

his father, Roger Gouk, and Dasha van Silfhout, a union organiser for the Rail and Maritime Transport Union (RMTU). For C3 written witness statements in affidavit format were lodged by Laura McLennan, formerly employed by C3 as Human Resources Services Manager, and Ratahi Ellis, an Operations Coordinator and President of the RMTU's Bay of Plenty Branch. Written witness statements in reply in affidavit format were lodged by Mr Gouk and Benjamin Thompson, former counsel for Mr Gouk in relation to this matter.¹

[4] Written submissions were provided for Mr Gouk and C3, followed by written submissions in reply for Mr Gouk.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination are:

- (a) When and how was Mr Gouk dismissed by C3?
- (b) Did Mr Gouk raise his personal grievance within the timeframe required under s 114 of the Act?

[7] I advised the parties should I find Mr Gouk raised his personal grievance within the timeframes required under s 114 of the Act and the parties are unable to resolve this matter between themselves, then a follow-up case management conference will be scheduled to timetable the investigation of Mr Gouk's substantive claim he was unjustifiably dismissed by C3, in relation to the ending of his employment for reason of medical incapacity, and claimed remedies. Should I find however Mr Gouk did not raise his personal grievance within the timeframes required under s 114 of the Act then he would have no claims to proceed against C3, which would be the end of the matter.

¹ Notice of change of solicitor for Mr Gouk was lodged and served on 5 December 2024.

When and how was Mr Gouk dismissed by C3?

Did Mr Gouk raise his personal grievance within the timeframe required under s 114 of the Act?

[8] This preliminary determination turns on what was communicated to Mr Gouk on behalf of C3 at a meeting on 9 May 2023, whether C3 terminated his employment on 12 May 2023 and whether Mr Gouk was aware of this in May 2023 or he first became aware his employment had been terminated at some time in early June 2023. Ms van Silfhout raised a personal grievance on Mr Gouk's behalf with Mr McClean on 20 or 21 August 2023², which means Mr Gouk needed to have been aware of his employment ending by 22 or 23 May 2023 for his personal grievance to have been raised within the 90-day timeframe specified in s 114 of the Act.

[9] The reason for the 9 May 2023 meeting was not disputed, being to discuss Mr Gouk's fitness to attend work to the capacity and at the capability C3 required. A letter dated 3 May 2023 from C3's Mount Maunganui Manager, Hamish McClean, arranged this meeting and alerted Mr Gouk to C3's desire to "open a discussion about the prospect of you achieving a full or partial return to work within a reasonable timeframe (or indeed at all)". The letter went on to say "a potential outcome of this meeting might be that your employment is terminated, with notice, on the grounds of medical incapacity or with agreement medical retirement".

[10] The meeting was attended by Mr Gouk, his father Roger Gouk, Mr Ellis, Mr McClean and Ms McLennan, with Mr Ellis taking notes. Starkly different views were presented about what C3 communicated at this meeting. C3 said it communicated a preliminary decision to terminate Mr Gouk's employment at the meeting, with this decision to be confirmed if he did not provide medical evidence by 12 May 2023, with its witnesses providing affidavits supporting this view.

[11] Mr Gouk and Roger Gouk both said while there was discussion of seeking an early appointment for Mr Gouk with his doctor, two weeks was agreed for him to seek further medical advice and there was then to be another meeting to discuss the medical advice.

² Ms van Silfhout says the notification was sent on 20 August 2023, although it was dated 21 August 2023. For reasons which will become apparent nothing turns on which of these dates the personal grievance was raised.

[12] C3 say following the meeting Mr Gouk's employment was terminated on 12 May 2023 on medical incapacity grounds. A letter Mr McClean sent on 9 May 2023, after the meeting, included statements about a "preliminary decision ... that you remain incapable of carrying out your contracted duties" and that Mr McClean had "reached the preliminary decision to terminate your employment by way of medical incapacity".

The letter also said:

Before reaching any final decision, we would like to again give you a further opportunity to provide any information you wish for our consideration. I invite you to present this information by 4pm on Friday 12 May 2023.

I have not made any decision on the final outcome of this matter, nor will I do so until the timeframe to put forward further medical information has expired, and I have considered any additional information provided. If I receive no further information, I will confirm my preliminary decision and your employment will be terminated effective Friday 12 May 2023.

[13] C3 acknowledge Mr Gouk did not receive Mr McClean's letter of 9 May 2023 as it was sent to his work email address rather than his personal email address.

[14] C3 also acknowledged Ms van Silfhout discussed Mr Gouk's employment situation with Ms McLennan on 12 June 2023, when Ms McLennan said she advised Mr Gouk had been dismissed in accordance with the preliminary decision. Ms McLennan provided a timeframe and associated documentation to Ms van Silfhout on 13 June 2023.

