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Handy v New Zealand Fire Service Commission (Wellington) [2017] NZERA 2063; [2017] NZERA Wellington 63 (24 July 2017)

Last Updated: 14 August 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 63
5455243

BETWEEN JARVIS HANDY Applicant

AND NEW ZEALAND FIRE SERVICE COMMISSION

Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person

Geoff Davenport, Counsel for Respondent

Investigation Meeting: 11 December 2015 and 12 and 13 July 2016

Submissions Received: 1 August 2016 from the Applicant

15 August 2016 from the Respondent

Date of Determination: 24 July 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jarvis Handy was employed by the New Zealand Fire Service Commission (NZFSC) as its False Alarm Administrator from 20 July 2012 until his dismissal for serious misconduct on 1 November 2013. Mr Handy brings a claim for unjustifiable dismissal and a claim that he was disadvantaged by an unjustifiable action by his employer, relating to a restructuring/redundancy affecting his position that was carried out by his employer in August 2013.

[2] In a preliminary decision, the Authority found other claims Mr Handy had made, relating to racial harassment and workplace bullying, had not been raised as

personal grievances within 90 days of alleged events and actions occurring.¹ The Member dealing with the matter at the time found no case had been made out for exceptional circumstances. He determined those matters could only be background, and only where relevant to the primary matters which were the two personal grievances that had been raised in respect of Mr Handy's dismissal and redundancy.²

[3] Mr Handy also claims wage arrears in respect of three days recorded by his employer as annual leave which he claims should have been recorded as sick leave. He seeks remedies including compensation for lost wages and for hurt and humiliation. He asks that penalties be imposed against NZFSC.

[4] NZFSC says Mr Handy was dismissed for serious misconduct comprising various specified breaches of its Standards of Conduct and its decision was substantively and procedurally justified.

[5] In relation to Mr Handy's claim to have been disadvantaged by NZFSC's restructure, the respondent says it carried out a restructuring of Mr Handy's role and one other role in a fair process in which Mr Handy's views were sought and considered before any decisions were made. NZFSC says the restructuring did not affect Mr Handy's employment to his disadvantage because his employment was terminated justifiably for serious misconduct and came to an end for that reason, irrespective of the restructuring process.

[6] In relation to the contended three days annual leave, NZFSC says the days in question were applied for as annual leave; approved as annual leave; and the email notification sent to Mr Handy at the time, which he did not then dispute, expressly confirmed that the leave he had requested, and which had been approved, was annual leave.

Relevant background

[7] Mr Handy had been employed in the False Alarm Administrator role at the National Headquarters of NZFSC for just over 12 months at the time the incident which resulted in his dismissal occurred. He was one of eight employees in Revenue and Assurance Team led by Darren Stafford, NZFSC's Revenue and Assurance

Manager.

¹ [2014] NZERA Wellington 130

² n1 at [21] and Member's Minute of 2 February 2015

[8] In mid-July 2013 Mr Stafford notified a proposal to restructure two roles within the team: Mr Handy's role and that of the Treasury Accountant. The proposal entailed disestablishing both roles and creating a new position of Treasury and Fire Alarm Administrator. Feedback on the proposal was sought.

[9] The consultation process was still underway when two workplace incidents occurred on 2 August 2013 involving Mr Handy and a co-worker in the Revenue and Assurance Team. I shall refer to that co-worker as Ms CW. These incidents led to an allegation that Mr Handy had made unwanted and unwarranted physical contact with Ms CW on two occasions that day. Ms CW alleged the contact was deliberate on both occasions.

[10] Mr Handy left the workplace early that day and subsequently agreed to remain on special paid leave while NZFSC investigated the incidents.

[11] The employer subsequently concluded the first of those incidents was likely to have resulted from careless conduct to which both Mr Handy and Ms CW may have contributed.

[12] At the conclusion of NZFSC's investigation Mr Handy was summarily dismissed for serious misconduct in relation to the second of the workplace incidents of 2 August.

The Authority's investigation

[13] The hearing of this matter was prolonged by the retirement of the Member originally dealing with it; the matter not being completed in the one day originally set aside for it; and scheduling difficulties with the second, successful, attempt to complete the hearing of the matter in 2016.

[14] Evidence was given by Mr Handy in person and his former manager at NZFSC, Mr Stafford, appearing under his summons. Brett Warwick, the Chief Financial Officer for NZFSC, and Raewyn Sinclair, who was at the time a Senior HR Advisor in the organisation, gave evidence for the respondent.

