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## King v Far North Holdings Ltd AA 104/06 (Auckland) [2006] NZERA 713 (3 April 2006)

Last Updated: 1 December 2021

ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN EVIDENCE (REFER PARAGRAPH [5])

Determination Number: AA 104/06 File Number: AEA 1048/05

*Under the [Employment Relations Act 2000](#)*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE**

**BETWEEN** William King (Applicant)

**AND** Far North Holdings Limited (Respondent)

**REPRESENTATIVES** Bryce Quarrie, Counsel for Applicant

Don Mackinnon, Counsel for Respondent

**MEMBER OF AUTHORITY** Robin Arthur

**INVESTIGATION MEETING** 31 January 2006

**SUBMISSIONS** 15 February 2006 (Applicant and Respondent) and 23 February 2006

(Respondent in reply)

**DATE OF DETERMINATION** 3 April 2006

**DETERMINATION OF THE AUTHORITY**

[1] In Kaitaia on 29 March 2005 an armed robber kidnapped the applicant and stole cash containers from the security truck Mr King drove in his job as a security officer for the respondent. Some 16 days later the applicant, through his lawyer, told his employer that he could not imagine being able to resume work for the company. He raised a personal grievance for constructive dismissal.

[2] Mr King claims his employer breached its obligations to him by not providing prior training on how to deal with the after-effects of an armed robbery, not providing proper support and counselling and making inaccurate reports to the Police about him.

[3] The respondent – whose security division trades as Security North – denies breaching its obligations. Rather, it says the company trained Mr King on how to respond during an armed robbery, offered him counselling after the robbery, and were not responsible for any suspicions that Mr King feared the Police may have about him.

[4] This matter was not resolved in mediation and proceeded to investigation by the Authority. The information available to assist the investigation comprised statements of problem and reply; witness statements from the applicant, his wife Giddy King, his former manager Andy Sanderson, his former supervisor Jack Wharerau, the respondent's chairman Malcolm Nicolson and a national manager of the respondent's main client, Frank Daken of

Chubb Security Services; and additional evidence given under oath at the investigation meeting by each witness in response to questions from the Authority and counsel for each party. Each party provided written closing submissions.

## **Non-publication order**

[5] I record in this determination the order made orally at the opening of the investigation meeting. Any evidence given or pleadings filed which discloses the amount of money taken in the robbery and the details of the circumstances or manner of the robbery and the treatment of the applicant during the robbery is not to be published. This order is made under Schedule 2 cl 10(1) of the [Employment Relations Act 2000](#) and remains in force until any further order of the Authority or the Employment Court. It is limited to information not already in the public domain as a result of statements to the media by Police representatives.

[6] The respondent sought this order at the request of the Police who were said to be still investigating the robbery. Publication of further detail might prejudice their inquiries. The applicant had no objection to the order.

[7] For the purposes of this determination only the following information on the events of 29 March – already in the public domain – is necessary. Mr King was driving a Security North truck on a cash pick-up round in Kaitaia. While the truck was parked outside a large retail store, an armed man got into the passenger seat. At gunpoint Mr King was directed to drive some six kilometres out of town to a remote quarry. At least one other person also arrived at the quarry and took part in the robbery. Mr King was handcuffed and his feet bound. Cash containers were removed from the vehicle. The amount of cash taken has not been publicly specified. Mr King was in fear of his life throughout the robbery. He was left tied up when the robbers left the quarry. He was able to reach his cellphone and, using the speed dial, called his supervisor who in turn telephoned the Police. He had been lying bound in the quarry for half an hour when police arrived.

## **Background facts and evidence**

[8] Mr King started working part-time for Security North in March 2004. Initially he worked with the senior employee who left later that year. By early 2005 Mr King was working full time for the company and was the main driver of the security van on the cash transit runs for the area, assisted as required by another employee.

[9] Mr King's training was largely done 'on the job' by both the senior employee and on occasions when Mr King accompanied Mr Wharerau on certain duties. In November 2004 Mr King also attended a day-long training Cash In Transit course provided by Armourguard. This course included some training on what to do in the event of an armed robbery.