Relevant law

[15] The Court said in *Drayton v Foodstuffs (South Island) Ltd* "the words "came to the notice" import the requirement that the employee has actual knowledge of the action which allegedly gave rise to the grievance".³ The Court in *Wyatt v Simpson Grierson (a partnership)*, a case referred to in submissions for both Mr Gouk and C3, said:⁴

It follows that an employee need not have every piece of evidence necessary to prove his or her case in an adversarial tribunal in order to submit a personal grievance to his or her employer. If the employee has the knowledge necessary to form a reasonable belief that the employer has acted in an unjustifiable manner, that will suffice.

... the 90-day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

³ *Drayton v Foodstuffs (South Island) Ltd* [1995] 2 ERNZ 523 at 530.

⁴ *Wyatt v Simpson Grierson (a partnership)* [2007] ERNZ 489 at [28] and [29].

[16] Submissions for C3 also acknowledged an employee may become aware of the unjustifiable reasons for their dismissal at a later date, with the consequences the 90-day timeframe would run from the later date.⁵

[17] Commentary on the requirements for an employee to have notice of a grievance includes the following observations:⁶

In view of the wording used in [s 114 of the Act], it will usually be a sensible precaution for an employer to communicate any decision to terminate employment or to impose disciplinary sanctions to the employee in person. If the decision is communicated by letter or other indirect means, the employer may run the risk that it does not come to the employee's notice until significantly later.

Analysis

[18] I find Mr Gouk more likely than not became aware of his employment having ended on 4 June 2023, when Roger Gouk raised a question with him about his no longer being on C3's roster. As a consequence, his grievance raised on 20 or 21 August 2023 was raised within the 90-day timeframe specified in s 114 of the Act.

[19] I am not convinced C3 unequivocally communicated a preliminary decision to terminate Mr Gouk's employment at the meeting on 9 May 2023, with this decision to be confirmed if he did not provide medical evidence by 12 May 2023. While C3 and its witnesses may have considered an intention to dismiss was communicated, this is not consistent with the letter Mr McClean sent on 9 May 2023, which at best indicated a potential for future dismissal and I consider, at a minimum, required Mr McClean to communicate he had confirmed his preliminary decision. No evidence has been presented Mr McClean did this, meaning I do not consider Mr Gouk was aware of the purported dismissal on 12 May 2023 and it is not clear there was an actual decision to dismiss on this date. I consider Mr Gouk's actions after this date, including in seeking further medical advice, is more likely than not consistent with him not being aware his employment had purportedly ended.

[20] I have also taken into account the termination clause for a permanent employee under the collective agreement between C3 and the RMTU, which applied to Mr Gouk's employment and provides:

47.1 Permanents

Employment shall be on a weekly basis and one week's notice of dismissal or resignation shall be given by the Employer or employee. Where the

⁵ Referring to the Court's judgment in *Robertson v IHC New Zealand Inc* [1999] 1 ERNZ 367.

⁶ *Employment Law* (online ed, Thomson Reuters) at ER114.04.

employment is terminated without the required notice, one week's wages shall be paid or forfeited as the case may be. This however shall not prevent the summary dismissal of an employee for serious misconduct.

[21] I consider this clause requires notice of actual dismissal, which did not occur in this case.

[22] I have also taken into account the duty of good faith under s 4 of the Act, which the Court said in *Chief of New Zealand Defence Force v Darnley* in relation to requirements to be active and constructive, and responsive and communicative, extended to the duty of an employee to give notice of resignation.⁷ I consider, by analogy, a fair and reasonable employer would give notice of dismissal.

[23] In this case C3 says it provided an oral preliminary view Mr Gouk's employment would be terminated on 12 May 2023 on medical incapacity grounds if no further information was provided. A preliminary view is not the same as a final decision and there was no evidence presented C3 reached or communicated a final decision to Mr Gouk prior to Ms McLennan advising Ms van Silfhout on 12 June 2023 that Mr Gouk had been dismissed in accordance with the preliminary decision.

[24] I am also not satisfied with C3's claims that references in Mr Ellis' notes from the meeting of 9 May 2023 to "two weeks" referred to the notice period for dismissal for medical incapacity. The notice period in the collective agreement was one week and no evidence was provided of a different notice period applying for dismissal for medical incapacity.

[25] These factors reinforce my view Mr Gouk was unaware until early June 2023 of his purported dismissal on 12 May 2023 or the circumstances sufficient to have the knowledge necessary to form a reasonable belief that C3 had ended his employment in May 2023.

Summary of outcome

[26] I find Mr Gouk raised his personal grievance of unjustified dismissal within the 90-day timeframe specified in s 114 of the Act.

⁷ *Chief of New Zealand Defence Force v Darnley* [2022] NZEmpC 4 at [118].

Next steps

[27] An Authority Officer will contact counsel to arrange a case management conference to discuss next steps in relation to the investigation of Mr Gouk's substantive personal grievance. If the parties agree to voluntarily attend further mediation considering this determination, then the case management conference will be scheduled following attendance at mediation.

Costs

[28] Costs are reserved.

Shane Kinley
Member of the Employment Relations Authority