[15] A timetable for receiving submissions from the parties was set on completion of the evidence on 13 July 2016. Unfortunately, while Mr Handy filed his initial submissions, to which the respondent replied, he experienced a number of issues,

primarily health-related, but also technological, which caused delays in the filing of his final reply submissions.

[16] As he was self-represented and eager to have the opportunity to make those submissions, a number of extensions were provided to him to accommodate that. It later became clear that further submissions were unlikely to be received, due to the difficulties Mr Handy was experiencing, although on 29 November 2016 he was still expressing the hope of being able to supply his submissions in reply. The delay in completing this determination has been partly due to my hope that this would happen but mainly from other pressing workload matters.

Issues

[17] The issues for determination are:

a. Whether the termination of Mr Handy's employment was unjustifiable;

and, if so,

- i. What remedies should be awarded.
- b. Whether the NZFSC restructuring of Mr Handy's and one other role was an unjustifiable action by his employer; and, if so,
 - i. Whether he was disadvantaged by that action; and, if he was,
 - ii. What remedies should be awarded.
- c. Whether Mr Handy is entitled to any wage arrears.
- d. Whether he has any other entitlements due to him by NZFSC.
- e. Whether a penalty or penalties should be imposed on NZFSC.

Was Mr Handy's dismissal justifiable?

[18] Whether a dismissal or other action by an employer is justifiable is to be determined on an objective basis. The test, which is specified in the [Employment Relations Act 2000](#) (the Act), is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the

circumstances at the time the dismissal or action occurred.³

³ [Section 103A](#).

[19] The Act sets out a number of procedural steps to be considered by the

Authority in applying this test and requires me to consider:

- (a) Whether, having regard to the resources available to it, NZFSC sufficiently investigated the allegations against Mr Handy before dismissing him; and
- (b) Whether NZFSC raised its concerns with Mr Handy before dismissing him; and
- (c) Whether NZFSC gave Mr Handy a reasonable opportunity to respond to its concerns before dismissing him; and
- (d) Whether NZFSC genuinely considered Mr Handy's explanations in relation to the allegations against him before dismissing him.

[20] In addition to the factors listed above, I may consider any other factors I think appropriate. However, I must not determine Mr Handy's dismissal to be unjustifiable solely because of defects in the process followed by NZFSC if the defects were –

- a. minor; and
- b. did not result in Mr Handy being treated unfairly.⁴

[21] It is not my role to substitute my decision for NZFSC's decision but to "assess objectively whether what the employer did, and how the employer did it, were what a fair and reasonable employer in those circumstances could have done".⁵ Clearly this will involve an assessment of the process followed by NZFSC in arriving at its decision that the summary termination of Mr Handy's employment was appropriate.

[22] I have briefly referred above to the events of 2 August 2013 in which Ms CW alleged two incidents of deliberate physical contact with her by Mr Handy. Within an hour of the second of the two incidents, Mr Stafford texted Mr Handy to advise he needed to meet with him shortly to discuss an incident that had been reported to him that was potentially serious. Mr Handy responded that he had safety concerns and needed to speak with his support person and other persons but was happy to speak by

phone with Mr Stafford.

⁴ Section 103A (5).

⁵ Angus & McKean v Ports of Auckland [2011] NZEmpC 160 at [25]

[23] Mr Stafford emailed a letter to Mr Handy later that afternoon setting out an allegation of serious misconduct that had been made against him relating to the two incidents concerning Ms CW. He noted a witness had provided information supporting the allegation about the second incident and that there would be further investigation carried out. I will refer to the witness as Mr W. Mr Stafford noted the potential for the conduct, if proven, to constitute serious misconduct under the organisation's Standards of Conduct which potentially could lead to termination of his employment.

[24] As the allegation was serious, Mr Stafford proposed that Mr Handy remain off work on pay until the material, including further details of the allegations and witness statements, could be put to him in person. He asked Mr Handy to indicate whether he agreed with that proposal. If he did not agree, Mr Stafford informed Mr Handy that NZFSC would need to seriously consider suspension during the investigation. In that event, Mr Handy would have the opportunity to comment before the employer made a final decision on suspension.

[25] Mr Stafford strongly recommended that Mr Handy be represented when the meeting took place. Mr Handy's union, the New Zealand Public Service Association Inc. (PSA), responded to Mr Stafford's letter. Mr Handy agreed to the paid leave which he remained on from that time until his dismissal on 1 November 2013.

[26] The allegations of Ms CW were that, in the first incident, Mr Handy had barged into her right shoulder as she was walking in the workplace while reading a report she was carrying. She had looked up and said "Excuse me" to Mr Handy who had continued walking without responding.