[10] In early March Mr Wharerau spoke with Mr King about Security North losing one of its main clients from April 2005. He told Mr King there would not be enough work to keep working full time on cash transit and other security work and Mr King was offered an ongoing job as a parking warden in Kaitaia. Although the offer was not finalised or in writing at that stage, it was clear that Mr King had ongoing employment with the company.

[11] On Friday 25 March an employee who was the "second man" on the company's cash transit truck in Kaitaia left at short notice. That day Mr King and Mr Wharerau spoke by telephone about organising a replacement worker to work on the following Tuesday, the day after the Easter public holidays. Mr Wharerau said he would ring another employee, Derek Abraham, to check if he was available and let Mr King know whether he should pick Mr Abraham up for work that day.

[12] Mr Wharerau's evidence was that, as the supervisor, "*it was [his] job to make sure that a second person was available and it was [Mr King's] job to arrange the pick up*". A second crew

member was engaged for cash pick up jobs on certain days of the week where, by experience, the company knew the amounts to be picked up would be larger than other days.

[13] Mr King's evidence was that Mr Wharerau did not telephone him to confirm that Mr Abraham was available to work and should be picked up. Mr Wharerau says that when he spoke to Mr Abraham he understood that Mr Abraham and Mr King had already spoken and Mr Abraham had said he was available. Mr Wharerau admits he

did not phone Mr King back to confirm the arrangement as he considered it unnecessary.

[14] This misunderstanding was not clarified on the morning of 29 March when Mr King and Mr Wharerau met in a carpark in Kaitaia to exchange some keys. The two men spoke about Mr King's concern that the truck had a flat battery and required repairs but did not speak about whether Mr Abraham was working with Mr King later that day.

[15] The result was that Mr King worked alone on the cash pick-up run that day.

[16] By the time Mr King rang from the quarry in the afternoon Mr Wharerau was in Kaikohe – around 90 kilometres away. Mr Wharerau called the Police and then contacted Mr Sanderson at his office in Opua – more than 130 kilometres from Kaitaia. Both men travelled to Kaitaia immediately.

[17] Mr King was taken by the Police to their Kaitaia station. When Mr Wharerau and Mr Sanderson arrived in the town they went to the station but were not permitted to see Mr King. They did talk with one of the investigating officers who asked why Mr King was working alone that day. They told the officer that they understood Mr Abraham was supposed to be working with Mr King.

[18] Mr King remained at the station from mid-afternoon until driven after 8pm to his home about 14 kilometres outside Kaitaia. Driving back into town with Mrs King shortly after to buy cigarettes, Mr King saw Mr Wharerau's car parked outside a local restaurant and contacted him on his cellphone.

[19] Mr King was asked to come into the restaurant where he spoke briefly to Mr Wharerau and Mr Sanderson. Mr Wharerau walked Mr King out to his car. Mr King recalls Mr Wharerau telling him: "If you need any help, we'll help you".

[20] The next day, March 30, Mr Sanderson was joined in Kaitaia by Mr Daken. They arranged to visit Mr King at his home. Mr Daken said the visit was part of "standard procedure" to sit down with "crew" after a robbery to debrief them and find out their state of mind. It was routine to offer counselling.

[21] The witnesses agree there was a discussion during this meeting with Mr King about counselling and the need for that to occur. Mr Sanderson says he pressed Mr King to get counselling. Mr King recalls saying: "*I don't need it but we carried on talking and I said 'OK, I'll get the counselling'. I just thought to myself I didn't need it but he said you'll need the counselling to get over this.*"

[22] It is clear that Mr Sanderson was aware from this meeting that Mr King was agitated and fearful as a result of the robbery. After the meeting Mr Sanderson contacted Victim Support and asked for arrangements to be made to provide counselling for Mr King. He also checked with Victim Support in the following days on progress with those arrangements and was informed that Mr King had not returned several phone messages. Mr King remembers a telephone call from a

counsellor called Ken Hall who said he was going on holiday and would call back on 4 April, but Mr King says he did not hear from Mr Hall again.

[23] Mr Wharerau visited Mr King at home on 31 March. His evidence was that Mr King was agitated and very angry. Mr King told him that he had a shot gun and would shoot anyone who came looking for him. For reasons I need not elaborate on but which were raised in evidence and known to the parties at the investigation meeting, I find that Mr King did have a reasonable fear that the robbers could identify him and his home address and gain access to his house.

