

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Irene Geen (Applicant)

AND The Commissioner of Police (Respondent)

REPRESENTATIVES Dan Gardiner, Counsel for Applicant
Ross Burns and Charlotte Parkhill, Counsel for Respondent

MEMBER OF AUTHORITY Alastair Dumbleton

INVESTIGATION MEETING 13 to 16 February, 3 March, 2006

SUBMISSIONS RECEIVED 3 April, 5 and 12 May, 2006

DATE OF DETERMINATION 17 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Ms Irene Geen served more than 18 years as a Dispatcher working for the New Zealand Police at the Northern Communications Centre. That career was ended in March 2005 when the Commissioner of Police terminated her employment on medical grounds.

[2] There is no dispute that legally the medical retirement of Ms Geen at the initiative of the Commissioner was not a resignation but amounted to a dismissal.

[3] Ms Geen has challenged the justification for the dismissal. She has also alleged that prior to her dismissal, in different circumstances on two occasions in 2003, the Commissioner acted unjustifiably and caused her disadvantage in her employment or in the terms of that employment.

[4] To resolve the dismissal and disadvantage grievances, under the Employment Relations Act 2000 monetary remedies are sought by Ms Geen to reimburse her for lost wages and compensate her for hurt feelings, humiliation and other general distress. Although to begin with she had sought reinstatement, that remedy was not pursued to the end of the investigation.

[5] A further remedy sought by Ms Geen from the Authority is the restoration of a number of day's annual leave that the Commissioner deducted from the balance due to her after she had

been on a private trip to Australia. Ms Geen contends that she was entitled to remain on sick leave during that trip. The annual leave at issue is 15 days, equivalent to \$3,478.08 gross. Ms Geen also seeks compensation of \$2,500 for loss of expected benefits from her employment.

[6] It seems likely that if her debilitating medical condition had not developed, Ms Geen would have continued with the Police until retirement after a further 11 years of employment. She has assessed her loss of wages (approximately \$220,000) arising from her termination on the basis of an expectation of working those additional years.

[7] About two months after her dismissal in March 2005, Ms Geen was able to resume employment with a new employer. The remuneration for the new job however, is significantly lower than received from the Police employment.

[8] In the course of the investigation meeting, which ran into five days, extensive evidence about the employment relationship problem was given to or obtained by the Authority. Much of this evidence was the correspondence and reports from medical advisers, including specialists and consultants retained to assist Ms Geen to recover from her condition and to resume employment in her old job as a Dispatcher. The Authority also took oral evidence from some of the medical advisers and specialists. I do not propose to refer in detail to any of this evidence except where necessary.

[9] An essential part of Ms Geen's work as a Dispatcher at the Police Communications Centre, was the continuous use of a keyboard to put information and data into a computer while responding to 111 calls from the public. It is in the nature of the job that while Dispatcher's are doing their particular work they are continually exposed to stress from a number of different sources. The condition Ms Geen developed prevented her from using a keyboard or enabled only limited use, and at times she was unable to work at all.

[10] Ms Geen's period of ill health began in February 2003, when she began to experience severe ongoing pain in her left arm, shoulder and neck. She consulted her GP and received medical certificates putting her off work for defined periods. She was also referred to several specialists.

The accident of 31 March 2003 – first disadvantage grievance

[11] On 31 March 2003, Ms Geen suffered an accidental injury at the Communications Centre on the same day that she had returned to work after being absent because of her medical condition. This accident and its consequences for Ms Geen, both direct and indirect, set back her recovery from the condition initially diagnosed and had a considerable effect on her ability to ultimately resume her job as a Dispatcher. Almost two years later, in March 2005, the Commissioner decided that the prospect of her being able to resume her old job was not great enough to justify the continuation of her employment, after the time that had gone by since the accident and subsequent surgery and other treatment she had to try and cure or improve her condition.

