

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 16/10
5163806

BETWEEN VERONICA HARROD
Applicant

AND BP (NZ) LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Jills Angus Burney for the Applicant
Frank van Hattum for the Respondent

Investigation Meeting: 9 December 2009 at Palmerston North

Submissions Received: 12 January 2010

Determination: 3 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Veronica Harrod) is a service station attendant working for the respondent (BP) at its Otaki Connect petrol station. She claims to have been unjustifiably disadvantaged in her employment (which continues to this day) for the four following reasons, which occurred in a background of alleged harassment and intimidation by her store manager and regional manager:

- suspension without pay;
- an unjustified warning for failure to report an injury;
- disciplinary proceedings taken against her for her alleged refusal to sign a new code of conduct; and

- notice of disciplinary action given to her for an alleged failure to do her duties on one occasion.

[2] In response, BP does not accept that it has breached any obligations to Ms Harrod, and that in any event she has not established that she has suffered any disadvantage.

The Facts

[3] Ms Harrod has been continuously employed by BP as a shift worker at its Otaki service station since February 2004, working 38 hours per week on average.

[4] Between 17 and 28 April 2009, Ms Harrod was on annual leave. During that time, she had to visit her doctor because of a sore back. The doctor diagnosed the injury as a work-related one, after Ms Harrod had told the doctor at the consultation that she had initially had back problems at work, following lifting some boxes. ACC later refused to accept that the back injury was in fact a work-related injury and while the matter was in dispute from the outset, I accept Ms Harrod's evidence that she was simply relying on her doctor's diagnosis when pursuing a work-related injury claim.

[5] Ms Harrod's doctor gave her a sickness certificate that extended until Sunday, 3 May 2009, whereas she had been expected back at work on 28 April.

[6] Ms Harrod informed the store manager, Mr Marios Wheeler, that she would not be back to work until 3 May and offered to fax him a copy of the doctor's certificate. Mr Wheeler replied that that was not necessary and that she could bring it in when she returned to work.

[7] On Friday, 1 May Mr Wheeler was contacted by ACC about the work injury, which he discussed with Ms Harrod on 2 May. Ms Harrod informed him that the injury was in her view what is known technically as a gradual process injury, which started when she was lifting boxes at work a month or so ago. I note here that Ms Harrod had not reported any such injury or discomfort to anyone else in BP until that time.

[8] Clause 49 of the parties' collective employment agreement provides for the reporting of accidents, injuries and incidents. It states:

Employees shall ensure that all accidents, injuries and incidents are reported to either their immediate superior or a designated person as soon as practicable but no later than the end of the employee's working day.

[9] Medical examinations are provided for under clause 54. It states:

Where the employer has concerns about an employee's ability to adequately or safely carry out their duties, the employer may request an employee to submit to a medical examination by a registered medical officer nominated by the employer and acceptable to the employee. In the case of non-agreement, the employee's medical practitioner shall be used. Provided that such medical examination shall be at the expense of the employer.

Prior to such examinations the employer and the employee shall reach agreement on the information to be released to the employer which shall be limited to the employees ability to carry out their duties. All information obtained through such examinations shall remain confidential. A copy of the result of medical examination shall be made available to the employee.

[10] Mr Wheeler rang his boss, Mr Alan Price, the Central Region Area Manager for BP, who told him to inform Ms Harrod that she was not to return to work until she had been cleared by the company's doctor. When Mr Wheeler informed Ms Harrod of the above, she agreed to go to the company doctor, but was worried about the financial implications of having to take leave. As the company doctor was in Wellington, Mr Wheeler arranged for her to come into BP Otaki on Monday morning and travel to Wellington with him.

[11] In reality, Ms Harrod was far from happy with being unable to return to work and having to go to the company doctor, although it is clear that she had agreed to do so earlier. She then sought assistance from her union organiser, Ms Laurel Reid.