[27] The second incident had occurred in a different location in the workplace some 40 minutes later when Ms CW said she was talking with another employee, Mr W, by the entrance way to the printing room. She alleged Mr Handy had deliberately dropped his left shoulder and barged into her left eye/cheek. She reported the impact was so significant that she fell into some boxes. She also complained it had caused some minor swelling and physical discomfort to her left cheek. Mr W had helped her up and assisted her.

[28] On 7 August 2013, Mr Warwick wrote to Mr Handy's PSA representative noting that, due to the serious nature of the issues, he would be conducting the

investigation with the support of Senior HR Advisor, Ms Sinclair. Mr Warwick listed as potential issues of serious concern under the NZFSC's Standards of Conduct (the Standards):

- a. Whether Mr Handy had breached the principle to *act with respect for the safety, health and rights of a colleague*, contained on page 1 of those Standards;
- b. Whether he had breached the principle to *maintain proper standards of integrity and conduct*, contained on page 1 of the Standards;
- c. Whether he had discharged his responsibility of maintaining a healthy and safe working environment, contained on page 4 of the Standards;
- d. Whether he had refrained from conduct or behaviour which might impair work performance or damage the reputation of the Fire Service, contained on page 4 of the Standards;
- e. Whether he had behaved reasonably, as per page 4 of the Standards;
- f. Whether he had exercised reasonable care, as per page 4 of the Standards;
- g. Whether he had taken all practicable steps to ensure that no action, or inaction of his, while at work, causes harm to any other person or may expose any person to the risk of harm, as per page 4 of the Standards;
- h. Whether he had respected the rights of his colleague, and specifically whether he had avoided behaviour which might endanger or cause stress or anxiety to the other staff member, as per page 6 of the Standards.

[29] Mr Warwick reiterated in his letter that, once confirmed notes of interviews with those involved had been compiled, that information would be provided to Mr Handy for his response. At that point Mr Handy would be requested to attend an employment disciplinary investigation meeting, to which he was recommended to bring his PSA representative in view of the potential seriousness of the situation. Mr Warwick stated he had yet to reach any conclusions on these issues.

[30] He recorded that, if Mr Handy's conduct or any aspect of his conduct was found to constitute serious misconduct, one of the options he would be considering was termination of his employment. Mr Warwick urged Mr Handy to treat the matter on a strictly confidential basis, and to ensure his support (PSA) person did the same.

[31] Jeff Osborne of the PSA responded to Mr Warwick the same day, confirming Mr Handy's agreement to remain on special leave on pay pending the conclusion of the investigation and his willingness to abide by his employer's confidentiality requirement. He requested full and complete disclosure of any and all information held by the NZFSC, which might pertain to the investigation.

[32] Mr Osborne also advised that Mr Handy was facing a charge of common assault arising from the allegations which, he understood, were the same allegations NZFSC was investigating. He advised Mr Handy intended to defend the charge, noted a

court hearing was scheduled for 20 August (2013) and proposed the employer defer its employment investigation until after the criminal hearing. The reasons he gave were the risk the employment investigation might prejudice the criminal hearing, and the common practice of employers to defer such investigations to provide room for police investigations and court hearings to proceed.

[33] NZFSC declined the deferral request, partly on the grounds it was not investigating the same matters as those before the District Court. It would be neither investigating nor determining whether there had been any criminal assault, which was an issue of criminal law to be determined on a standard of beyond reasonable doubt by that court.

[34] Another reason for declining to defer the investigation was its belief that giving Mr Handy an opportunity to respond to the employment issues and provide any innocent explanation he may have for what occurred could not be prejudicial to him in terms of his court process. Finally, NZFSC noted the conclusion of the criminal proceedings might be several months away and that to leave the employment issues outstanding, with the uncertainty that would result, could impact on both Mr Handy's and Ms CW's health and safety.

[35] Mr Warwick and Ms Sinclair interviewed Ms CW, Mr W and other relevant persons who had been present, or in the vicinity, when one or both of the incidents had occurred. Mr Warwick wrote to Mr Handy, enclosing notes of interviews with those employees, on 27 August 2013. He requested a meeting with himself and Ms Sinclair at which Mr Handy would have the opportunity to respond to the allegations and statements.

[36] Mr Handy preferred to respond in writing rather than in a meeting. He did so by letter, with attached photographs, on 19 September 2013. He rejected Ms CW's account of what had occurred. In his version of both incidents Ms CW had

deliberately veered into him. He referred to previous incidents which he said evidenced her *unstable and erratic* behaviour towards him.

