

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 29
3062753

BETWEEN GLEN COLLINS
 Applicant

AND PARKS GARAGE LIMITED
 Respondent

Member of Authority: David G Beck

Representatives: Gregory Bennett, advocate for the Applicant
 Jeff Goldstein and Linda Ryder, advocates for the
 Respondent

Investigation Meeting: 8 December 2020 in Christchurch

Submissions Received: 8 December 2020 from the applicant
 22 January 2021 from the respondent

Date of Determination: 26 January 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Glen Collins (“Glen”) was employed by Parks Garage Limited (“PGL”) in Christchurch from 4 January 2017 until his employment ended on 4 June 2019 by way of a resignation first communicated in a statement of problem filed with the Authority and served upon PGL.

[2] Glen has claimed that he was disadvantaged by a warning letter issued to him on 22 January 2019 for his involvement in an incident during a December 2018 staff Christmas function and he further claimed that he has been constructively dismissed. The latter claim is

based upon an assertion that his employer had failed to assure him of being able to return from long term sick leave to a safe working environment as PGL allegedly failed to properly deal with a claim Glen made that he was physically assaulted by a co-worker during the aforementioned Christmas function.

[3] Glen also advanced an ‘alternative’ claim in his brief of evidence that “Parks followed a course of conduct that was set to destroy the employment relationship between myself and Parks”. Upon being questioned on this latter assertion, Glen could not articulate it further and his advocate chose not to develop it in his submissions instead placing reliance upon the third limb of categories of potential constructive dismissal identified by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* (a breach of duty by the employer leads an employee to resign).¹

[4] PGL’s response asserted that Glen’s assault claim was properly investigated which resulted in the claim not being established and Glen being found to have significantly contributed to the situation for which he and two co-workers received warnings.

[5] Further, PGL assert that they took several proactive measures to address negative workplace culture issues identified by an independent investigator and that they then took sufficient practical steps to ensure Glen could return to a safe working environment, but he instead chose to resign.

[6] PGL challenged the grievances as being ‘out of time’, but in a determination of 20 December 2019, the Authority found both grievances (disadvantage and constructive dismissal) were raised within the statutory timeframe and directed the parties to mediation.²

[7] The parties attended mediation but the matter remained unresolved.

The Authority’s investigation

[8] Pursuant to s 174E of the Employment Relations Act 2000 (“the Act”), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise, carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant.

¹ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

² *Glen Collins v Park Garages Limited* [2019] NZERA 732, 20 December 2019.

[9] Glen Collins, David Gerring (PGL's Fleet Manager) ("David") and Stuart Gerring (PGL's General Manager) ("Stuart") gave evidence at the investigation meeting and their advocates made oral and written submissions.

Issues

[10] Was the written warning Glen received for his part in the Christmas party incident justified in accord with s 103A of the Act?

[11] Did PGL breach terms of employment or duties owed to Glen and if so, was it reasonably foreseeable that he would resign and the ending of his employment be categorised as a constructive dismissal rather than a resignation?

[12] If any of Glen's claims are established what remedies should follow?

[13] If Glen is successful in all or any element of his claims should the Authority reduce any remedies granted as a result of contributory conduct?

[14] An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[15] PGL is a well-established family towing and vehicle storage business based and operating around Christchurch and employs around fifteen drivers and support staff.

[16] Glen worked as a vehicle recovery operator. At the time of the Christmas function (15 December 2018) Glen was, and remains, on ACC earnings related weekly compensation recovering from a significant 'non-work' related accident that occurred on 17 November 2018.

[17] Glen related that he attended the PGL Christmas function with his partner Jacqui, with one arm still in a sling, the other one bandaged and both sore from recent treatment. The function was held in the workplace from early afternoon to late evening and attended at various times by PGL staff and families. Witnesses agreed that alcohol and food was freely available. At the investigation meeting, PGL witnesses tried to suggest that the alcohol consumption was moderate and had been carefully allocated. I note however, in disclosed

documents David suggested that the function went on too long (3pm – 9pm) and that “there was a lot of booze on offer”.³

[18] A brief time after arriving at the function, Glen decided to approach and greet a co-worker (Steve) with whom he had been engaged in a long-running and bitter dispute that arose outside the workplace but had been impacting upon workplace relationships and was openly discussed by others.