[12] Ms Geen was at the Communications Centre on 31 March 2003 because she had returned to work that day after receiving a letter written on behalf of the Commissioner to advise her that she had used up all her available paid sick leave. On 17 March 2003 when the letter was written, the Commissioner was still awaiting advice from CRM Group Ltd as to whether Ms

Geen qualified for ACC cover. CRM was the contracted provider of services to the Police for claims administration and case management rehabilitation. The Commissioner in his letter to Ms Geen advised that any further sick leave taken after 31 March 2003 by her would be treated as leave without pay because her paid sick leave entitlement had been exhausted. Ms Geen was also advised that she could apply for a sickness benefit or take leave without pay.

[13] Ms Geen considered that the Commissioner had left her with no option but to return to work. She had been examined by an orthopaedic surgeon on 27 March 2003, who cleared her to return to work on light alternative duties, providing they involved no repetitive work. The surgeon diagnosed Ms Geen's condition as regional pain syndrome and he gave his opinion that possibly that had been caused by a strain from using the computer keyboard at work.

[14] The accident on 31 March occurred when Ms Geen tripped over a footstool that was available for her to use. In her evidence, Ms Geen described how the accident happened:

The footstool was left where she [Team Leader] dropped it and after a period of time someone called me to assist them in some way. I stood up and moved away, forgetting that the footstool was sitting in the middle of the floor. I stepped on it and as a result tripped and fell over. I threw my left arm out which took the impact of the fall. I hit my knee on the footstool bar and also jarred my neck.

I stayed on the floor but was assisted to my feet by my Team Leader as I was a bit stunned.

[15] Shortly after this, Ms Geen attended at an Accident and Emergency Department where she was examined and had her wrist put in plaster. She then returned to work but was sent home and told to take the next two nights off from work.

[16] This accident and the circumstances surrounding it form the basis of Ms Geen's first disadvantage grievance claim. She considers that the advice given by the Commissioner in his letter of 17 March 2003 about her used up paid sick leave, had compelled her to return to work. She considers that if she had not had to return she would not have been exposed to the accident that happened and would not have suffered the resulting injury. Undoubtedly that injury was a significant complication to her existing condition, and there were still further complications as a result of surgery and other treatment she subsequently received.

[17] A personal grievance in relation to her return to work on 31 March and the accident suffered by her that day was raised by Ms Geen, but the Commissioner rejected responsibility for any unjustified action. Later in 2003 Ms Geen advised him that she did not intend to proceed with that particular personal grievance for the time being, but she reserved the right to do so at a future date.

[18] I find that Ms Geen does not have a personal grievance in relation to the 31 March 2003 return to the workplace by her and the accident she suffered that day at the Communications Centre, a place Ms Geen had been working in for many years. In my view, the accident was the sort that could have happened to her or to any other employee at any time.

[19] The fact that Ms Geen had gone back to work on 31 March in response to the letter from the Commissioner about her lack of paid sick leave entitlement, does not create a causal link between the writing of that letter and the accident, in my view. The letter did not compel her in any sense to return to work but simply informed her of her leave entitlements and limitations on those, and it also suggested options if she was not well enough to return to work. Those options were obviously limited and undesirable to Ms Geen, but they were not forced on her.

[20] The position on the workplace floor of a piece of moveable furniture relative to Ms Geen, was the immediate cause of the accident. Ms Geen's movements brought her into contact with the footstool which was in the office for the purpose of being used from time-to-time by her. There will be few offices and other workplaces where employees have not tripped over or knocked into some item of furniture, fixed or moveable. No doubt in some cases the direct or indirect consequences of such an accident will prove to be out of all proportion to the simplicity of the situation that caused it. Ms Geen's case appears to be in that category unfortunately.

[21] I reject therefore the view that the accident on 31 March occurred because of a combination of some unlawful or unreasonable requirement made of Ms Geen by the Commissioner to return to work, and the presence of a workplace hazard on 31 March 2003. I find that there was no unjustified action on the part of the Commissioner in writing to Ms Geen on 17 March to advise her of her limited options for remaining on paid sick leave. In my view, it was necessary for the Commissioner to ensure that Ms Geen was fully aware of her leave situation under the terms of the employment agreement. I also consider that Ms Geen was not justified in losing some confidence in her employer, as it appears she did after this accident.