[12] Having taken advice from someone else in the union, Ms Reid advised Ms Harrod to simply return to work the next day, Sunday 3 May, on the usual basis, but to take her medical certificate with her. Neither Ms Harrod nor Ms Reid made contact with anyone at BP. Mr Wheeler was completely unaware, Sunday not being one of his regular days of work, that Ms Harrod had returned to work in breach of his instruction and what he also genuinely believed (with good cause) was Ms Harrod's concurrence. Ms Reid had, however, earlier made a call to Mr Price, who then spoke

to her on the Sunday. Ms Reid and Mr Price could not agree on whether or not Ms Harrod ought to return to work. She made it clear to Mr Price that Ms Harrod no longer intended to visit the company doctor before returning to work, but in fact she already was back at work.

[13] When Mr Wheeler came into work on Monday, 4 May, Ms Harrod told him that the company could not require her to visit its doctor or to keep her away from work and that she intended to carry on working. Mr Wheeler instructed her to stop working until further notice.

[14] In this case, BP had concerns about Ms Harrod's ability to safely carry out her duties because of the back injury, which is entirely understandable. It then followed the collective employment agreement by requesting Ms Harrod to submit to a medical examination by its own doctor. Such a doctor had to be acceptable to the employee and Ms Harrod had clearly accepted the company's doctor as suitable on 2 May. However, she then changed her mind, which meant that the matter was no longer able to be progressed by agreement. In that case, the collective employment agreement provides for the employee's medical practitioner to be used. It was clear that BP did not want to pursue this approach. The most likely reason for this is that it was working off its own internal policy manuals requiring clearance from the company doctor, rather than following the provisions in the collective employment agreement. There is no doubt that the collective employment agreement must be followed in preference to any policy manuals of an employer. Collective employment agreements have contractual and statutory precedence.

[15] Once Ms Harrod made it clear that she no longer wanted to see the company doctor, the proper approach under the collective employment agreement was for BP to arrange for further consultations with Ms Harrod's own doctor. Instead, it attempted to use the company doctor to liaise with Ms Harrod's doctor. This is quite acceptable, but it needed agreement on the information to be released to the company doctor. That agreement had to be limited to Ms Harrod's ability to carry out her duties and within that constraint could only be for what information the parties had agreed on. From Ms Harrod's perspective, it is understandable that she thought that that information might be less than all the information relevant to the issue of her ability to do her job. The parties might therefore consider a more clear definition of the first sentence of the second paragraph of clause 54, as while it might appear to BP that it

was entitled to all information about an employee's ability to carry out their duties, the clause does not necessarily reflect that.

[16] Why BP later tried, in the course of the negotiations about what information would be released by her doctor, to suspend Ms Harrod without pay is unclear, except that probably it goes back to BP's belief that it could rely on its internal policy guidelines about the need for employees to see the company doctor. Even although Ms Harrod would agree to limited information being made available by her doctor to the company doctor, this was insufficient for BP's purposes, which wanted to get to the bottom of the claim for a work-related injury and whether it was safe for Ms Harrod to go back to work.

[17] It is also clear that BP felt that Ms Harrod had not suffered a work-related accident, because on 7 May it informed her that she was being required under clause 25 of the collective agreement to obtain an additional medical certificate from the company's doctor. Clause 25 of the collective employment agreement relates to sick leave and states, amongst other things:

... sick leave may be used for a non-work accident.

The employer may require an additional medical certificate at the employer's expense from a doctor nominated by the employer.

[18] Ms Harrod was told that if she did not comply with that request, she would be suspended without pay effective from Friday, 8 May.

[19] The difficulty with BP's approach at this point was that Ms Harrod had been cleared by her doctor to return to work and the requirement for an additional medical certificate appears to be restricted to the context of someone on sick leave, whereas the opposite was the case here, as Ms Harrod had been cleared to return to work by her doctor and had continually presented herself for work.

[20] After complaints were raised by Ms Reid about the legitimacy of its approach, BP agreed to pay Ms Harrod for the whole period and allowed her to return to work on her next shift, being Sunday, 10 May.