[19] What occurred next was the subject of ongoing disputation: Glen says that he had a verbal altercation initiated by Steve who returned his greeting with an obscenity. Then, another co-worker (Mark) approached Glen and hit him in the “throat area”. Glen claimed Steve proceeded to threaten him saying “leave him, he’s mine, I will get him later”.

[20] Glen says he left the function shortly after the incident and then called David one of his direct reports saying that he had been assaulted by Mark. From this point in time Stuart, who described his role as being responsible for the “day to day running of the business”, assumed responsibility for resolving the aftermath of the incident. After Glen departed, the function ended abruptly after his brother David intervened and was subsequently involved in a further incident.

[21] The first step Stuart undertook was to post an apology to all staff on PGL’s work Facebook page the next day; acknowledging that the actions of some had ruined the evening, he indicated:

This type of thing is not acceptable and I’m sorry that I had to call it off as that effected the entire team. There will be changes made and follow up with those involved.

[22] Stuart also texted Glen on 16 December and the following exchange ensued:

Hi Glen,

I’m really gutted about last night. I don’t really even know what took place. I will be looking into what took place during the week as it’s not a culture I won’t in my work place [sic]. Are you and Jackie ok?

hi Stu

We are ok and would like to speak to u or David when you are free.

³ Page 66 of the agreed Bundle of Documents.

[23] No meeting took place following the above text exchange as Stuart said he engaged a Tauranga based Health and Safety consultant (“Martin”) who had been working with PGL for several months on ACC and Health and Safety compliance issues to conduct an investigation.

[24] Glen recalls Stuart then contacting him and explaining that he needed to engage an independent investigator as his brother David had been involved in the ‘chain of events’.

[25] Stuart communicated the investigation decision to all staff in a Facebook post of Tuesday 17 December. It included the stricture “It is very important that I highlight these types of behaviour and actions are not acceptable in our company”. The approach he envisaged the consultant would take was detailed as:

Martin will be in the office this Thursday and will be meeting where possible with all the people involved face-to-face. Given logistics involved some may have to be interviewed over the phone. I will stress that this process is about gathering all the facts and fully understanding the events that took place at the time, in the lead up, as well as subsequent.

I have asked Martin to treat all conversations as confidential so that he can make a clear and objective report for my recommendations. Martin will be conducting the interviews by himself.

[26] Stuart ended the Facebook page post with a suggestion that if anyone had any queries they should contact him or Martin.

[27] Glen recalls being interviewed by Martin on 20 December and hearing nothing further until he was asked to attend a meeting on 22 January 2019 where he was presented with a written warning dated 15 January.

Was the warning justified?

[28] In assessing the above question I am obliged to apply the factors detailed in s 103A of the Act and good faith principles. The key overall provision asks that I consider:

.... whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time...
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[29] Judge Corkill indicates in *Spotless Facility Services v McKay (No 2)* that:

..... s 103(1)(b) of the Act allows an employee to bring a personal

⁴ Section 103A(2) Employment Relations Act 2000.

grievance if the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer. The issue of whether the action in question is unjustified requires a consideration of the test of justification as provided in s 103A of the Act.

The meaning of “conditions” of employment is well established. It includes all the rights, benefits and obligations arising out of the employment relationship; the concept is necessarily wider than the terms of an employment agreement.

I also observe that the statutory context within which this assessment must arise includes the obligation in s 4(1A)(b) that the parties be active and constructive in establishing and maintaining a productive employment relationship, in which they are, amongst other things, responsive and communicative.⁵

Procedural issues

[30] Glen raised some legitimate concerns with the Authority and my own critical observations about the process leading up to the warning include that:

- No detailed terms of reference were disclosed for the investigation.
- The investigator’s original interview notes were not provided to Glen at the time of being interviewed or to the Authority to ascertain their accuracy or otherwise (what was later provided after the matter had been filed in the Authority, was Martin’s typed summaries of the interviews).
- The interview notes did not record any of the questions put to the interviewees.
- Glen’s partner Jacqui, was not interviewed despite her subsequent comments at the 22 January meeting being relied upon during the later disciplinary meeting to support PGL’s views on the validity of the written warning.