Opportunity to apply and be considered for Trainer position – the second disadvantage grievance

[22] The injury to Ms Geen's wrist suffered on 31 March 2003 set back her rehabilitation from the original condition diagnosed as regional pain syndrome. Although Ms Geen returned to work on 7 April 2003, she was still in no condition to perform her normal job and was given other duties she could do. Over the next few weeks and months, there were further consultations with her GP and referrals by CRM to a plethora of advisers and specialists, including a psychiatrist. Her Accident Compensation claim in relation to the regional pain syndrome had eventually been accepted by CRM and a claim in relation to the 31 March 2003 injury was also accepted.

[23] While Ms Geen continued to be unfit to resume her job as a Dispatcher, consideration was given by the Police to the possibility that other positions in the force might be suitable to her. They included the jobs of Prison Escort Officer, Motorway Support Officer and Speed Camera Operator. None of those were regarded by Ms Geen as suitable but she did have an interest in the possibility of a position in the Burglary Squad Unit.

[24] Her second disadvantage personal grievance was raised on 31 October 2003. It was a complaint that she had not been given the chance to apply and be considered for a training position at the Communications Centre.

[25] Ms Geen expressed her interest in the position of Trainer in a letter to the Commissioner written on 26 August 2003. She said she had heard through a colleague that the vacancy had been advertised and she said that the position would be most fulfilling as it was one requiring the

use of the skills, knowledge and extensive experience she had gained from her work in the Communications Centre. She pointed out that it had been agreed that alternative employment options would be positions of a similar nature to her job as a senior Dispatcher. She asked for the Police to give full consideration to her suitability for the training position, as she said her sole purpose was to return to work as soon as possible.

[26] I am satisfied that the Commissioner discharged his obligations under the employment agreement and its associated policies, including the Rehabilitation Policy, to consider suitable opportunities for redeployment within the Police. A number of those were identified and made known to Ms Geen but for various reasons she preferred not to pursue them.

[27] I accept the evidence of Ms Judith Nicholl, the Human Resources Manager for the Communications Centre at Auckland, that the Trainer vacancy had not been offered to Ms Geen as an option for redeployment because it involved a considerable amount of computer-keyboard work. The decision was based on medical advice received, stating that Ms Geen was not able to be redeployed to any position requiring significant keyboarding.

[28] I am therefore unable to find that the Commissioner's actions with regard to possible alternative positions of employment for Ms Geen gave rise to any disadvantage grievance. In particular, those actions were not unjustified in respect of the Trainer position and the Commissioner's decision that it would not be suitable.

[29] Ms Geen had surgery on her hand in March 2004 but afterwards began to experience serious problems, for which she required further medical attention.

[30] The Commissioner then advised Ms Geen of his intention to medically retire her from the end of March 2004. Later, however, that decision was deferred by the Commissioner until Ms Geen had undergone any necessary rehabilitation programme and a prognosis had been obtained as to her ability to return to work. By this time, Ms Geen had engaged legal representatives.

Medical retirement on 22 March 2005 – the dismissal grievance

[31] A report was prepared on behalf of the Commissioner recommending that Ms Geen be compulsorily medically retired. The two page report, written on 21 March 2005 for the General Manager Human Resources of the Police, Mr Wayne Annan, included the following paragraph:

While Police have been sympathetic to Ms Geen's situation, it is time for Police as a reasonable employer to fairly "cry halt". Some two years on from the date of injury, and almost one year on from the date of her operation Ms Geen's medical condition has still not resolved. The projected length of rehabilitation she will require, together with the restrictions on the work she can safely undertake during rehabilitation and the uncertainty about whether she will ultimately ever be able to resume her roll as a dispatcher, contribute to make this situation untenable for North Comms and for Police.

[32] The report, which had been prepared by Ms Maureen Walker of the Wellness and Safety division of the Police, was forwarded to Mr Annan who approved the immediate medical retirement recommended by Ms Walker.