[37] With regard to the second incident Mr Handy said Ms CW had started walking towards him as he entered the printing room and had veered towards him. That was the cause of the contact between them. He said:

"As I looked back from the supply cabinet (Ms CW) shouted,

'He just assaulted me!' She then looked at me and said 'You just assaulted me'. I replied, 'I don't know about that, but are you OK?' (Ms CW) said 'You did just assault me.' I replied, 'If you say so'".

[38] Mr Handy's response referred also to the incidents having occurred after *a year of daily abuse and antagonism from several coworkers, including (Ms CW)*. His letter, which also disputed the account of Mr W regarding the printer room incident, concluded with a denial of both Ms CW's allegations that he had assaulted her.

[39] Following receipt of Mr Handy's response, Mr Warwick and Ms Sinclair re-interviewed Ms CW and Mr W. Notes of those interviews were provided to Mr Handy with a copy of information from Ms CW's doctor from whom she had sought assistance after the incidents on 2 August. Mr Handy was asked to provide his comments or responses to the additional information. He did so by letter dated 16

October 2013.

[40] Mr Warwick and Ms Sinclair completed a draft Investigation Report which they signed and dated 23 October 2013. The report canvassed the evidence gathered from those they had interviewed and from Mr Handy and made findings in regard to each of the incidents of 2 August.

[41] The investigators noted they had been aware of the need to consider information carefully before reaching views in light of evidence of a *less than positive working relationship* between Ms CW and Mr Handy. They considered the evidence of Mr W to be relevant in reaching conclusions on that matter, particularly noting his calm demeanour when interviewed and the lack of embellishment or exaggeration in his recounting of what he had observed.

[42] With regard to the first incident, which preceded the second by some 40 minutes, the investigators concluded it was likely to have resulted from careless conduct to which both Mr Handy and Ms CW may have contributed.

[43] With regard to the second incident, the investigators concluded Mr Handy had made deliberate contact with Ms CW's cheek and shoulder. They also found his responses regarding his conduct had not been honest in several respects. They concluded Mr Handy had breached the Standards of Conduct, specifically those specified at i, iii, v, vi, vii and viii referred to in paragraph 28 above. Mr Warwick and Ms Sinclair found Mr Handy's lack of acceptance and acknowledgement of the deliberate nature of his action reinforced the seriousness of his conduct.

[44] The report concluded by recording the investigators' serious concerns about the level of trust and confidence NZFSC could have in Mr Handy, given the findings they had made, his lack of acknowledgement of his actions and their impact and his lack of remorse for his conduct.

[45] Mr Warwick and Ms Sinclair stated that the Fire Service was considering terminating Mr Handy's employment on the basis of serious misconduct. They noted Mr Warwick was to make the final decision on the outcome but, before he did so, Mr Handy had the opportunity to make any submissions he wished on the draft investigation report and on the proposed outcome.

[46] Mr Handy responded in writing by letter dated 29 October 2013. At his request, he and Mr Osborne also met Mr Warwick and Ms Sinclair on 30 October

2013 to provide responses and submissions in person.

[47] On 1 November 2013 Mr Warwick wrote to Mr Handy informing him he and Ms Sinclair had considered his written responses and his and Mr Osborne's oral responses and submissions. He advised their confirmation of the conclusions reached and recorded in the draft investigation report. Mr Warwick and Ms Sinclair had concluded that the trust and confidence in the employment relationship with Mr Handy had been irreparably harmed and, as a consequence, Mr Handy's employment was to be summarily terminated, effective that day.

[48] In his submissions to the Authority Mr Handy has raised issues over the investigation findings relating to the relative positions of Ms CW, Mr W and himself at the time the contact between himself and Ms CW occurred in the second incident of

2 August 2013. The investigators had concluded Mr Handy's assertions about their respective positions, and about Ms CW veering towards him and therefore causing the

contact, were not honest. They had detailed their reasons for reaching that conclusion in the investigation report.

[49] Mr Handy's submissions refer in particular to evidence given by Mr W to the NZFSC investigators. He claims there was a *glaring inconsistency* between that evidence and the evidence Mr W gave to the District Court in the course of Mr Handy's trial for assault over the same incident. A transcript of that trial which had taken place on 8 June 2015 was provided to the Authority.

[50] I note the trial took place approximately 20 months after NZFSC had conducted its investigation and is not relevant to my assessment of whether the employer adequately investigated the matter and reached a conclusion open to it in all the circumstances at the time, i.e. following the event on 2 August 2013.