⁵ *Spotless Facility Services v McKay (No 2)* [2017] NZEmpC 15, [2017] ERNZ 64 at [49] – [51].

- None of the other interview notes were put to Glen for comment (presumably as Stuart had wrongly assured interviewees that their comments would remain confidential).
- Glen was not provided with a copy of the investigator's report and its findings (the interview notes and report were not disclosed until after Glen filed the matter in the Authority).
- Glen did not get a formal 'disciplinary' invite to the meeting when the warning was delivered setting out any allegations and he was not advised of his right to representation.
- The warning was pre-determined and Glen had no opportunity to comment upon it prior to it being administered.
- No minutes were taken or provided of the 22 January 2020 meeting.
- Overall, PGL failed to adhere to its own promulgated House Rules (specifically clause 23 "Investigation Procedure for Misconduct") that accompanied Glen's employment agreement and were expressly incorporated by such at clause 12. I observe that had these rules been adhered to, the above concerns may not have arisen.
- There was scant explanation from the investigation report writer on how he reached his conclusions and no draft report was provided to Glen for comment.

The content of the warning letter and meeting of 22 January 2019

[31] The 22 January meeting was attended by Glen, his partner Jacqui, Stuart, and Kathy Posie (PGL's HR advisor).

[32] Neither party in their evidence initially outlined what happened at the 22 January meeting but Stuart made a reference in his written brief that Glen's partner Jacqui had said in the meeting that "she thought Glen should not have pushed the situation and that all involved were to blame due to the expletives being used at the onset of the meeting" and that Glen had also conceded "he shouldn't have aggravated the situation".

[33] During the investigation meeting, Glen also acknowledged that he did verbally abuse Steve in response to him telling him to "fuck off" when he greeted him and he used

derogatory language directed at Steve as the verbal altercation escalated and he accepted that he had acknowledged this to Stuart at the 22 January meeting.

[34] Glen recalled Stuart opening the meeting by indicating that the investigation had been completed, that all those involved were being dealt with and that they “all would be disciplined”. He recalled asking for the statements of co-workers and that this request was denied. Glen said he was then presented with the warning letter dated 15 January 2019 that he had to read during the meeting.

[35] The warning letter over Stuart’s signature, was headed “Unsatisfactory Performance” and first disclosed that the investigation was “into the alleged argument, fighting and other unsatisfactory behaviour at the Christmas Party”. It proceeded to recite the investigation finding that it had:

.... clearly identified that you played a key role in starting the initial confrontation with a fellow colleague. This then escalated into a standoff between you and that staff member as well as with other staff members.

In addition, your subsequent phone call to David Gerring alleging that you were physically assaulted in turn escalated a separate series of unfortunate events. Although you played no part in the actual events your phone call which based on the multiple evidence provided by you and others would seem to be inaccurate in that you were not actually physically assaulted.

Your behaviour shown in this situation is not acceptable and will not be tolerated.

[36] The letter then proceeded to say this was a “first warning letter” and that if Glen’s “conduct, behaviour and actions regarding your fellow workers do not improve immediately” his employment may be terminated. It indicated the letter would remain on Glen’s personnel file for 12 months and proposed a further meeting on 22 February to “review” progress. The letter invited Glen to “respond to this formal warning letter” either by approaching Stuart or writing to him.

[37] Glen recalled that after reading the letter during the meeting, he questioned Stuart on how he had reached his decision and Stuart said he was only passing on the investigation report writer’s conclusions.

[38] Glen also said that at the meeting he proceeded to briefly relate to Stuart what had happened during the Christmas function but Stuart did not engage him and said that he was

only going on Martin's investigation report recommendations and the meeting concluded. Stuart did not contest Glen's recollection of the meeting and he acknowledged he did not explain to Glen how he reached the conclusion to give him a warning other than he had accepted the conclusions of the investigation report.