[33] Ms Geen was advised of the decision by a letter written on behalf of the Commissioner on 22 March 2005, the date also declared by him to be her last day of employment.

[34] To resolve the employment relationship problem, the Authority must determine whether Ms Geen's dismissal was justified or not. As the dismissal (but not the disadvantage grievances) occurred after December 2004, the applicable test of justification is contained in s.103A of the Employment Relations Act 2000. That test is expressed in the Act as follows:

... the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[35] Generally, justification requires the presence of grounds available in law for dismissal and the procedure used must be a fair and reasonable one, depending on the particular circumstances.

[36] The collective agreement applicable to the employment of Ms Geen makes the following provision, at clause 2.5, for the termination of employment of sick or injured non-sworn members of the New Zealand Police:

Termination of employment of sick or injured employees is permitted subject to accepted terms of general employment law, i.e. if the time has come where the employer may fairly call a halt to the employment relationship and if the termination is procedurally fair. Where employment is terminated in such circumstances the provisions of clause 4.10.07 covering medical retirement shall apply as if the employee was medically retiring.

[37] Clause 4.10.07 of the collective agreement provides a retirement leave entitlement of a minimum 65 working days, regardless of length of service.

[38] Clause 2.5 of the collective agreement states that the termination of employment of sick or injured employees must conform to "accepted terms of general employment law". The provisions of the collective agreement binding on the Commissioner and Ms Geen, expressly require that:

The time must have been reached where the employer may fairly call a halt to the employment relationship,

and that:

Termination is procedurally fair.

[39] The first requirement will be met if the medical problem is of such a nature and/or has lasted for such duration as to cause disruption to the performance of the employment agreement to such a degree that it is not reasonable for the employer in the circumstances to continue to be bound by the agreement. The second requirement is for the decision about medical retirement to be reached and implemented in a way that is fair and reasonable in the particular circumstances.

[40] The relevant circumstances stretch back to the very beginning of Ms Geen's employment, when she started an employment career that led her to serve the Police for 18 years by the time of her dismissal in March 2005. The circumstances also include the nature of Ms Geen's work and of the workplace itself insofar as the employer was legally bound by safety and health requirements. The evidence given to and obtained by the Authority in this investigation has necessarily been extensive in relation to all the circumstances that had a bearing on the employer's decision to dismiss, or that should have had.

[41] After reviewing the evidence and taking into account the equally extensive submissions made on behalf of Ms Geen and the Commissioner, I must conclude that objectively the way the Commissioner acted was not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. I must conclude that the termination of employment was not procedurally fair as it was required to be under clause 2.5 of the employment agreement and s.103A of the Act. Statutory, contractual and judicial principles of procedural fairness were breached in my view. There was also a breach of a particular statutory principle in relation to the duty of good faith that applied to the employment relationship.

[42] I uphold the particular submission of Mr Gardiner, counsel for Ms Geen, that after the recommendation to dismiss was made and before a decision was made by Mr Annan whether or not to approve it, Ms Geen should have been given an opportunity to have input before the decision to terminate was reached.

[43] The Act itself required the Commissioner, as an employer, to allow Ms Geen to participate in the process leading to any decision about the continuation of her employment.

[44] That requirement is found in s.4(1A) of the Act, which defines the duty of good faith imposed on the Commissioner as a party to an employment relationship. The section provides:

The duty of good faith in subsection (1) –

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse affect on the continuation of employment of 1 or more of his or her employees to provide the employees affected –

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) and opportunity to comment on the information to their employer before the decision is made.

[45] The statutory provisions were breached, I find, in the following circumstances.

[46] Ms Walker's report of 21 March 2005 recommending the medical retirement of Ms Geen, contained a concise but accurate account of the history of Ms Geen's medical problems and the treatment she had received for those. The report referred to "the most recent medical advice" which had been provided by Ms Geen's hand surgeon, and the report quoted extensively from the surgeon's written report. Ms Walker underlined some parts of the quoted passages, particularly the surgeon's opinion that Ms Geen's problem was still significant and might take 18 months or more to resolve. Ms Walker also quoted the following part of the report:

As to Irene's likelihood of returning to work as a Police dispatcher, if the above plan is followed she may well be able to return to such work although perhaps not on the long shifts that she used to work.