[51] Mr Handy's submissions also refer to the response he had made to NZFSC's draft investigation report of 23 October 2013, in which he had commented on the issue of swelling to Ms CW's face that had purportedly resulted from the second incident. Mr Handy, in his 29 October 2013 response, had referred to Ms CW having a *usually prominent cheek* which he considered could explain her doctor's report of swelling to that cheek.

[52] He also commented in the 29 October 2013 response that the short timeline for responding to NZFSC made it unlikely he would be able to *obtain a timely statement from a doctor which supports that swelling is most accurately observed by ultrasound, and that bruising generally follows swelling*. (spelling corrected). He stated that, with adequate time, he would be *eager to provide NZFS with this information to refute the conclusions regarding swelling and bruising*.

[53] In the Authority's investigation Mr Handy raised, in questions intended for Mr Warwick's response, the issue of further medical evidence being required in relation to the swelling on Ms CW's cheek. Mr Warwick's response was, in part, that he was unaware Mr Handy was seeking further time to obtain medical advice. He also noted Ms CW's assertion of swelling was supported by the doctor she consulted on the day of the incident. Her evidence of the injury to her cheek had also been supported by another NZFSC employee who had not witnessed the incident but had looked up, on hearing Ms CW's loud expression of pain, and had seen her holding her head. The

interviewer who took a statement from the employee noted that he had put his hand over the side of his face when relaying that information.

[54] I note that, although Mr Handy raised the issue of further medical information in his 29 October 2013 response to the investigation report, he did not request further time to obtain that information. The final comment in his emailed response was that he *awaited acknowledgement of receipt of the reply and a carefully considered conclusion to this investigation*. That seems at odds with the inference Mr Handy's submissions implicitly invite me to make that he had been given insufficient time to obtain information important to NZFSC's decision making.

[55] In any event I do consider that the issue of swelling to Ms CW's cheek was a determining factor in Mr Warwick's decision making. I accept his evidence that the physical injury sustained by Ms CW was only one factor among others, including the evidence of Ms CW, the doctor she consulted later the same day, Mr W and the witness who looked up on hearing Ms CW's exclamation of pain.

[56] Both Mr Warwick and Ms Sinclair attended the Authority's investigation and gave evidence. I am satisfied from their evidence, and from the documentation provided by both NZFSC and Mr Handy, that the employer followed a fair and

reasonable process that was also open-minded and respectful.

[57] Mr Handy was put on notice at an early stage of his employer's view of the seriousness of the allegations and of the potentially serious consequences if they were upheld. The time frames for his responses were reasonable and there is no evidence that extensions had been sought by Mr Handy and rejected by his employer.

[58] The investigation took place over several weeks. I find NZFSC's focus was on conducting a fair and comprehensive investigation rather than rushing to hasty conclusions in the matter. Having the Chief Financial Officer undertake the investigation with the assistance of a senior HR advisor, rather than the immediate manager undertaking it, afforded a measure of distance and independence to the process.

[59] Mr Handy was urged to have representation and his wish to provide responses in writing in the first instance, rather than in a meeting, was respected. After he had provided his written response on 19 September 2013, Mr Warwick and Ms Sinclair

conducted further interviews and provided detailed and comprehensive reasons for the conclusions they had reached in the draft investigation report of 23 October 2013.

[60] Mr Handy had the opportunity to respond to their further deliberations and to comment on the proposed outcome of their investigation. He did so both orally, with his representative, in a meeting, and in writing. I am satisfied Mr Warwick and Ms Sinclair fulfilled their obligations as investigators and, on Mr Warwick's part, decision maker, carefully and fairly and that they gave proper and genuine consideration to all responses made, and issues raised, by Mr Handy throughout the process.

[61] This included consideration of Mr Handy's allegations to have been subjected to *daily abuse and antagonism* by some members of the Revenue Assurance team, including Ms CW. Mr W was not a member of that team and there was no credible evidence before the investigators to suggest he had any reason to be other than truthful in his statement and responses to them.

[62] Ultimately, Mr Warwick preferred the evidence of Ms CW and Mr W over that of Mr Handy in relation to the second incident on 2 August. Having reviewed the evidence that was before him, and the detailed reasoning provided for that preference, I accept Mr Warwick's evidence that there were valid grounds for doing so.

[63] I also accept Mr Warwick carefully considered Mr Handy's view that Ms CW and Mr W had given inaccurate and dishonest accounts of the incident before deciding that it was Mr Handy's account that was not credible.