[24] I also accept that on that occasion Mr Wharerau emphasised the importance of counselling and was told by Mr King that he had not spoken to any counsellors yet but knew someone was trying to get in touch with him.

[25] Mr Wharerau again visited Mr King at home on 1 April to pick up some keys and used the opportunity to check on Mr King's welfare and emphasise the importance of counselling.

[26] Later that day both Mr Wharerau and Mr Sanderson told a Police officer that they understood Mr King had a gun and were concerned for his wellbeing. During the conversation they were asked to 'back off' from Mr King and leave him alone for a few days so the Police could complete their investigation. Mr Sanderson asked if the Police considered Mr King was involved in assisting the robbery and was told it was normal Police procedure to consider

employee involvement.

[27] On 6 April Mr King assisted the Police with a re-enactment of the robbery. He was taken to the quarry site, tied up and asked to demonstrate how he had managed to use his cell phone. The Police had also picked up his wife from her work and took her home to show them where Mr King's gun was and to be present while they searched the house.

[28] Around this time, but on a date that Mr King cannot now recall, he was visited by a woman who he described as "the lady from Whangape". She had been contacted by Victim Support and asked to call on Mr King.

[29] On the same day he was visited by Te Uri Reihana, a youth worker with Kaitaia Police. Mr King understood that Mr Reihana called at the suggestion of the Police and because he knew Mrs King through the local iwi trust where she worked. Mr Reihana also talked with Mr King about the need for counselling following the traumatic event of the robbery.

[30] Around this time Mr King also spoke with Eric Reid, a social worker with the local iwi trust, who also knew his wife. Mr King says he "decided to go with Eric" and met with him on 8 April to talk about his reactions to the robbery and how he was coping.

[31] Mr Wharerau did not speak to Mr King again until 8 April but had left telephone messages on 3 and 6 April. He also called by Mr King's house on 5 April but Mr King was not home. On 8 April Mr King telephoned Mr Wharerau. They arranged to meet at a carpark in Kaitaia. Mr and Mrs King both met with Mr Wharerau. Mr King was angry that Mr Wharerau had told the Police that he had a gun.

[32] Mr Wharerau says he had spoken with a Police officer earlier in the day and was able to tell Mr King that he was "more or less cleared" of any Police suspicion of involvement in the robbery. Mr Wharerau also asked again about counselling and Mr King said he had been contacted by a counsellor who had gone on holiday but had himself now arranged to see Eric Reid.

[33] Mr Wharerau then asked Mr King to attend a meeting in Opuia with Mr Sanderson to talk about his health and his return to work. They agreed to meet five days later.

[34] At the meeting in Opuia on 13 April Mr Sanderson and Mr Wharerau spoke to Mr King about returning to work, possibly on light duties initially. They reminded him that his role, as discussed in early March, was to change to one as a Parking Warden. Mr King was clear that he did not feel ready to come back to work. Mr King was told that this job would be kept open for some time but that his sick leave had been used up and the company could not promise to keep paying him. He was asked to provide a medical certificate. Mr King was encouraged to talk to the Accident Compensation Corporation ("ACC") or Work and Income ("WINZ") about whether they could help him with income in the meantime.

[35] Following the meeting Mr King consulted a lawyer. By letter on 14 April his lawyer raised a personal grievance of constructive dismissal. He advised that Mr King could "not imagine being able to resume working for the company at any time" and considered the company had "abandoned him" and repudiated the employment relationship.

[36] On 5 May 2005 – around five weeks after the robbery – Mr King was interviewed and assessed by a registered psychologist in Whangarei. Results of psychometric tests indicated severe anxiety and depression. The psychologist considered Mr King's emotional state was "consistent with a diagnosis of Post Traumatic Stress Disorder" ("PTSD"). Mr King was referred to his GP to access therapeutic services through the District Health Board or ACC.

[37] Mr King was subsequently assessed by a psychiatrist on 30 July 2005. Her diagnosis was also that Mr King's symptoms appeared to fulfil the criteria for PTSD. She recommended medication and trauma counselling.

[38] The respondent, through counsel at the investigation meeting, did not take issue with the diagnosis of the psychologist and the psychiatrist. It accepted Mr King was extremely upset by the robbery and its after-effects and this had an effect on his health.