[47] Ms Walker noted that the medical restrictions on the work Ms Geen could safely undertake were such as to make it impossible to provide meaningful alternative duties for her at the Communications Centre where she worked. Ms Walker concluded the report with the recommendation that the Commissioner invoke the "fairly cry halt" principle contained in the employment agreement and decide upon compulsory medical retirement from the Police for Ms Geen.

[48] In my view, the Commissioner was required by the provisions of s.4(1A) of the Act to provide a copy of Ms Walker's report to Ms Geen, as it contained information relevant to the continuation of her employment. That information was the decision itself that Ms Walker recommended should be made by the Commissioner, and the information was also the reasons Ms Walker gave in support of her recommendation. Those reasons included reference in Ms Walker's report to part of the hand surgeon's medical report.

[49] The Commissioner was not in breach of s.4(1A) of the Act by failing to provide Ms Geen with access to the hand surgeon's report, as she had already been sent a copy by the surgeon herself. Although only part of the report was referred to by Ms Walker, I do not consider that Mr Annan had been presented with a distorted account of the entire medical advice given by the hand surgeon. There were, however, some more favourable aspects of the medical report that were not referred to because of the incomplete reproduction of it in the letter.

[50] It is implicit in s.4(1A) that at the same time access to information is provided and an opportunity to comment on that information is given, the employee will be made aware that the employer is proposing to make a decision that will, or is likely to, have an adverse effect on the employee's continuation of employment. Ms Geen must be taken to have had that awareness, as on 3 March 2005 Ms Emma Bassett of the Police had written to Mr Barry Hart, barrister, who was then acting on behalf of Ms Geen. In her letter, Ms Bassett referred to the hand surgeon's report of 1 February 2005 and advised:

... it is simply not viable to continue to hold Ms Geen's position open for another 18 months given the likelihood that her wrist injury will ultimately prevent her returning to her former full time position. In the circumstances a decision to medically retire Ms Geen could hardly be characterised as premature.

...

In the circumstances, Police confirm the previous intention to proceed with Ms Geen's medical retirement from her position as a Dispatcher with the Northern Communications Centre.

[51] The course of correspondence between Ms Geen's legal advisers, Mr Hart and Mr Gardiner, and Police representatives in February and March 2005, shows that there was an opportunity for Ms Geen to comment on the hand surgeon's report of 1 February 2005. It does not matter that the opportunity may have been taken without invitation, so long as there was an

opportunity. It is important that the opportunity was utilised and with knowledge on the part of Ms Geen or her advisers that a decision about her continued employment was pending.

[52] Although therefore the requirements of s.4(1A) of the Act may have been satisfied in the circumstances in relation to the hand surgeon's report, they were not I find in relation to Ms Walker's report and recommendation dated 21 March 2005.

[53] I consider that it was particularly important in this case that s.4(1A) of the Act was complied with because of the additional circumstance that Ms Geen had twice before been taken by her employer to the brink of a decision to medically retire her. On both occasions the decision was eventually deferred, but it seems to me that if the third occasion was to be the final time then Ms Geen should have been given a last chance to have full input to the decision-making.

[54] It seems from the Police correspondence that there was another piece of information that Ms Geen was not given an opportunity to comment on. This was her GP's medical certificate of 9 March 2005. In a letter written to Mr Hart by Ms Bassett on 19 April 2005, the medical certificate is referred to in the explanation given for the decision to medically retire Ms Geen:

Police considered the medical advice available, including the opinions of Dr Karen Smith and the most recent medical certificate dated 9 March 2005 from Dr C Ferguson concluding that Ms Geen was restricted from using "hand tools" and undertaking "repetitive movements".