[64] I find NZFSC's decision to dismiss Mr Handy was made after a thorough and fair investigation had been conducted, and it was a decision NZFSC could reach in all the circumstances. In coming to that conclusion I have considered the imperfect working relationship between Ms CW and Mr Handy and am satisfied Mr Warwick and Ms Sinclair paid proper attention to that factor in their investigation and in reaching their findings.

Was the restructuring of Mr Handy's and one other role an unjustified action?

[65] Mr Handy claims the restructuring was disingenuous in that the reasons given for it were not genuine. He says he was not offered redeployment despite a comparable role being available. He was disadvantaged by the short time frame for consultation and by being given insufficient information. In particular no specific

detail had been provided about the savings to be achieved by combining the two roles into one. There had been no financial reports or forecasts provided to support the proposal.

[66] In oral evidence Mr Handy added that he had recently returned from an extended period of sick leave and his ability to consider and research the matter was affected by the medication he had been taking. When asked if he had requested an extension to the specified period for responding to the restructuring proposal, Mr Handy confirmed he had requested, and been granted, a *minimal* extension.

[67] He further confirmed that his PSA representative had requested a one-day extension and that a one-day extension was agreed to by Mr Stafford. I note there is no evidence Mr Handy asked for further extensions or that he sought financial information regarding the proposal.

[68] NZFSC submits Mr Handy's claim regarding the restructuring process is misplaced as he was not dismissed for redundancy but for serious misconduct. In its view the restructuring proposal was based on genuine reasons. These arose from Mr Stafford's observations about the workloads relating to the two positions proposed for disestablishment during a lengthy period of absence by Mr Handy.

[69] I accept the basis for restructuring the two roles was genuine. Mr Stafford proposed the restructure in a Consultation document dated 16 July 2013 shortly after Mr Handy's return from leave. During his absence, Mr Stafford and the Treasury

Accountant who, until Mr Handy commenced in the role on 20 July 2012, had been the False Alarm Administrator, together managed the duties of that role. Mr Stafford accordingly had first-hand knowledge of performing the role and was in a good position to evaluate it and that of the Treasury Accountant.

[70] In the introduction to his proposal document, Mr Stafford cited the Government's expectation that the Fire Service, in line with other Public Service organisations, needed to be mindful of its costs of operation, and of the need for efficiencies. He noted that, because of the demands of his work, the Treasury Accountant had borne the brunt of the False Alarm Administrator's duties during the period of Mr Handy's absence. Mr Stafford had observed over this time that both roles were sporadic in nature. As he stated in the proposal document "Both roles had

peaks and troughs, and both roles appear that they may be considerably under-utilised over significant periods."

[71] He carried out an analysis of the numbers of telephone calls, emails and letters relating to false alarms over a one week period in May 2013, and noted the relatively low numbers of each. Similar considerations applied to the Treasury Accountant's role. Additionally, that latter role was, at the time, being carried out under a contracting arrangement which was due to end in approximately eight weeks.

[72] Mr Stafford found both roles to have a "baseline element", which he detailed, and both had peak times of operation but, in his analysis, it did not seem that there was ever a time when the two peaks would present an unrealistic workload. That was the basis for his proposal to disestablish both the False Alarm Administrator's and the Treasury Accountant's positions and create a new combined full time Treasury and False Alarm Administration role.

[73] His proposal document set out the proposed salary band for the new role and noted that, given its scope and technical components, NZFSC would advertise it. Applications from Mr Handy and the incumbent of the Treasury Accountant role would be welcome and their applications would be considered on their merits alongside any other applications that were received.

[74] Mr Stafford sought feedback on the proposal, stressing that no decisions had been made and none would be made until after feedback had been received and considered. A time frame of 26 July 2013 was set for the receipt of feedback. EAP was offered to affected team members as well as additional Human Resources support.

[75] Following the expiry of the feedback period, during which the PSA made a submission on the proposed restructure on Mr Handy's behalf, NZFSC presented a decision document on 21 August 2013. It notified its intention to implement the proposal but, in light of the PSA's feedback, advised it would ring fence the new role for Mr Handy's application in the first instance.

[76] One week was allowed for him to make application for the position. If he applied, an appointment panel would assess his application and, depending on their assessment, might interview him. If he applied and was unsuccessful, the role would be further notified to the contractor filling the Treasury

Accountant's role. If she applied and was unsuccessful the role would be advertised nationally, both internally and externally.