Potential disparity issues

[39] Although not provided to Glen prior to or during the investigation proceedings, I directed PGL to provide evidence on what sanctions the other two workers involved in the incident had received. I was given a copy of a letter provided to Steve and I am satisfied that the content indicates that he was given the same outcome as Glen. However, there was a subtle difference in comparing Glen's warning letter with Steve's equivalent. Glen's outlined a conclusion that he had been found as "starting" the confrontation whereas Steve was found to have played a "key role in the initial confrontation". I find this subtly different approach was inconsistent with the investigation finding that "Steve and Glenn equally to blame with the start". One witness' notes captures what is likely to have occurred – "Glenn came trying to be nice and Steve told him to fuck off – Glenn calls him a f' homo".

[40] A concern of consistency for Glen was that Mark, his alleged assailant, was not given a formal written warning and according to evidence recently provided by PGL he was only "spoken to about the incident". The approach to Mark is impliedly drawn from the investigation finding that "for the most part Mark did not do anything wrong" despite being found to have pushed Glen when he intervened in a verbal altercation between Glen and Steve. There was also a curious additional exhortation that Mark be spoken to about his behaviour in punching a shipping container after the incident – this is clearly suggestive of Mark having 'anger control' issues.

[41] I find, without knowing other contextual issues that the approach to Mark did show a degree of unexplained disparity and the investigation report finding did not necessarily fully in accord with the interview notes. All but one witness, attested that Mark intervened and physically pushed Glen. Objectively, Mark should have received the greater sanction as a message that overly aggressive behaviour had no place in PGL's work environment.

[42] Evidence given suggested that Stuart uncritically accepted the investigation report findings of fact and the suggestions of warnings for those involved rather than critically assess the report and the interview notes.

[43] I have to balance the above observation against the overall content and purpose of the investigation that was wider than the incident between the three cited parties and assess what general steps PGL took to implement the investigation reports findings. That was, that the investigator highlighted significant negative cultural issues, a singular lack of consistent HR processes and leadership modelling on dealing with past incidents. This was best summed up by the report writer as “There are a number of underlining [sic] issues that have been left to fester for some time”.

[44] In the above context, Stuart amply demonstrated to the Authority that he had taken steps as advised to put in place a number of sensible initiatives including immediate messaging on unacceptable conduct, posting visible bullying awareness material and clearer adherence to HR processes. Inevitably working from a “low base” takes time but I did not perceive PGL to have ‘buried their heads in the sand’ and they deserve credit for focusing more sharply on making positive changes in the context of a workplace with an evident ‘macho culture’.

Assessment

[45] Whilst it was evident that Glen’s perspective was solely focused upon the alleged assault and his employer’s lack of acknowledgment of such, I objectively find from the witness notes that it is more likely than not that a minor assault took place but that the threatening language used by Steve was in the ‘heat of the moment’ and objectively not particularly credible evidence of an ongoing threat. On the latter, Glen disclosed that the long-running ‘feud’ with Steve was not accompanied by any previous threatening incidents and they rarely worked together.

[46] The lack of PGL’s ‘acknowledgment’ of an assault having taken place I find has however, blinded Glen to his own contribution to the situation, that notwithstanding provocation, was reactive and verbally abusive.

[47] As Mr Goldstein suggested, I find some of PGL's actions leading up to the warning to be objectively reasonable in that they engaged an independent investigator in a timely manner, took regard of his findings that, given the context of a function where alcohol was consumed, were difficult to reconcile and then took decisive action to deal with those involved and PGL also addressed wider cultural issues.

[48] However, I find that Glen's written warning and the suggestion by Mr Goldstein that he "instigated" the altercation was simply wrong and such a conclusion could not have been reached by reading and carefully assessing the interview notes and fairly addressing Glen's and witness accounts of what occurred.

[49] I have also highlighted above significant procedural defects in the process leading up to the delivery of the warning that breached PGL's own House Rules on the conduct of a disciplinary investigation.

[50] In making this finding on PGL's lack of adherence to a fair process, I was convinced that in hearing from PGL witnesses that this was largely caused by inexperience coupled with a commendable desire to try and do things differently to how they had previously handled such matters. I also make an observation that PGL was dealing with the thorniest of employment relationship problems involving co-worker conflict and them bringing an outside dispute into the workplace during the Christmas function which was an environment of largely uncontrolled alcohol consumption.

