February 2016 (actually 2015).

[102] In reply R stated, in a letter dated 2 March 2015:

> [R] still seeks to have the necessary information about driver's licence and epilepsy in order to be able to consider whether [A] may be permitted to safely return to work. …
>
> [R's] focus is looking at whether [A's] current medical condition (of any cause) means that she cannot safely undertake the work of [role]… If, as you suggest, [A] is not currently fit to be driving and has current medical issues, meaning that she cannot safely attend to her own needs, then [R] needs to carefully consider whether she is safe to be in employment. ….

[103] R then set out the information it required from A. This included information on whether A had ever been diagnosed with epilepsy, the reason for A's loss of licence and her ability to work given her medical fitness and not holding a licence.

[104] A took issue with many of the conclusions R had drawn and stated in its letter and its request for further information. A believed this letter made it clear that R did not intend to allow her to return to work. As a result A's lawyer wrote to R and gave notice of resignation and raised the personal grievance for unjustified dismissal.

[105] A never returned to work for R.

[106] Looking at the evidence there may be some criticism of the time it took to progress matters but this was a reflection on both parties and simply a product of people's availability, response times and waiting for events to occur.

[107] The other criticism from A is the manner in which R raised issues, dealt with them and then raised further issues. A's complaint is that it appeared every time she believed she had satisfied R of a concern another issue would be raised, issues which in some cases were not valid. I do not accept this.

[108] From the evidence I heard I see the issues that R had with A's return to work being:

a. A's ability to safely carry out her role given the seizures, which R characterized as arising from epilepsy, and her history of mental health issues.

b. The non-disclosure of relevant health information by A during her job application and interview process and the implication of this on R's ability to trust A to be honest and open with it.

c. The impact of the pending criminal charges.

d. A's ability to fulfil the requirements of her role if she was unable to drive.

[109] Each of these issues or concerns was raised with A during the course of discussions over her potential return to work. A was given opportunities to understand the concerns and respond to them before R made any decision on them.

[110] At the point at which A resigned two issues had been addressed and resolved by R – the impact of A's mental health on her ability to work and A's failure to disclose relevant information during the job application and interview process.

[111] At that stage R still had concerns about any ongoing seizures or possible epilepsy and the impact this might have on A's safety at work and A's ability to perform her role given the status of her driver's licence. R also had reservations about the pending criminal charges but accepted that that issue did not pose any impediment on A's return to work.

[112] Again, the process by which the issues were raised, considered and resolved may have been protracted but I do not see this as being a breach of duty by R. In fact, to the extent that the two issues remained unresolved when A resigned, R's evidence was that it wanted to discuss these matters directly with A in January 2015 but in a letter of 15 January 2015 A refused to attend the proposed meeting seeking a decision in writing from R as to her return to work.

[113] In her email of 14 January 2015 A, though her then lawyer, said she had provided all the information requested by R but "if there is anything specific you would like [A] to address please ask for this".

[114] This led to R providing its decision as it could then and requesting the further information it wanted A to address. In its letter of 30 January 2015 R advised A she could return to work provided it received satisfactory information on her medical history in connection with the seizures she had suffered and the potential for A to suffer seizures, and the status of her ability to drive.

[115] R had put its position in writing including a request for information it wanted A to address - this was specifically what A asked R to do and she has no basis to complain that it did so.

[116] In any event, I do not see R's actions as being unreasonable. R had a duty to A to protect her at work and a duty to others to ensure they would be safe at work when A was working. R also had a right to know if A could carry out a required function of her role (driving) and if not the limitations on that restriction.

[117] For these reasons, R was continuing to explore those two remaining issues when A resigned and that cannot amount to a breach of duty.

[118] As there is no breach of duty leading to A's resignation there is no dismissal and consequently no basis for the unjustified dismissal claim.

Determination

[119] A did not raise her personal grievance for unjustified action causing disadvantage in connection with the alleged failure by R to allow her to return to work from 9 June 2014, within the requisite 90 day period. The Authority does not have jurisdiction to investigate the personal grievance for unjustified action causing disadvantage as it relates to the refusal to allow A to return to work.

[120] R did not act in an unjustifiable manner causing disadvantage to A in the course of investigating and determining the appropriate sanction for the alleged failure to disclose material information in the course of her recruitment. I decline A's personal grievance for unjustified action causing disadvantage.

[121] R did not unjustifiably dismiss A. I decline A's personal grievance for unjustified dismissal.

Costs

[122] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[123] If they are not able to do so and a determination on costs is needed any party seeking costs may lodge, and serve, a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge, and serve, any reply memorandum. I will not consider any application for costs outside this timetable unless leave is sought and granted.

Peter van Keulen
Member of the Employment Relations Authority