

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 32
5373561**

BETWEEN ANDREW LAWRIE
 Applicant

AND AIR LIQUIDE NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Helen White, Counsel for Applicant
 Brandon Brown & Joanne Douglas, Counsel for Respondent

Investigation Meeting: 11 & 12 December 2012 at Auckland

Submissions received: 12 December 2012 from Applicant and from Respondent

Determination: 30 January 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Andrew Lawrie, claims that he has been unjustifiably disadvantaged and unjustifiably dismissed by the Respondent, Air Liquide New Zealand Limited (Air Liquide).

[2] Mr Lawrie claims that he has been disadvantaged in his employment by actions by Air Liquide including bullying, disclosure of personal information to other employees, and attempting to coerce him to resign.

[3] Air Liquide denies that Mr Lawrie's employment was unjustifiably terminated and claims that Mr Lawrie's employment was justifiably terminated on the grounds of medical incapacity as a result of a high level of absenteeism followed by a complete absence from work from 31 January 2012 onwards.

[4] Air Liquide denies that it unjustifiably disadvantaged Mr Lawrie.

Issues

[5] The issues for determination are whether Mr Lawrie has been:

- Unjustifiably terminated from his employment with Air Liquide
- Unjustifiably disadvantaged in his employment by:
 - i. Bullying
 - ii. Requiring the disclosure of his confidential information
 - iii. Disclosure of his personal information to other employees
 - iv. The initiating of a disciplinary process without basis
 - v. An attempt to coerce him to resign

Background Facts

[6] Air Liquide is a New Zealand based subsidiary of a global supplier and manufacturer of industrial, medical, food and hospitality gases. There are 8 operational locations in New Zealand and approximately 75 employees.

[7] Mr Lawrie commenced employment with Air Liquide on 23 February 2011 in the role of Customer Service Representative based at the Air Liquide Auckland office. Mr Lawrie was employed in accordance with the terms of an individual employment agreement (Employment Agreement) which included a minimum working week of 40 hours, commencing at 08.00 and finishing at approximately 16.30 each day; and a sick leave entitlement to 8 days for each period of twelve months.

[8] The Employment Agreement included a section headed 'Medical Examinations and Tests' which stated:

In any circumstances where the Company reasonably believes it to be necessary, the Company shall be entitled to require the Employee to be medically examined by a registered medical practitioner nominated by the Company, at the Company's expense, and will be entitled to require a written and/or verbal medical report from the medical practitioner.

[9] Mr Lawrie had signed and initialled each page of the Employment Agreement on 1 March 2011.

[10] Mr Lawrie reported to Mr Michael Batterton, National Customer Service & Administration Manager, who managed the small Auckland-based customer service team of which Mr Lawrie formed part.

[11] Mr Batterton explained that shortly after Mr Lawrie commenced employment with Air Liquide, approximately from mid-March 2011, he had become concerned as Mr Lawrie had been frequently absent from, or arrived late to, work.

[12] Mr Batterton said Mr Lawrie had not contacted him directly to advise of his absences from work, rather Mr Lawrie had contacted Ms Carol Whiteman, Customer Services Representative, who had sent an email to all employees at the Penrose office.

[13] Mr Batterton said Mr Lawrie's high absence level had also been brought to his attention by other employees in the customer service team who complained that they had been directly impacted by Mr Lawrie's absences and poor time-keeping, which had resulted in an increase in their workload.

[14] Mr Batterton said that although he had personally been aware of Mr Lawrie being absent from work on a frequent basis, he had had difficulty monitoring the actual extent of the absences because Mr Lawrie often contacted Ms Whiteman rather than himself, and Mr Lawrie failed to use Air Liquide's Preceda payroll system website (Preceda website) to request his leave.

[15] Mr Batterton explained that he had advised and shown Mr Lawrie how to use the Preceda website, and as a result of Mr Lawrie's constant failing to use the system, had sent him an email on 30 May 2011 reminding him to do so.

[16] Despite this reminder Mr Lawrie continued to not record his absences on the Preceda website as requested and so on 20 July 2011 Mr Batterton said he had sent Mr Lawrie a further email reminding him to process his sick leave absence which he had taken on 18 July 2011. However despite the reminders Mr Lawrie did not consistently process his leave requests through the Preceda website.

[17] Mr Batterton said that although he had had some difficulty in monitoring Mr Lawrie's absences, by July 2011 he had been aware that Mr Lawrie had had a significant amount of absenteeism in his relatively short period of employment. Accordingly on or about 20 July 2011 he had approached Ms Leanne Brimble, HR Coordinator, for advice on how to manage the problem of Mr Lawrie's absences.