[21] However, matters did not end there. BP instituted disciplinary action against Ms Harrod for failure to report an accident or incident which resulted in harm to her. She was advised that this was general misconduct, which could at worst lead to a

written warning. In response, Ms Harrod raised a personal grievance over her treatment.

[22] Ms Harrod complains of intimidatory and harassing behaviour by Mr Wheeler and an assistant store manager during the period between her returning to work and the disciplinary meeting. While I accept that she felt intimidated, I do not accept that the managers engaged in any harassment or intimidation. Rather, I conclude that Ms Harrod was understandably very sensitive about her treatment over that period and saw management carrying out their normal duties as intimidating. For example, there was a genuine need for close proximity to her when management were conducting cigarette counts.

[23] The parties met for the disciplinary meeting on 13 May. Ms Reid noted that Ms Harrod had already explained the situation to BP and Mr Price responded that he would like to hear Ms Harrod's reasons for not reporting the injury at the time, to which Ms Harrod responded that she had reported it. There was a dispute about whether or not the lifting of boxes constituted an injury or whether it was part of what is known as a gradual process injury. Mr Price wanted Ms Harrod to clarify whether it was an injury or an illness that she had suffered. Ms Reid noted that it was the doctor who actually reported the matter to BP.

[24] Ms Harrod was asked to explain why she did not report it when she first felt pain, rather than waiting until she saw the doctor weeks later. In turn, she wanted to know whether she was being accused of not reporting the accident or reporting it after the event. Mr Price sought an adjournment so that Ms Harrod could decide whether or not she suffered an accident or an injury.

[25] After the adjournment, Ms Harrod confirmed that she did believe she suffered a work-related injury, that it had occurred about five weeks beforehand, but that it did not affect her ability to do her job until the week before her return to work.

[26] Mr Price suggested that a work-related injury requires an event that has happened at a specific time. If not, it would not be considered an injury. Ms Harrod disputed that an injury had to occur at a specific place and time. I conclude that it is clear that, given the ability for coverage by ACC of gradual process injuries, Mr Price's approach was not correct.

[27] Mr Price made the point that it did not matter whether the injury impacted on her performance; it needed to be reported at the end of her shift. Ms Harrod made it clear that she did not, at the time, regard it as an injury because it did not impair her performance. Ms Harrod also made it clear that she did not understand what it was she was supposed to have reported, because she thought that accidents had to be performance impairing before they had to be reported and thus she had operated on the basis of a misunderstanding.

[28] There was then a long discussion over these points, together with discussion of what Mr Wheeler was told at the time. Mr Price then adjourned the meeting. When it reconvened, he informed Ms Harrod that she should have reported the issue when it occurred five weeks ago and to Mr Wheeler the week before. Ms Harrod was informed that she had breached the collective employment agreement and the employee handbook and therefore was issued with a first written warning, to remain on her file for one year. Ms Harrod refused to accept the warning and raised a subsequent personal grievance.

[29] Ms Harrod's employment continued without serious incident until September. In the intermittent period, the parties attended mediation, but the employment relationship problems raised were not resolved.

[30] On 6 September, Ms Harrod was given a copy of a letter dated 20 July, which addressed the matter of BP issuing a revised code of conduct. Ms Harrod was told to read the relevant documents and then return a signed copy within one week. She was told if she did not understand anything to contact and discuss it with management.

[31] Ms Harrod had some concerns about parts of the code, and emailed the union to get its response on her issues. When Mr Wheeler asked Ms Harrod a week later whether she had signed the code, she said that she had not and that she was discussing it with the union. Mr Wheeler told Ms Harrod that failure to sign the code was a breach of her employment agreement. Ms Harrod stated that she was not refusing to sign it, but that she wanted the union to look at it first.

[32] After another discussion, with a similar result, Ms Harrod was called to a disciplinary meeting on 17 September. She was told that she had refused to perform her usual duties or refused to comply with fair, reasonable and lawful instructions of a

manager. This allegation was categorised as serious misconduct, with dismissal being the most serious potential outcome.