[55] Since Ms Geen would already have had a copy of Dr Ferguson's medical certificate of 9 March 2005, the Commissioner was not obliged under s.4(1A) to give her another one. However, one purpose of giving her an opportunity to comment on the medical certificate would have been to clarify Ms Geen's work capacity, as there seems to be some conflict within the certificate between the statement that she was fit for a graduated return to work and the statement that she was unable to resume any duties of work for 90 days. On their face, these statements are difficult to reconcile and some discussion about them would have left the Police in no doubt as to Ms Geen's actual work capacity.

[56] The same applies to the medical advice given by the hand surgeon in writing on 1 February 2005. Ms Geen and her representatives had commented on this advice in correspondence to the Police, although the advice seems unclear in some parts. The evidence of Dr Evan Dryson, occupational medicine specialist who saw and examined Ms Geen on two occasions, was that the hand surgeon's advice was open to more than one interpretation.

[57] Mr Annan, giving evidence on behalf of the Commissioner, accepted that Ms Geen should have been given the right to talk to him in person before he made any decision about the continuation of her employment. He said he had been under the impression that such an opportunity had been given to Ms Geen, as it was standard practice. I find that she was not given that opportunity.

[58] Applying the statutory test of justification, I find that a fair and reasonable employer would not have dismissed Ms Geen without giving her access to information relevant to a decision about the continuation of her employment, or without giving her an opportunity to

comment on that information before the decision was made. I conclude that Ms Geen's dismissal was for that reason unjustified.

[59] A point was argued on behalf of Ms Geen that Mr Annan, in approving the recommendation to dismiss her, had not been fully aware of all the relevant circumstances. I find from the evidence, however, that he was sufficiently informed to be able to make that decision without relying entirely on the contents of a two page report given to him by Ms Walker. I accept Mr Annan's evidence that he had been briefed about Ms Geen's situation by Ms Judy Nicholl and also by Superintendent John Lyall who was the manager of the Northern Communications Centre where Ms Geen was employed. Superintendent Lyall confirmed in his evidence that he had provided Mr Annan with information to support the decision to medically retire Ms Geen.

[60] I do not consider that because the Police is one of the largest employers in New Zealand and a government funded agency, it was bound to carry Ms Geen's vacant position indefinitely or to create a job for her. As is stated in the Police Rehabilitation Policy, "there are limits to the Police ability to keep employees on indefinite absence or alternative duties." The employment agreement expressly allowed the Commissioner to "fairly cry halt" at the point where performance of the contract had become something other than the parties had contemplated when entering into it. However, before the Commissioner was able to reasonably conclude that point had been reached he needed to give Ms Geen information relevant to the decision he had to make, and he also had to give her an opportunity to be heard about the proposal to medically retire her.

Remedies

[61] I have found in this determination that Ms Geen does not have a disadvantage personal grievance in relation to either the accident of 31 March 2003 or the Trainer vacancy that she was not offered later that year. No remedies are therefore required to be given for those grievances. Ms Geen is, however, entitled to remedies for her dismissal grievance.

[62] In fixing remedies, the Authority must take into account contingencies which would have affected Ms Geen's likely future employment had she not been unjustifiably dismissed. As was observed by the Court of Appeal in *Telecom New Zealand Ltd v Nutter* unreported, CA127/03, 21 July 2004, at para.[81]:

The assessment [of compensation] must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed, the employee would have been dismissed.

[63] I consider that if the Commissioner had complied with s.4(1A) in reaching the decision to dismiss, there was a reasonable likelihood that Ms Geen would still have been medically retired, if not on 22 March 2005 then within a few months of that date. It was open to the Commissioner to consider all the medical information and reach a conclusion about the likelihood of full recovery and the time that was likely to take. If Ms Geen and her representatives had been given an opportunity to read Ms Walker's report of 21 March and to

comment on it before the decision to dismiss was made, the best they might have hoped for would be an extension of the employment for two or three months while further progress with recovery was monitored. It does seem to me that all the medical advice was leaning towards an eventual medical retirement of Ms Geen from the position of Dispatcher. I am satisfied that no other reasonable alternative positions acceptable to Ms Geen had been able to be identified and offered to her, so there is no loss in that regard.