[18] Ms Brimble said that she and Mr Batterton had met to discuss their concerns about Mr Lawrie's absences, and whether there were any problems in the workplace which might be contributing to his absenteeism. On or about 23 September 2011 Ms Brimble said that she had suggested to Mr Batterton that they should meet with Mr Lawrie to ascertain if there was any assistance which Air Liquide could offer to him.

Meeting held on 29 September 2011

[19] Mr Batterton said, he had written to Mr Lawrie on 26 September 2011 inviting him to attend a meeting with himself and Ms Brimble on 29 September 2011. In the letter Mr Batterton had stated that the meeting would be a counselling meeting in connection with Mr Lawrie's attendance record, and noted that Mr Lawrie's absences had placed an increased pressure: "*on our ability to operate effectively*".

[20] Although there is no reference in the letter to the fact that Mr Lawrie was entitled to have a support person present at the meeting, Mr Batterton said, and Ms Brimble confirmed, that he had asked Mr Lawrie at the start of the meeting if he would like to have a support person present, however Mr Lawrie had stated that he did not need a support person, and was comfortable to proceed without one.

[21] Ms Brimble said she had taken notes during the meeting. Mr Batterton said he had opened the meeting by advising Mr Lawrie that his level of absenteeism and his lateness in arriving at work were concerning, and had placed additional stress and strain on the other employees.

[22] Mr Batterton said he had asked Mr Lawrie the reasons for his absenteeism, and whether there was anything he could do to help him. Mr Lawrie's response had been that his absences had nothing to do with the work environment, but that he had been ill that year. The meeting notes record Mr Lawrie as stating:

AL replied that he had never been so ill as he had been this year. AL didn't think it was anything to do with his work environment. ...

AL replied that he thought it [the work] was going well. He has a greater understanding of requirements. He would, however, like to take on more challenges.

[23] Mr Lawrie said he had not informed Mr Batterton and Ms Brimble of the reason for his absence, as he considered that this was a personal matter.

[24] Mr Batterton said that towards the end of the meeting, following some discussion about the unreliability of the train system which Mr Lawrie said contributed to his lateness, he had informed Mr Lawrie that if his absences were connected to something he did not feel comfortable discussing with himself or Ms Brimble, he could speak to someone at EAP, a confidential counselling service available at no cost to Air Liquide employees.

[25] Mr Batterton said the meeting had concluded with him advising Mr Lawrie that it had not been a disciplinary meeting; nonetheless he had expected to see an improvement in Mr Lawrie's attendances.

[26] Following the meeting Mr Batterton said he had discussed with Mr Lawrie some ways in which any lateness resulting from the unreliability of the trains running on time could be addressed. Mr Batterton said that as a result, it had been agreed to change Mr Lawrie's hours to accommodate his concerns about the unreliability of the trains.

[27] Mr Lawrie disputed that the problem of his lateness was the only reason for the change in his start and finish times, explaining that his working hours had been changed in order to accommodate operational requirements also.

[28] However despite the alteration in Mr Lawrie's start and finish times, Mr Batterton said Mr Lawrie's lateness, in addition to his absenteeism, had continued. In particular Mr Batterton said Mr Lawrie's absences had increased during November 2011, a fact of which he had become aware through the emails from Ms Whiteman, comments from the other employees, and his own observations.

[29] Mr Batterton said that during October and November 2011 he and Ms Brimble had again discussed Mr Lawrie's absences and on 23 November 2011 they had met to review Mr Lawrie's absence record based on the Preceda website records. Ms Brimble said the Preceda records showed that Mr Lawrie had taken 15 days sick leave, however on the basis that she had been made aware that Mr Lawrie had failed to consistently use the Preceda website to record his absences, she had considered this to be an understatement of Mr Lawrie's absences

Meeting held on 25 November 2011

[30] Mr Batterton said he had contacted Mr Lawrie by letter dated 23 November 2011, and invited him to attend a meeting with himself and Ms Brimble to be held on 25 November 2011. The purpose of the meeting was stated to be to discuss Mr Lawrie's attendances, pointing out that the Air Liquide leave records showed that Mr Lawrie had been absent for 15 out of 38 working days.

[31] Mr Lawrie was advised in the letter that he could have a support person with him at the meeting. Mr Batterton had also written: "*I would also like to hear your view on whether the nature of your work is having an adverse effect on your absenteeism*".