[51] I was not persuaded by Mr Goldstein's submission that no disadvantage occurred as Glen's employment was not in jeopardy because of his injury and consequent absence likely to be ongoing beyond the twelve months of the warning remaining on his personal record. I consider that Glen was subjected to unnecessary distress whilst the employment relationship was still 'on foot', he was not fairly heard by the decision-maker before his warning was administered and his concerns were not properly investigated and resolved.

[52] By contrast, his assailant was treated comparatively lightly and I have found this to be a case of disparity. These omissions caused disadvantage to Glen including some erosion of trust and confidence in his employer.

[53] Overall, in terms of s 103A(5) (a) - (b) of the Act the defects were 'not minor' as Mr Goldstein has suggested and they objectively did result in Glen being treated unfairly.

Finding

[54] I conclude that Glen has made out that he was disadvantaged by the written warning that I find to be unjustified. Glen is entitled to a remedy subject to his contribution to the situation giving rise to his grievance (discussed below).

Events following the warning letter being issued - do they amount to a constructive dismissal?

[55] A 'constructive dismissal' can be found if an employer's conduct compels an employee to resign in circumstances where although on the surface the employee appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this doctrine is where the resignation is caused by a breach of a duty owed to the employee and the employer could reasonably foresee that rather than put up with the breach, the employee resigns - effectively signalling a belief that their employment agreement has been repudiated by the employer. The Court of Appeal has stated the legal test as:

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. ⁶

[56] The overarching duty that is now statutorily recognised as a component of 'good faith' ⁷ is that an employer should not – without proper cause – act in a manner calculated to

⁶ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

⁷ Section 4 (1A)(a) and s 4(1A)(b).

or likely to, destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship.⁸

A challenge to the warning letter

[57] Following the meeting by email of 23 January 2019, Glen challenged the warning letter. The key contentions he raised were:

- He felt his assault complaint had not been properly dealt with and that he had been “pushed and held by my throat, this is definitely an assault”.
- He disagreed that he had “played a key part in starting the confrontation”.
- He felt he was being unfairly blamed for a further incident after he had left by the fact of him raising the assault allegation with David Gerring.
- He felt that insufficient account had been taken of Steve threatening him and that “I would like to be able to come to work and do my job in a safe environment moving forward”.

The response

[58] Rather than addressing the issues Glen had raised with him, Stuart (as the notional decision-maker) instructed Martin the investigator, to respond which he did so on 2 February 2019. The response from Martin did not disclose his investigation report or interview notes (or Glen’s interview notes). Stuart could not recall discussing the response from Martin before it was sent.

[59] Martin opened his letter claiming that he was responding “primarily because I led the investigation” and his responses included stating:

- The “nature of this disciplinary meeting” of the 22 January “did not warrant the need for you to seek advice. A written warning is at the lower end of the disciplinary spectrum”.
- That Glen failed to mention the “word assault” during the investigation.

⁸ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

- A comment about Glen saying that he would not make a false assault allegation as he understood video cameras were operating with an implication that this was an unusual response.
- An outline of his view that information he gained during the investigation from Glen was “very conflicting”.
- A repetition of an assertion that Glen’s “actions contributed to the overall escalation of events” but then a suggestion that the warning was narrowly for Glen’s “involvement in the incident with Steve and Mark. The written warning was not for the escalation”.
- That he had assessed that “personal issues” between Glen and Steve were impacting upon their working relationship.
- That others had described Glen as using threatening language and being “confrontational and aggressive”.

[60] Martin concluded the response with:

You have presented to me evidence at the investigation that you are now contradicting. This is not ideal as it either means you were not truthful in the first instance or what you are presenting now is not truthful. Either way it challenges your position Glen.

If you wish to take this further, you have every right to do so. We will treat this within the parameters set out in your employment contract. Such a communication should be addressed to Stuart directly.

[61] Glen did not initially formally respond to the invitation made to take the matter up further with Stuart but claimed during the investigation meeting that he discussed his dissatisfaction about the warning and his fears of returning to work on an ongoing basis with Stuart and David.

[62] Mr Goldstein’s submission alluded to the fact that although Glen remained on ACC, he did not resign until 4 June 2019 (four months after receiving his response to concerns he raised about the warning).