[64] As reimbursement for lost remuneration I fix the relevant period to be three months, as provided by s.128(2) of the Act. That period runs from 22 March 2005. The Commissioner is ordered to pay to Ms Geen a sum equivalent to the monetary entitlements she would have received had she remained an employee of the Police in that three month period. The end of the period will overlap the beginning of her employment in her new job, so there must be a setting-off of earnings from that job which was started Ms Geen at the very beginning of June 2005. I will leave it to the parties to agree on the exact sum owed, but application can be made to the Authority for further directions if there is any difficulty in doing that.

[65] In fixing compensation under s.123(1)(c)(i), I take it into account that Ms Geen had been conditioned by a prolonged inability to recover fully her health and by severe setbacks experienced in her recovery. I find no evidence that the cause of her initial condition as diagnosed at the beginning of 2003, was any failure by the Commissioner to provide a safe and healthy workplace at the Communications Centre. It does not follow that because Ms Geen developed a medical condition related to her work, there was a breach of any law or a failure by the employer to act reasonably in providing a safe and healthy workplace. Clearly there was room to improve the working conditions, as there usually is in any workplace, but that does not mean that they were unsafe to begin with.

[66] I do not regard the Final Report from the Independent External Review into the Police Communications Centres as providing any proof that the working conditions experienced by Ms Geen were unsafe or were maintained by the employer in breach of health and safety in employment legislation. The report is not the findings of OSH or a similar enforcement agency as to the health and safety of Dispatchers employed in the Centres. It is a series of recommendations for improvements which no doubt any 'good employer' will continually seek to make, even when already compliant with the legal standards. I do not consider that the report provides proof that the conditions were unreasonable to such an extent that would found a personal grievance claim. Obviously other employees have worked there under the same conditions without experiencing the problems Ms Geen unfortunately suffered.

[67] Compensation must therefore be awarded on the basis of the effect on Ms Geen of not being provided with that final opportunity to have a say about the recommended decision to terminate her employment and also the reasoning put forward and the medical evidence relied upon. On this limited basis, I assess compensation at \$4,000 and order the Commissioner to pay that sum to Ms Geen in addition to the reimbursement of lost monetary entitlements.

[68] I make no award of compensation for loss of any expected benefits from the employment, as there is no evidence of such loss for the period of three months after 22 March 2005.

Claim for annual leave

[69] The final matter is the claim to restore a number of days to Ms Geen's balance of annual leave due at termination. On 6 March 2003, she was given approval to take annual leave for the period of three weeks between 6 and 27 July 2003. Her stated intention was to go on holiday to Australia during that time. In submitting her time sheets she claimed the period as ACC work-related sick leave.

[70] I do not consider there is any evidence that would justify the reversal of the decision by the Police to treat the period 6 to 27 July 2003 as annual leave and not as sick leave. There was some doubt as between CRM and Ms Nicholl in her letter to the Police Association dated 12 September 2003, whether Ms Geen's absence in Australia had caused a disruption to the supply of specialist and rehabilitation treatment. Ms Nicholl also stated that the Police were not able to progress with identifying suitable alternative duties for Ms Geen while she was away, and I accept that would have been the case.

[71] This was not a situation where an employee about to take or already on annual leave has fallen ill or has been injured. Usually the employer in that situation will convert the time from annual leave to sick leave, because the purpose of having annual leave will not be achieved if the illness or injury is significant enough. In this case Ms Geen was well enough to travel for the purposes of a holiday and no doubt gain some relief from the regime of medical consultations. She applied for the time off as annual leave and I consider that type of leave was appropriate for her purpose. No order is made therefore under this head of claim.

Costs

[72] Costs are reserved. Counsel are to discuss the question with a view to reaching agreement. If that is not possible memoranda may be filed, providing the Authority with the usual relevant information and requesting an order for costs.

A Dumbleton
Member of Employment Relations Authority