[32] Ms Brimble said that at the meeting held on 25 November 2011 Mr Lawrie had not brought a support person with him, and although Mr Batterton had asked at the beginning of the meeting if he needed to have a support person with him, Mr Lawrie had declined.

[33] Ms Brimble said Mr Lawrie had provided a medical certificate at the meeting, this had been signed by Dr Ben Lees and stated that Mr Lawrie had been unfit for work during the period 8 November until 18 November 2011, however there was no further information provided on the certificate.

[34] Ms Brimble said Mr Batterton had discussed his concern that Mr Lawrie was not using the Preceda website for requesting absences, to which Mr Lawrie had responded that he had not considered it necessary since his leave had been noted on his payslip. Ms Brimble said Mr Batterton reminded Mr Lawrie that it was important to use the correct process and had pointed out that it could also be accessed from an employee's home.

[35] Mr Batterton said Mr Lawrie had advised him that part of his absences were linked to a bout of influenza, the rest to a personal matter which he did not wish to discuss. Mr Batterton said Mr Lawrie had acknowledged that his absenteeism was not acceptable, and that it was not connected to his employment with Air Liquide. Ms Brimble took notes of the meeting which record

AL replied that his sick leave has nothing to do with Air Liquide. Neither the work nor the environment has been contributing to his sick leave.

AL continued that the cause of his illness has now been sorted.

*LB asked if AL was being put under pressure by any staff members?
AL replied no.*

[36] Mr Batterton said that he had repeated the advice he had given at the previous meeting in regards to the EAP assistance being available, and that this was a confidential service for which Air Liquide would pay.

[37] Mr Lawrie said he had informed Mr Batterton and Ms Brimble that he was having some difficulties with two employees on the team, however Mr Batterton had told him (Mr Lawrie) that he was not in a position to criticise anyone. At the Investigation Meeting Mr Batterton explained the comment was meant to indicate that relationships were two-way in nature.

[38] Mr Batterton said that Mr Lawrie had not stated he had an issue with two employees and that the only issue raised by Mr Lawrie had been that Ms Adrienne Craig, Agency Administrator – Hamilton, had been quite rude to him. Mr Batterton said that Mr Lawrie had made this comment following his observation that Ms Craig and Mr Geoff Wines, Agency Manager, had complained about the lack of invoices to agents, and following the question from Ms Brimble as to whether or not he was being pressured by other employees.

[39] Mr Batterton said the meeting had concluded with his statement to Mr Lawrie that there needed to be a significant improvement in his attendance, and that there would be a follow-up meeting held on 15 December 2011.

[40] Following the meeting with Mr Lawrie, Mr Batterton said he had spoken with Ms Craig and had expressed the concerns Mr Lawrie had raised about her communication style, and stated that she needed to be more tolerant of new employees. Mr Batterton said Ms Craig had accepted his instructions to her, and that he had relayed his discussion with Ms Craig to Mr Lawrie. Mr Batterton said Mr Lawrie had not raised any further issues about Ms Craig with him after this point.

Meeting held on 18 January 2012

[41] Mr Lawrie said that he had been on sick leave on 16 and 17 January 2012, and on 18 January 2012 Mr Batterton had asked for a meeting. At this meeting Mr Lawrie said he had been feeling pressurised as a result of the previous meetings and felt he had no option but to tell Mr Batterton that he was suffering from depression.

[42] Mr Batterton denied that he had requested the meeting, stating that Mr Lawrie had requested the meeting by email dated that day, 18 January 2012, in which Mr Lawrie had written: “*Could I have a quick catch up sometime today if you’re free?*”.

[43] At the Investigation Meeting Mr Lawrie agreed that it had been he and not Mr Batterton who had requested the meeting.

[44] During the meeting Mr Batterton said that Mr Lawrie had told him he was suffering from depression, which was the first time he had been informed of this.

[45] Mr Batterton said he had told Mr Lawrie that now he had identified his condition, Air Liquide would be able to help and support him. Mr Batterton said he had reminded Mr Lawrie of the EAP services, and asked how Air Liquide could help him with rehabilitation. Mr Batterton said he had also enquired if there were any issues at work contributing to his condition, but Mr Lawrie had said there were no problems at work.

[46] Mr Batterton said he had advised Mr Lawrie that he would need to speak to Ms Brimble and to Mr John Webber, Managing Director, about the situation. Mr Batterton explained that he had wanted to inform Ms Brimble on the basis that he would require her HR support in managing Mr Lawrie's attendance level and in assisting with his rehabilitation, and Mr Webber on the basis that he had expressed concern to Mr Batterton about Mr Lawrie's absence level.