[33] At the meeting Ms Harrod was represented by a different union official, Mr Wayne Ruscoe. This was an aggravated meeting, which started with a refusal by Ms Harrod and the union to sign BP's standard interview consent form, before the parties proceeded to address the issue of failure to sign the code of conduct. Mr Price made it clear that the union had agreed to the changes and that Ms Harrod was therefore refusing a fair and reasonable request from her manager. Whether or not the union had agreed to the changes has not been established.

[34] Mr Price noted that Ms Harrod had signed an earlier version of the code, which gave BP the power to update it. From Mr Ruscoe's point of view that was the end of the matter, as he believed Ms Harrod therefore did not require to sign any new documents, as she would still be bound by subsequent copies of the code. He then made it clear that Ms Harrod had not refused to sign it, but wanted more time. Ms Harrod added that seven days was not enough time to cover something so important. Ms Harrod made it clear that it did not matter what Mr Ruscoe thought about the contents of the code, as she did not think that the proposed contents were fair and reasonable.

[35] From there the meeting went round and round in circles about what would result. Mr Ruscoe kept insisting that there was no need for the meeting to carry on, particularly as Ms Harrod would get her response from the union in the near future and it could be dealt with then, and that it was made clear that Ms Harrod was not refusing to sign the code. Mr Price made it clear that there was a difference between saying something and doing something and it was about *the intent of the actions rather than what is said*.

[36] Mr Ruscoe then asked for a private meeting with Mr Price and when he returned told Ms Harrod that he recommended she sign the code, which she did. Mr Price then took a break and returned to state that no further action would be taken but that BP was concerned about *the continual blocking of things that the company is trying to do ... The employer/employee relationship is getting to the stage where it is not impossible but getting to the stage where it is near impossible for us to work together*, which Ms Harrod disputed. Mr Price asked Ms Harrod if she would modify her approach to management and Ms Harrod asked if that meant she would be

expected to *roll over* and that she was entitled to receive information when she sought it. Mr Ruscoe noted that he hoped the relationship could progress on a civil basis and more smoothly in the future.

[37] Even although no disciplinary action resulted, Ms Harrod filed another personal grievance for being forced to go through the disciplinary process.

[38] The final incident of relevance took place on 13 October, in relation to an incident the previous Monday, when Ms Harrod had written on the activity board that it was *too cold* to clean the pumps. Mr Wheeler told her that it being too cold was not an acceptable reason for her not to do her job. Although it was October there was a bitterly cold southerly and Ms Harrod did not do a full pump clean, although she did complete all her other outside jobs, such as collecting rubbish and refilling water buckets. Ms Harrod also noted that other staff did not fully complete their duties when it was particularly cold or wet and that Mr Wheeler had said nothing about the matter for over a week.

[39] Disciplinary action was instituted. It was said to be over her refusal to perform her usual duties, which constituted serious misconduct, with the most serious potential outcome being termination of employment.

[40] This disciplinary meeting has never taken place because BP has agreed to postpone it, first because the parties were due to attend mediation and subsequently because of this investigation meeting.

[41] Later on 13 October, Mr Wheeler questioned Ms Harrod about why she had taken so long to cash up, when he had seen her talking to another employee. Ms Harrod explained that the discussion was about union matters, to which Mr Wheeler replied that the till came first. Ms Harrod complained the next day of Mr Wheeler following her and standing over her. Again I conclude, on the balance of probabilities, that Mr Wheeler was simply going about his duties counting cigarettes and that he was entitled to tell Ms Harrod not to use bad language when behind the counter.

[42] Fortunately, Ms Harrod's relationship with Mr Wheeler has improved significantly since October, which at least in part has been generated by assistance given to her by BP. However, Ms Harrod remains considerably aggrieved by the actions of management, who she thinks, in the colloquial, are *out to get her*.

Determination

[43] Just as Ms Harrod was wrong to return to work when she had been told not to on Sunday, 3 May, so was BP to refuse to allow her to return to work once she had reneged on the agreement to see the company doctor. Then, pursuant to the terms of the collective agreement, BP had to work through her own doctor and as her own doctor had passed her fit to work she should have been allowed to return to work.