[77] The decision document also signalled that NZFSC would consider any application for voluntary redundancy by 28 August 2013, on the basis, however, that the determination of any such application would be at the employer's sole discretion.

[78] Mr Handy applied for the new position and, through the PSA, also indicated his interest in exploring the voluntary redundancy option, setting out the terms that would be acceptable to him. Some correspondence on that issued followed between the parties but did not result in agreement being reached, primarily because Mr Handy's terms included a redundancy payment almost four times greater than he

would be entitled to under the terms of his employment agreement.⁶

[79] Mr Handy was notified by NZFSC on 6 September 2013 that the preliminary view of the selection panel for the new combined Treasury and Fire Alarm Administration position was that he would not be appointed to it. This was due to his lack of qualifications and experience in the Treasury aspects of the role. The panel had considered that the advanced treasury/cash management and financial capabilities of the position could not be taught, or developed within a reasonable timeframe. Mr Handy had applied for another position within NZFSC, that of Training Administrator, but had been unsuccessful in that.

[80] In its letter of 6 September 2013 NZFSC invited Mr Handy to provide any comments on the information and preliminary views it had conveyed by 10 September

2013 before it made a final decision. He was notified that, if its preliminary views were confirmed, he would be issued with one month's notification of the termination of his employment based on redundancy in accordance with the terms and conditions of his employment. He would also receive redundancy compensation.

[81] Some correspondence ensued between Mr Handy, the PSA and Mr Stafford in which further information was requested and supplied. Mr Handy requested a review of the decisions to decline his applications for both the Treasury and False Alarm

Administrator's position and the Training Administrator's position. He also sought the

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assessment and selection information for the person(s) offered and appointed to each role.

[82] A review of Mr Handy's non-appointment to the two positions for which he had applied was undertaken by a Review Committee comprising NZFSC's Principal Advisor Workplace Relations and its Director Programme and Change Management. In its memorandum to the Chief Executive conveying its conclusions and recommendation, the Review Committee summarised Mr Handy's submissions in relation to each of the positions for which he had applied unsuccessfully. It considered his submissions in relation to the each of the interview panel's decisions, and made findings on those decisions.

[83] One of the matters raised by Mr Handy had been whether consideration was given to an ongoing employment investigation or if other factors affected his applications. The Review Committee, after setting out the reasons for Mr Handy's lack of success in each of his applications, noted it had "...not found any evidence to suggest either decision was made on the basis of any considerations save as to the strength of Mr Handy's applications".

[84] The Committee's memorandum to the Chief Executive, which was dated 23

October 2013, ended with its recommendation that both of the decisions reviewed should be upheld. The Chief Executive wrote to Mr Handy by letter dated 29 October

2013, enclosing a copy of the Review Committee's report, and informing him that he accepted their recommendation. He ended by noting that Human Resources would be in contact with Mr Handy regarding his existing employment.

[85] Before that occurred, however, Mr Handy's employment was terminated on 1

November 2013 for serious misconduct.

[86] I have already found NZFSC was entitled to embark on a restructuring for the reasons clearly stated in the 16 July 2013 proposal document formulated by Mr Stafford. The restructuring was not the reason for the termination of Mr Handy's employment and, at the date of his dismissal for serious misconduct, no decisions had been made about his continued employment with NZFSC arising from the restructuring.

[87] I find the restructuring to have been a justifiable action by NZFSC. No issue as to disadvantage therefore arises.

Is Mr Handy owed wage arrears?

[88] It is Mr Handy's contention that in February 2013 three days that should have been treated as sick leave were deducted from his annual leave entitlement. In his two statements of problem he referred to this as "Payment for annual leave which was not taken was also withheld from (him)".

[89] Mr Handy first raised this as an issue with NZFSC after his employment had been terminated on 1 November 2013. In a letter dated 15 November 2013, for Mr Warwick's attention, headed *Personal Grievances – Proposal for Mediation* Mr Handy raised personal grievances for unjustified dismissal and for unjustified action which disadvantages the employee. The first item under the unjustified action personal grievance was:

"Whether the employment agreement allows the employer to withhold pay where potential error led to leave being categorized as annual leave rather than sick leave."

[90] NZFSC's response at the time was that he had not raised valid personal grievances and needed to specify the remedies he was seeking. Mr Handy's then representative raised the matter again by letter dated 31 January 2014, which referred to "...an issue of 3 days leave which he was not paid and which you know he is entitled to."

[91] Mr Handy later raised this as a claim for wage arrears. It was his evidence to the Authority that the payment he was seeking related to *annual leave which had not been expended and that I had not received*. He referred to two occasions on which Mr Stafford had *used an internal computer system, when I was not in the office, to request and approve the use of 3 days of my annual leave entitlement although I had elected to take sick leave*.