[47] Mr Lawrie said that Mr Batterton had not only told him that he would be informing Ms Brimble and Mr Webber, but that either he or Mr Lawrie needed to tell the other team employees that he was suffering from depression. Mr Lawrie said Mr Batterton also asked him if he was on medication and seeing a counsellor.

[48] Mr Batterton denied that he had insisted on either himself or Mr Lawrie telling the other team employees about Mr Lawrie's suffering from depression; however he had discussed with Mr Lawrie whether or not to let the customer service team know the reason for his absences so that they would be conscious and supportive of his situation.

[49] Mr Batterton said Mr Lawrie had agreed that the customer service team should be informed and that he (Mr Batterton) rather than Mr Lawrie should advise the other team employees of his condition. Mr Batterton said Mr Lawrie had given him no indication that he was uncomfortable at the customer service team being informed.

[50] Mr Batterton said that later that day he had had a quiet word with Mr Lawrie to let him know that he was going to gather the team employees together to tell them about Mr Lawrie's condition, and Mr Lawrie confirmed that he was happy with this proposal.

[51] Mr Batterton said he had advised the employees that Mr Lawrie was suffering from depression and that they needed to be sensitive to this and to be supportive of him. Mr Batterton said that despite some initial grumbling, the outcome had been that the team employees had reacted to the information in a positive way.

[52] Mr Batterton said that later that day, 18 January 2012, he had spoken to Ms Brimble who told him that she had anticipated that Mr Lawrie had depression before he had informed her of this. Ms Brimble said she had realised Mr Lawrie had depression as she herself had suffered from the condition, and she had asked Mr Batterton if she could speak to Mr Lawrie to see if she could assist him, to which Mr Batterton had agreed.

[53] Mr Lawrie said that following the meeting with Mr Batterton on 18 January 2012 he had been called into several informal meetings with Mr Batterton and Ms Brimble.

[54] Ms Brimble denied that she and Mr Batterton had had a series of informal meetings with Mr Lawrie following the 18 January 2012 meeting; however she said that a few days after 18 January 2012 she had asked Mr Lawrie to come into her office as he was passing.

[55] Ms Brimble said she had told Mr Lawrie she was aware that he was suffering from depression and that she fully empathised with his situation, having experienced depression herself. Mr Lawrie agreed that Ms Brimble had told him that she also had suffered from depression and said that she had been supportive.

[56] During their discussion Mr Lawrie said Ms Brimble had asked him about his treatment and if he was going to counselling sessions, and he had advised her that he was seeing a counsellor. Mr Lawrie said Ms Brimble had informed him that she had worked with counsellors in the past, and it would be a good idea if she could talk to Mr Lawrie's counsellor, however he had not been happy with this suggestion and had not agreed to it.

[57] Ms Brimble said Mr Lawrie had told her he was seeing a counsellor and she had reminded him of the EAP services offered by Air Liquide, explaining that Air Liquide normally paid for three sessions but would probably pay for more if necessary. Ms Brimble said she had concluded the meeting by telling Mr Lawrie that he was welcome to talk to her at any time, and Mr Lawrie had acknowledged this and then left her office.

[58] Mr Batterton stated that after the meeting on 18 January 2012 he had had no further meeting with Mr Lawrie on the subject of absenteeism prior to the meeting which took place on 10 February 2012

31 January to 10 February 2012

[59] Mr Batterton said that on 31 January 2012 Mr Lawrie had sent him a text message asking if he could leave early to go to see his GP and obtain a prescription to which Mr Batterton said he had agreed.

[60] Mr Batterton said Mr Lawrie had not returned to work after 31 January 2012. Mr Lawrie said the reason why he had been unable to return to work after 31 January 2012 was because he could not cope with the pressure he was being put under by Air Liquide and the fact that the other employees all knew his personal information.

[61] During the period from 1 February to 10 February 2012 Mr Batterton said he had received intermittent text messages from Mr Lawrie advising him of his absences from work

[62] Mr Batterton said he had received a text message from Mr Lawrie on 3 February 2012 saying he was off sick, and would be back the following week, however on 7 February 2012 Mr Batterton had heard from Mr Lawrie to the effect that he was sick that day.

[63] Mr Batterton said that the information being provided by Mr Lawrie was confusing and made it difficult for him to understand what was happening, or to plan the workload around Mr Lawrie's absences. Additionally Mr Batterton said there had been no medical certificates provided by Mr Lawrie.