[39] After leaving Security North Mr King worked in a labouring job which ended following an argument with his new employer. He then got a job as a care worker with disabled people. He started that job on 27 September 2005 and was still employed there at the time of the investigation meeting.

## Legal issues

[40] The issues to be resolved regarding Mr King's claim of constructive dismissal include:

- (i) whether Security North breached its duties to Mr King?
- (ii) whether, if Security North did breach its duties, those breaches were sufficiently serious to make it reasonably foreseeable that Mr King would resign?
- (iii) whether Mr King has a personal grievance, either as alleged or of another type?
- (iv) whether actions of the applicant contributed to the situation giving rise to any personal grievance he may have?
- (v) remedies required, if any?

### The employer's duties

[41] Mr King's employment agreement with Security North has no specific term regarding training, apart from a requirement for the employee to attend training courses nominated by the employer. A clause on policies requires the employee to follow the procedures of Security North's

clients when working for them and for the employer to provide the employee with copies of those procedures or relevant extracts. Another clause requires the employee to observe sensible safety precautions at all times and for the company to "provide appropriate equipment and training for the execution of the job".

[42] The parties were also bound by the implied mutual obligations of trust and confidence. For Security North this included an obligation to provide a safe system of work and meet obligations under the [Health and Safety in Employment Act 1992](#) to take all practicable steps to prevent harm. Reasonable measures to avoid the unnecessary risk of psychological harm are part of the employer's duty of trust and confidence. The employer is not guarantor of a worker's health and safety but is obliged to take reasonable steps proportionate to known and avoidable risks: *A-G v Gilbert* [2002] NZCA 55; [2002] 1 ERNZ 31 at [77] and [83].

[43] Mr Sanderson told me that Security North had not developed its own safety measures in relation to armed robberies but used guidelines developed by its client, Chubb Security, for its procedure and safety measures on cash pick-up work.

[44] Prior to this case he had not seen the *Guidelines for the Safety of Staff from the Threat of Armed Robbery* ("the *Guidelines*") published by the Department of Labour's Occupational Health and Safety Service in 1995. These were developed by OSH and a number of industry organisations, including the Security Industry Association. Security North is not a member of the Association but Chubb Security is.

[45] The standards and recommendations outlined in the *Guidelines* are a helpful guide to what could be reasonably expected of employers in industries where there is a readily identifiable risk of armed robbery. A number of relevant extracts from the *Guidelines* were put to Mr Sanderson and he accepted them as being fair statements and reasonable measures to be expected of a reasonable employer. These included:

*... Any business handling cash, whether large or small, in town or country, is at risk of armed robbery.*

*... Staff who experience a robbery may have a complex range of reactions which can affect not only their performance and morale at work, but also their home life and personal relationships. Their feelings about their employers, their workplace and their job can all be seriously affected. Those who are traumatised may be disillusioned if they feel their problems are not taken seriously, or if their employer gives them inadequate support. Some may look for transfers to other jobs or even want to leave altogether.*

*... Key elements for the safety of staff from armed robbery are:*

- *A risk management process to deter armed robbery, involving an assessment of the design and operation of workplace protection appropriate to the type, size and location of the workplace.*
- *An education and training programme to establish awareness of safety procedures and behaviour prior to, during, and following a robbery.*
- *A post-robbery support system which is timely, recognises that reactions of those involved can vary from minor shock to severe trauma, and seeks to minimise the problems faced.*

*... All staff involved in cash-handling ...should be trained in what to expect in the event of a robbery ...*

... The risk of reactions developing can be reduced if staff are adequately trained in security procedures and receive appropriate support immediately after the incident.

### **After the robbery**

Employers, managers, supervisors and colleagues must have an awareness of the complexity of reactions to robberies. Short-term reactions to shock can include:

- Anger, or a general mistrust of strangers, and wariness of customers;
- Fear and anxiety attacks, especially of returning to work;
- Feelings of helplessness, isolation, frustration or even guilt; ...

Staff who experience a robbery should have a sensitively conducted debriefing as soon as practicable after the robbery ...

... Managers should ensure that staff know that individual counselling following an armed robbery is positively encouraged, and is available, within the financial limitations of the business, for all who would benefit from it. ...