[92] Mr Stafford denied doing this or having the capability to do it. Ms Sinclair's evidence supported his view. Their evidence was that NZFSC's Pay Kiosk does not allow any person, other than the employee concerned, to apply for annual leave and that managers can access sick leave, but not annual leave, for employees. They deposed that Mr Handy had applied for the annual leave himself on the three days in question. Those days were 11 and 12 February and 18 March 2013. System-generated

emails had been sent to him on 13 February and 20 March confirming approvals for the respective leave applications.

[93] Both Mr Stafford and Ms Sinclair noted that Mr Handy had not disputed those emails or asked that the annual leave be debited against his sick leave entitlement.

[94] Mr Handy provided the Authority with evidence of an email exchange between himself and Mr Stafford on 12 February 2013, with the subject line "*Re: 2 days leave*". Mr Handy had emailed his manager:

"Need to give it one more day. Got tetnus shot for possible infection. Return tomorrow, apologies."

[95] Mr Stafford's response had been:

"OK – I think you will remember this birthday for some time!"

[96] Mr Stafford did not recall the email exchange but did not deny it had occurred. [97] Mr Handy also referred to an email from Mr Stafford dated 19 March 2013 in

which Mr Stafford had referred to a meeting that morning between himself and Mr Handy and an HR employee. The purpose of the meeting had been to discuss Mr Handy's entry in the Accident and Event Reporting and Incident Kiosk as well as Mr Handy's overall wellbeing "...(*noting your day off yesterday to attend the doctor*)..." and another matter.

[98] Mr Stafford recalled the accident report and the meeting with Mr Handy on 19

March. He said he had tried to find out what the accident report had been about and had also wanted to discuss behavioural matters with Mr Handy. Mr Stafford was certain he had not, and could not, apply for annual leave on Mr Handy's behalf. He believed Mr Handy had previously requested annual leave for 18 March and that he did not ever ask him to change that leave to sick leave.

[99] He noted that if an employee requested annual leave and then became sick or injured the employer would consider, on the request of the employee, that leave being changed to sick leave. He said it was not an automatic process just because an employee attended a doctor during a period of annual leave.

[100] In submissions to the Authority, NZFSC submits that going to see a doctor is not the same as being sick, and that many people go to the doctor for check- ups or appointments. In its submission that did not mean those people were sick or were entitled to take sick leave for doing so.

[101] I accept that submission as a general premise, but have some concerns in applying it to Mr Handy's situation with regard to the three days' leave. While he did not recollect applying for annual leave for any of the three days, I find it is likely he did so.

[102] I also find, however, his email exchange with Mr Stafford on 12 February

2013 resulted in his manager being aware that he had injured himself in some way necessitating a tetanus injection and a period of recovery. It is also clear from the email from his manager regarding the meeting they had on 19 March that Mr Stafford was aware Mr Handy had attended his doctor on 18 March and had made an accident or incident entry into NZFSC's system.

[103] [Section 36](#) of the [Holidays Act 2003](#) provides that an employee who is taking annual holidays and who then becomes sick or injured

...may, with his or her employer's agreement, take any period of sickness or injury that the employee would otherwise take as an annual holiday as sick leave.

[104] It is implicit in the provision that the onus is on the employee to seek the agreement of the employer and that the employer has the discretion to agree, or not, to the employee's request. That did not happen in Mr Handy's situation until several months later, after his employment had ended.

[105] I have considered whether the employer's obligation of good faith imposed a duty on NZFSC to bring to Mr Handy's attention his ability to request the three days' annual leave be treated as sick leave. However, while I consider it surprising Mr Stafford did not discuss this with Mr Handy, I do not find his failure to do so constituted a breach of good faith.

[106] I find NZFSC does not owe wage arrears to Mr Handy.

Are any other entitlements owing to Mr Handy?

[107] Mr Handy did not specify which entitlements he had in mind and he presented no evidence on the matter. In the

absence of evidence of any entitlements that remained unpaid or unfulfilled on the termination of his employment, I find there are none.

Determination

[108] Mr Handy does not have personal grievances for unjustifiable dismissal or unjustifiable action by his former employer that caused him disadvantage in his employment.

[109] No wage arrears are owing to him and there are no grounds for imposing a penalty on NZFSC.

Costs

[110] The issue of costs is reserved.

Trish MacKinnon

Member of the Employment Relations Authority

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