[44] I conclude that the issue of suspension had been resolved by the parties by the agreement for Ms Harrod to return to work, and that it was understandable that BP would be concerned about the situation, given that Ms Harrod had reneged on the arrangement to see the company doctor and had turned up to work without informing anyone in BP that she intended to do so. Given these circumstances, even if there was a disadvantage in the temporary suspension, it was remedied by a payment to her over the period and the lifting of the suspension in a relatively short period of time, so no compensation is required.

[45] BP's actions in issuing Ms Harrod with a first written warning for failure to report an accident at work were unjustified. An important factor for a fair and reasonable employer to take into account when it comes to refusing to follow terms of the parties' employment agreement is an employee's intent. It was clear from the disciplinary interview and the Authority's investigation meeting that Ms Harrod misunderstood what she was required to do under the agreement. She thought that she only had to report injuries that impaired her work performance. That is quite understandable, even if it is wrong. Indeed, it would be difficult for BP's operations to be conducted efficiently and effectively if every time a worker felt a back twinge they were required to fill in an accident injury register. If that is how BP wishes to conduct its business that is its right, but it needed to make that very clear to employees before it could consider issuing disciplinary proceedings in such circumstances. There was no evidence that Ms Harrod had been informed that the slightest twinge should be reported. It is BP's failure to take into account this lack of intent (given the misunderstanding by Ms Harrod) that makes its conclusion that she had failed to meet the employment agreement's requirements, justifying a warning, wrong.

[46] Ms Harrod clearly felt her employment was at risk as a result and it also undermined her trust and confidence in her managers. In all the circumstances, I consider that compensation in the sum of \$2,000 is appropriate. As Ms Harrod was

not responsible for BP's approach to the matter and was genuine in her view that she did not have to report as an accident every twinge she felt at work, there can be no grounds for blameworthy behaviour and thus any reduction to this sum for contributory conduct.

[47] Ms Harrod suffered no disadvantage as a result of the disciplinary proceedings in relation to the code of conduct, nor, to date in any event, over the actions over her failure to clean the pumps on 5 October. On the other hand, BP's actions over the code did seem rather rushed; in the sense that perhaps it may have been more diplomatic to have allowed Ms Harrod a little longer to voluntarily sign the code before disciplinary proceedings were issued. However her employment was not placed in any greater jeopardy than it was before, as no action was taken.

[48] Similarly, the situation has not been reached that her employment has been in any way jeopardised over the pursuit of the issues on 5 October, because no investigation has yet been undertaken.

[49] I therefore order the respondent, BP (NZ) Limited, to pay to the applicant, Ms Veronica Harrod, the sum of \$2000 compensation under s.123(1)(c)(i) for the issuing of an unjustified warning. No compensation is required over BP's attempt to suspend her. Her other claims are dismissed.

[50] Finally, I note that this employment relationship is not operating effectively at present. The parties are required to act towards each other in good faith, and there have been demonstrated failures in this regard by both parties. Both need to perhaps draw back from their combative relationship and focus instead on developing a more productive one in the future. This is not to say that BP has to stop managing Ms Harrod. Nor is it to say, as Mr Price once intimated, that Ms Harrod should take more notice of it and less of the union. Ms Harrod is an employee of BP and also a member of the union. The two roles are not incompatible and neither party should see them as so. Instead, the parties should use their undoubted talents to working out effective structures and systems so that BP is able to effectively run its business on a day-to-day basis and Ms Harrod does not feel intimidated while at work. Mediation, rather than the continuation of a disciplinary process over the pump cleaning issue (which would mean an extensive assessment of whether in choosing to discipline Ms Harrod over such a matter she was not being treated in a disparate manner to other

employees, as was the evidence of one co-worker) would appear to be a far more appropriate next step.

Costs

[51] Costs are reserved.

G J Wood
Member of the Employment Relations Authority