... Counselling is not the whole answer to the problem: support from management and colleagues is as important to the recovery process as counselling.

### **Training**

[46] Mr King attended a one-day course four months before the robbery. He says the seminar did not discuss the after effects of armed robbery on staff or the need for counselling. While making staff aware of their possible reactions following an armed robbery may assist them to cope with their actual reaction, the obligation is for managers to be aware of the risks of harm in the after effects and to take appropriate steps to address those. Not having discussed possible personal reactions to armed robbery or the need for counselling, in advance of the event, does not amount to a breach of Security North's duty to adequately train Mr King regarding the risks – before, during and after – of armed robbery.

[47] While there was some evidence from Mr King about some informality in the way that he and other employees carried out their duties – known about and permitted by his supervisor – I accept that he was adequately trained in the company's procedures regarding cash pick-up work.

### **Post robbery counselling**

[48] I accept that Mr Daken and Mr Sanderson meeting with Mr King the day after the robbery was an appropriate debriefing session and properly raised the need for counselling with him. Mr King was reluctant but his manager, again appropriately, insisted that he needed counselling. Mr Sanderson then took appropriate steps to set that in place but Mr King did not return calls from Victims Support. Mr Wharerau – in his phone calls and visits to Mr King – also appropriately reinforced the need for this to occur.

[49] I accept Mr King's evidence that in the days after the robbery that he was scared and depressed, staying home with the curtains drawn, but he gave the company no indication that he needed more help in making arrangements. Over a week he was aware of phone messages from Victim Support, visited by "the lady from Whangape" and Mr Reihana, spoke with Mr Reid and had a phone call from Mr Hall. There were ample opportunities for him to make arrangements that could have helped. Apart from his initial reluctance, Mr Wharerau did not inform his employer –

either by a phonecall to Mr Sanderson or Mr Wharerau or in discussion with Mr Wharerau – that he was having any difficulty in making those arrangements or would prefer for the company to set up a counselling session for him. By 8 April, when Mr Wharerau again checked with him, Mr King said he had arranged to speak with Mr Reid.

[50] In terms of the standard set by the *Guidelines*, Mr King was positively encouraged to undertake counselling and provided with support – particularly by the telephone calls and visits of Mr Wharerau. Taking all these circumstances into account, I find there was no breach of duty in this aspect of the employer's conduct.

### **Police suspicion**

[51] Mr King alleges he suffered intense Police scrutiny following the robbery because company representatives wrongly suggested he had not followed proper procedures that day, including picking up a second crew member – Mr Abraham – to work that day.

[52] Mr Sanderson and Mr Wharerau admit that they told a Police officer on 29 March that it was not the company's procedure for Mr King to be working alone that day. The Police also interviewed Mr Abraham, including the question of whether any arrangements had been made to pick him up for work that day.

[53] Mr King's evidence was that during the Police interview on 29 March he was told by a detective that Mr Wharerau and Mr Abraham had made statements that "*reckoned I was the one who did it*". He says the detective told him: "*The finger's pointed at you*".

[54] However Mr King accepted at the investigation meeting that he understood that security officers were always immediate suspects in the event of a robbery from a security firm, that it would be standard procedure for the Police to follow that line of inquiry and that the Police were likely to be bluffing in their questioning to see if he was involved. I accept also that Mr King had just been through a frightening experience and would be upset by the detective's suggestion. However the responsibility for that lies with the Police and not his employer.

[55] I accept Mr Wharerau's evidence that he did ask one of the investigating officers whether she thought Mr King was involved and was told that it was normal procedure to consider whether there was any 'inside' involvement. As Mr Wharerau put it: "*In our game, the crew is number one suspect*". Both he and Mr Sanderson said they were interviewed by the Police about the background to the robbery and understood that they too could be suspects.

[56] I also accept that it was appropriate for Mr Wharerau and Mr Sanderson to report to the Police their concern that Mr King said he had a gun. In the circumstances of Mr King being fearful and agitated following the robbery, he could have harmed himself or another person. While Mr King was upset that Mr Wharerau "got him in trouble" with the Police over having the gun, I do not accept the employer breached any duty to Mr King by telling the Police about the gun.