Glen's claim regarding a potential breach of duty

[63] Glen initially suggested that PGL's inability to recognise the seriousness of the assault at the Christmas function and deal with the consequences of it did not provide him with a sufficient assurance that when he recovered from his injury and returned to work it would be to a safe environment.

[64] On being pressed during the investigation meeting about what could PGL have done beyond the measures they took - Glen indicated that he expected his assailant co-worker to be sacked as he feared his presence in the workplace when he returned.

[65] The above, raises an immediate problem in which Mr Goldstein alluded to in his submission that when it became apparent (22 January 2019) that this would not occur, Glen did not identify this stipulation in his 23 January response to his warning letter (instead he identified the other co-worker Steve as the problem). Glen did not resign at this point in time or place his employer on notice that he was contemplating resigning.

[66] In questioning, Glen suggested that a big issue was that he felt he had not been believed about the assault but he considered that "Stu should have guessed" he would later resign - I objectively do not find this to be a reasonable assumption.

[67] Instead whilst on ACC leave, Glen continued to positively engage with PGL about the possibility that he could be running a new PGL operation in Nelson up to the end of May 2019 (including an amicable informal meeting with Stuart and David on 22 March 2019 at a local restaurant). When this option fell through Glen said it led to his decision to resign as that would have kept him away from his co-workers. However despite this assertion, Glen did not allude to the loss of the Nelson option being at issue in signalling his intention to resign on 4 June.

[68] In giving evidence at the investigation meeting, Glen claimed that during a 22 March 2019 meeting he discussed his misgivings about returning to the Christchurch workplace alongside Steve and Mark. David recalled this brief conversation being with him and that he had assured him Stuart had dealt with the situation. Glen recalled that was so, as Stuart was present at the meeting but on the phone during the conversation.

[69] If I accept Glen's evidence it still leaves a further three and a half months before Glen signalled that he had resigned and generally, Glen indicated that he otherwise had a good working relationship with Stuart and David.

[70] A further reason Glen says prompted him to resign, although not strongly emphasised in his advocate's submission, was him being rebuffed by PGL in his attempt to return to work on light duties.

[71] By 9 May 2019, Glen had engaged with Kathy at PGL and his ACC-provided occupational therapist ("OT") over a graduated return to work programme that was forwarded to Stuart for his approval from 13 May.

[72] In a follow up email of 9 May, Glen thanked Kathy for attending with his OT regarding the return to work programme but then reiterated his concerns about returning to work alongside Steve and Mark "in a small company with shared facilities". He stated that Stuart had suggested that he go to the police (a fact Stuart acknowledged) and that the matter was not resolved and he closed the email asking for guidance on a way forward

[73] Glen then indicated that he would return to work the following Monday but PGL made it clear that had to be cleared by Stuart. This took a few days for a response and Stuart emailed a letter to Glen on 14 May, rejecting the notion that he had not satisfactorily dealt with the Christmas function altercation and he suggested that PGL had "moved on" from this. Stuart then indicated:

We would very much like to see you fully fit and back at work as your skill set has been missed. What I would like to do is give you the confidence that in the unlikely event that something does happen to make you feel unsafe we would have you report this directly to myself immediately.

Since the event we have issued an Anti-Bulling [sic] Policy and have an ongoing focus off this, we are also about to carry out some more work around culture. We want our team to enjoy working at Parks.

[74] Stuart concluded by saying that he had Glen's return to work programme and noted that he had been cleared to return on light duties but did not say if that was going to be approved by him. He concluded "If you wish to discuss please call me".

[75] Glen said that he then contacted Stuart but was told no light duties were available. Stuart in written evidence claimed that Glen had been advised multiple times prior to the

email exchange that no light duties were available that would preclude the risk of further injury and that he had advised his OT of this.

[76] In giving evidence, Glen suggested that he had offered to do administration work but this was turned down. When questioned, Stuart said light duties were not available as PGL was “overstaffed”.

[77] I objectively conclude from limited evidence around the issue that PGL chose not to provide what would have been ‘alternative’ duties on the reasonable assumption that Glen’s tow truck driving role could not be undertaken due to the nature of his injury and that no light duties were available within his core role. I find that was a reasonable and cautious stance and PGL was under no legal obligation to provide light duties.

Post-resignation contact between the parties

[78] In Glen’s advocate’s next communication of his resignation of 4 June 2019 by way of an application to the Authority, Mr Bennett made no reference to the refusal of light duties being at issue in Glen’s decision to resign. Glen could not explain why he then did not communicate to his OT that his employer had refused light duties and that he had resigned.

[79] Correspondence between PGL and the OT resumed in mid-July 2019 as a new HR advisor was appointed at PGL. The OT emailed PGL on 24 July seeking clarity suggesting a discussion between Glen and PGL needed to proceed to re-visit the return to work plan that the OT believed had not been completed due to “employment tension”. The email asked PGL to respond as to whether the workplace tensions had been resolved (the correspondence implies that Glen had briefed the OT about the issues involving co-workers).

[80] Stuart replied to the OT on 25 July indicating that he believed the ‘employment tension’ was resolved and in his view had nothing to do with the return to work plan, no light duties were available but Glen remained “still employed in his pre-injury employment” and that workplace tensions would not prevent him “being able to return to the work environment and then engage in this return to work plan”.

[81] Despite the conciliatory tone of the above, Stuart also wrote to Glen on the same day seeking a meeting to discuss his injury as the last medical certificate he had received was

dated 5 May 2019. The letter referred to the exchange with Glen's OT, repeated no light duties were available and said the envisaged purpose of the meeting was:

..... to discuss your fitness for work and whether or not the company can continue to hold your position of Vehicle Recovery Operator open for you.

and:

Can you please bring with you all current medical information so that we can have a full understanding as to the reason for your absence?

[82] Glen responded on 26 July saying Stuart should contact his advocate as "my employment matter is in the employment relations authority".

[83] The OT then emailed Stuart on 30 July saying that she was no longer involved and any queries around Glen's return to work should be discussed with his ACC case manager.

[84] Glen then provided Stuart with an ACC medical certificate from his GP indicating that he was fit for some work and could do normal hours from 9 August 2019 to 6 November 2019 provided he not engage in "lifting or forceful movements".

[85] Despite being told not to do so (although copied to his advocate), Stuart emailed Glen on 2 August 2019 suggesting that if he did not attend the suggested meeting "the Company may make a decision about your ongoing employment in your absence".

[86] The correspondence ended with Glen's advocate emailing PGL's advocate on 5 August indicating contact must cease as the Authority application had identified Glen believed he had been constructively dismissed and he "does not desire to return to work with your client given that he has lost complete trust and confidence with it".

[87] On questioning the parties during the investigation meeting why correspondence continued after 4 June 2019: Stuart indicated that although he had by this point, received the Authority application, he did not comprehend that Glen had resigned. I found this less than credible as Stuart also indicated that he sought immediate legal advice to prepare a statement in reply.

[88] Once the parties' advocates became involved there is inevitably a degree of 'artificiality' in positions as each side jockeys for their clients' advantage, this included the

unusual step of Glen's advocate signalling a grievance and resignation for the first time in an application to the Authority rather than using the more conventional route of writing a personal grievance letter. I also observe that PGL's experienced advocate tried to portray the employment as ongoing which led to PGL taking initial steps toward a dismissal for medical incapacity.

[89] Whilst Glen also expressed some confusion during the investigation meeting over whether he had resigned on 4 June 2019, I have to 'step back' and apply an objective test, to assess whether Glen has established that he was constructively dismissed or voluntarily resigned.⁹

Finding

[90] Assessing the overall evidence, contextual issues on the relationship between the parties and background factors, I do not find an unjustified 'constructive' dismissal has been made out as a sufficient breach of duty has not been established.

[91] I base this on a finding that objectively, PGL has not breached an obligation to provide Glen with a safe working environment. I find that PGL took reasonable and practicable steps to ensure Glen's concerns were addressed. The measures taken described and communicated to Glen, could not be deemed inadequate and PGL continued to try and reassure Glen that he was, once fit, welcome to return to work. This included keeping Glen's position open for a significant amount of time (around seven months) without initiating moves to address the prospect of him lacking capacity to undertake work that is essentially physically demanding.