### **Were there other breaches of duty?**

[57] While I have found that Mr King has not established the specific breaches of duty he alleges resulted in his constructive dismissal, under [s160\(3\)](#) of the [Employment Relations Act](#), the Authority is not bound to treat the matter as of the type described. [Section 122](#) provides that a personal grievance may be found to be of a different type from that alleged: see *Ruebe-Donaldson v Sky Network Television Ltd (No 1)* [2004] 2 ERNZ 83 (EC, Travis J) at [12]. I indicated at the investigation meeting that this was a possibility in this case. The respondent's closing submissions

object to the prospect I had indicated that its treatment of Mr King might amount to a personal grievance for unjustified disadvantage. The company says there would be a significant miscarriage of justice if it were liable for a breach of a duty of care around the safety of its practices and that it would have brought different evidence if that were what Mr King's case was about.

[58] I do not accept that submission because the issues which remain to be examined were squarely raised in the applicant's submission of his personal grievance and were responded to in the respondent witness statements and answers to questions during the investigation. They are these:

- Did the company operate a safe system of work if Mr King was able to go to work on his own on a cash transit run on 29 March 2005?
- Was Mr King fairly treated in being told on 13 April 2005 that his sick leave had expired, his pay was stopped and to seek financial assistance from ACC and WINZ?

### **Safe work system**

[59] The letter raising Mr King's grievance on 14 April 2005 states:

*Serious issues also exist in relation to the manning of the truck on the day of the incident (and in fact during a period of time*

prior to the incident). It is astonishing that Mr King was on his own carrying out duties. He was placed in a totally unsafe situation.

[60] Mr King's witness statement addresses what he regards as shortcomings in staffing arrangements that resulted in him working alone on some occasions. Mr Sanderson's witness statement addressed those allegations by describing the company's standard operating rules for where a two guard shift is required and states that must always be "two men on the run" on certain days. Mr Wharerau's witness statement says the company "had a rule that there would always be two men on the cash in transit run [on certain days] as well as the days after public holidays". I understand the reason for this to be that – in the generally held view on the safety and security of this type of work – an armed robbery is less likely to occur or be attempted where there are two officers on the job.

[61] Mr Wharerau acknowledged that, as supervisor, he was responsible for making sure a second person was available for those shifts.

[62] A system relying mainly on whether the supervisor had made the necessary arrangements was

– as it proved to be on 29 March 2005 – inherently fallible. It contrasts with an important example discussed with the witnesses in the investigation meeting. Some of Security North's work involves callouts to replenish cash stocks in ATM cash dispensers. Client banks have set up a procedure for this work so that the job is not able to be carried out unless there are two security officers present. This is achieved by a system that requires each guard to complete a separate part of the process to enable them to gain access to the premises and the ATM. It shows how the safety and security element of having two officers on the job is prudently built into the procedure for their work.

[63] Security North's procedures for cash transit work did not incorporate such safeguards. In this regard it has not taken all practicable steps to ensure the safety of staff doing such work. That the misunderstanding occurred about whether the second crew member was authorised and available to work on 29 March, and Mr King was able to go ahead working alone, put him at risk. I find this was a breach of the employer's duty to provide a safe workplace.

[64] However it does not follow that this breach was sufficiently serious that it was foreseeable that Mr King would not be prepared to work under those circumstances. He must bear some of the

burden for the risk and not taking all practicable steps to protect his own safety. On the morning of 29 March he met with Mr Wharerau. He could easily have asked: "Is someone working with me on the cash transit run today or what's the story". He did not.

[65] The company increased the risk for Mr King being involved in an armed robbery, and the harm to him that could result from it. It was not reasonably foreseeable that Mr King would not work under such circumstances because, in fact, he did. The company's inadequate system of work does not support a finding of constructive dismissal but does amount to an unjustified disadvantage.

### **Expiry of sick leave and suggestion on ACC/WINZ**

[66] At the meeting with Mr King in Opuia on 13 April Mr Sanderson acted on Mr Nicholson's instructions to advise Mr King that his sick leave had expired and his pay was stopped. Mr King was asked to provide a medical certificate for his absences from work from the date of the robbery.