[92] I accept Glen feels strongly about PGL not concluding that he had been assaulted but he chose to further amicably engage with his employer for a significant time period after being issued with a written warning and he did not in a timely manner, signal that PGL not finding his assault complaint credible had repudiated his employment agreement.

[93] The latter issues Glen raised as justification for resigning during the investigation meeting (the Nelson option falling through and the refusal to allow light duties) were not

⁹ See *Cornish Trucks & Van Ltd v Gildenhuis* [2019] NZEmpC 6 at [45] where Judge Holden held that: "The test is an objective one: was it reasonable for somebody in Mr Gildenhuis position to have considered that his employment had been terminated?"

sufficiently identified at the time and therefore it was not reasonably foreseeable to PGL that he would resign and were not in any case capable of being considered breaches of duty sufficient to establish a constructive dismissal claim.

Conclusion

[94] Having obtained a finding of unjustified disadvantage for an unjustified warning, Glen has been partially successful in his personal grievance claims and is entitled to remedies for this finding.

Remedies

Compensation for hurt and Humiliation

[95] Glen gave evidence of the impact the warning coming at a time that he was struggling to cope with an ongoing painful injury. He described the high expectation he had placed in his employer that his assault complaint would be treated seriously and fairly and his feeling of betrayal when it was not. Stuart's initial failure to engage (including not directly dealing with him when he challenged the warning) led to a belief that PGL did not understand Glen's perspective of the situation for a significant period of time.

[96] Glen indicated that he felt the written warning "came out of nowhere" which is understandable in the circumstances. He also described anxiety at contemplating returning to a workplace that contained one person who had assaulted him and one other who had threatened him and highlighted the lack of communication on what sanctions were in place to deal with their behaviour (for which I have found disparity was evident).

[97] I find that the procedural failings in the approach to Glen's complaint and the warning procedure denied Glen agency and dignity as his perspective was not fairly considered by the investigator or Stuart as the decision-maker.

[98] Against the above, I found Glen to present as a reasonably robust character and he seems to be coping with a difficult long term injury together with ACC income support. The injury was not caused by his employer who I have found kept Glen's position open for a fairly generous timeframe. I have found that the distress around the warning was reasonably significant but not directly causative of Glen losing his job.

Finding

[99] Taking into account the evidence proffered and awards made by the Authority and Court in similar situations and surveying cases brought to my attention in submissions, I consider that Glen's evidence warrants modest compensation of \$8,000 under s 123(1)(c)(i) of the Act.¹⁰

Contribution

[100] Section 124 of the Act states that I must assess the extent to what, if any, Glen's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*¹¹.

[101] I find that Glen engaged in a degree of reactive blameworthy behaviour during the incident that led to his warning by not immediately walking away from Steve when he swore at him. Given the evidence of previous tension in the relationship, I do not find that Glen would have been particularly surprised by Steve's reaction and Glen's profuse language in engaging with him further unnecessarily escalated the situation. I however, have to balance this consideration up with my finding that PGL's investigation fell well short of thoroughness and Glen cannot be blamed for these deficiencies.

Finding

[102] On balance, I consider Glen's reactive response and contribution to the situation that led to his warning warrants a reduction of 10% of the remedy I have awarded.

¹⁰ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

¹¹ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Summary

[103] **I have found that:**

- (a) Parks Garage Limited failed to fairly resolve Glen Collins' complaint of assault and then gave him a written warning that was procedurally unjustified and did not meet the test of justification set out in s103A Employment Relations Act 2000.**
- (b) Glen Collins was not constructively dismissed.**
- (c) In the circumstances, Parks Garage Limited must pay Glen Collins the sum of \$7,200.00 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.**

Costs

[104] Costs are at the discretion of the Authority and here Glen Collins has obtained a compensatory remedy for his disadvantage claim concerning an unjustified warning but has not established that he was constructively dismissed following a day long investigation meeting.

[105] The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having discretion to assess costs, must be persuaded that circumstances exist to depart from the normal application of scale costs.

[106] If no agreement is achieved, Glen Collins has fourteen days following the date of this determination, to make a written submission on costs and Parks Garage Limited has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David Beck
Member of the Employment Relations Authority