[67] Mr Nicholson told me that Mr King's time away from work was treated as sick leave and that Mr King would have to apply to the company's board for additional paid leave. Mr Sanderson confirmed that Mr King was not told he could apply for additional paid leave. Rather Mr Sanderson accepted that Mr King was entitled to leave the meeting that day feeling his sick leave was at an end and there was no promise of any more. Instead Mr King was told that he should see a "sympathetic doctor" and see whether he was eligible for income from ACC or WINZ. Mr Sanderson and Mr Wharerau admitted that neither knew at that time whether Mr King was eligible for any payments from ACC or WINZ. Neither had inquired whether the suggestion they made was of any merit or had any prospect of success. Brief inquiry would have established that ACC could not assist in a case of this type in the absence of physical injury and Mr King was probably not eligible for a benefit as his wife was working.

[68] Neither had Mr Nicholson, Mr Sanderson or Mr Wharerau considered whether the company had properly

accounted for the use of Mr King's sick leave entitlement. Mr Wharerau knew that Mr King had spent 6 April in the company of the Police assisting with a re-enactment of the robbery. He is likely also to have known from his earlier talks with Mr King that Mr King was involved in assisting the Police by answering questions on other days. However rather than treating that as time where Mr King was carrying out work related to his job – and in his role as an employee – the company treated those days as time that could be deducted from his sick leave entitlement.

[69] In both the treatment of his sick leave entitlement and suggesting he see ACC and WINZ I consider that the company failed in its duty of trust and confidence to a distressed employee. It failed to provide a reasonable level of pastoral care to an employee who was subject, in the service of his employer, to a violent armed robbery. Its actions were also likely, directly or indirectly, to mislead Mr King. I find they amounted to an unjustified disadvantage.

## **Determination**

[70] Mr King does not have a personal grievance in relation to his claim that he was constructively dismissed by the employer's conduct in relation to training, offering post robbery counselling or increasing police suspicion of him. Rather than committing serious breaches making it reasonably foreseeable that he would resign, the company had offered to have him return to work on light duties and confirmed an offer that he could work as a parking warden on the same pay. However I have found that Mr King does have a personal grievance for unjustified disadvantages occurring as a result of an unsafe work system and the company's representations regarding his sick leave entitlement and whether he could get income in the meantime from ACC or WINZ.

## **Remedies**

[71] Mr King is not entitled to his claim for lost wages. He ended the employment relationship.

[72] He is entitled to compensation for the distress caused by the unjustified disadvantages he suffered. This is not compensation for being subject to an armed robbery. That harm was not caused by his employer. The company's unsafe work system did however increase the risk of it occurring. Mr King is entitled to compensation for the effect of the increased risk not the robbery itself. He is also entitled to compensation for the distress arising from ending his paid sick leave and the accompanying misleading advice. The appropriate award should be modest and I fix it as

\$4000 without deduction.

[73] While there was contributory conduct by Mr King in respect of aspects of his claim which were unsuccessful, I do not consider the actions of Mr King contributed to the situation giving rise to the personal grievance for unjustified disadvantage. Mr King was not responsible to develop a safe system of work or for the position that the company took on his sick leave and advice to him.

[74] The cost of Mr King being assessed by a psychologist on 5 May 2005 – five weeks after the robbery – was \$1012.50. The invoice went to his barrister. That is an amount that the company should properly pay as part of the care of staff following a traumatic event of this kind. The respondent is ordered to reimburse the applicant the sum of \$1012.50 for payment of the invoice of Education & Counselling Northland (for the services of Richard Smith, Registered Psychologist) dated 27 July 2005.

[75] Mr King also incurred a bill of \$18.00 for one doctor's consultation related to the aftermath of the robbery. The respondent is ordered to reimburse the applicant the further sum of \$18.00.

## **Summary of orders**

**[76] The respondent is ordered to pay to the applicant:**

- (i) the sum of \$4000 without deduction as compensation under [s123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#); and**
- (ii) the sum of \$1012.50, for payment of the invoice of Education & Counselling Northland dated 27 July 2005, as reimbursement under [s123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#); and**

(iii) the further sum of \$18.00 as reimbursement under [s123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#).

## Costs

[77] The parties are encouraged to resolve the issue of costs between them. In the event that they are not able to do, either party may apply for a determination of costs by the Authority.

Robin Arthur

Member of Employment Relations Authority

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