[64] After discussing the situation with Ms Brimble, Mr Batterton said that they had decided to arrange to meet with Mr Lawrie to discuss his situation and to see what support they could provide.

[65] Mr Batterton said he had sent a text message to Mr Lawrie and offered to meet him at a café near his home, to which Mr Lawrie had responded by saying he would be at work the following day. However Mr Lawrie had not attended for work the following day and Mr Batterton said he had consequently contacted him and they had arranged to meet on the morning of 10 February 2012.

Meeting held on 10 February 2012

[66] Mr Batterton said he and Ms Brimble had met with Mr Lawrie at a café near to his home on 10 February 2012. Ms Brimble said that Mr Batterton had said at the outset that the meeting was informal and no notes would be taken, but that he was concerned about Mr Lawrie's absences from work and the lack of communication from him. Ms Brimble said

both she and Mr Batterton had reassured Mr Lawrie that they wanted to know how they could help him.

[67] Mr Batterton said he had spoken in general terms to Mr Lawrie during the meeting about the effect his absences were having on the wider customer services team who had been covering Mr Lawrie's workload in addition to their own, and that this in turn had involved their working additional hours.

[68] Mr Lawrie having advised him that he was seeing a counsellor, Mr Batterton said he had again reminded him that EAP services at Air Liquide's expense were available to him.

[69] Mr Lawrie said it had been suggested during the meeting that he should look for temporary work with an agency so that he could work just three days a week, or consider taking three weeks unpaid sick leave, which Mr Lawrie said he had told Mr Batterton and Ms Brimble he could not afford to do.

[70] Mr Batterton said the suggestion that Mr Lawrie take three weeks off had been made to help his recovery, and also to assist him in planning the workload for the other employees, who had been working significant additional hours to cover Mr Lawrie's workload.

[71] Ms Brimble said that as the purpose of the meeting had been to explore options that might assist Mr Lawrie with his absence level, it had been her suggestion that Mr Lawrie might want to try some temping work to experience different working environments, especially given the older age profile of Air Liquide. However when Mr Lawrie had rejected this suggestion, she had told Mr Lawrie to forget about it

[72] Ms Brimble said she had asked Mr Lawrie if he felt Air Liquide was right for him, and whether there were any problems with the workplace, the people, or his role at Air Liquide, and Mr Lawrie had responded that he liked working at Air Liquide and there were no problems.

[73] Mr Batterton said he had told Mr Lawrie that he was concerned Air Liquide had not received any medical certificates, whereupon Mr Lawrie had handed him a medical certificate. The medical certificate, which was signed by Dr Sulochana Chand, was dated 31 January 2012, and explained that Mr Lawrie had been ill with depression and had required time off work in the period leading up to 31 January 2012.

[74] Mr Batterton explained that this medical certificate was the first time Air Liquide had been provided with any medical documentation that referred to the nature of Mr Lawrie's illness.

[75] Mr Lawrie said he had told Mr Batterton and Ms Brimble that he would like to return to work on Monday 13 February 2012 because he believed that he would be dismissed unless he did so. Following some discussion, Mr Lawrie said he had been informed that he could return on Monday provided his counsellor contacted Ms Brimble and confirmed he was fit to return to work.

[76] Mr Batterton and Ms Brimble denied that either of them had said anything during the meeting to suggest that Mr Lawrie would be dismissed unless he returned to work on Monday 13 February 2012. Mr Batterton said however that Mr Lawrie had repeatedly represented that he was fit to return to work throughout the meeting and also said he was fit to return to work that day, Friday 10 February 2012 although he (Mr Batterton) had said it was best if Mr Lawrie returned on the following Monday.

[77] Ms Brimble explained that Mr Lawrie had advised them during the meeting that his counsellor had told him that he should be working no more than two or three half days a week. Ms Brimble said that following this comment she had expressed her concern to Mr Lawrie that this conflicted with his representations that he would be fit to return to work on Monday 13 February 2012, and if this were the advice he was being given, he should not be returning on a full-time basis.

[78] Given these concerns, Ms Brimble said she had asked Mr Lawrie if she could speak to his counsellor in order that she could assist with his transition back to work and with his rehabilitation back into the workforce. Ms Brimble said Mr Lawrie had said that he would be comfortable with her doing this, so she had asked for his counsellor's contact details and Mr Lawrie had said he would speak to his counsellor that afternoon.

[79] Mr Batterton said towards the end of the meeting he had suggested to Mr Lawrie that he should consider whether or not he wanted to take three weeks off to recover, or whether he was fit to return to work on Monday 13 February 2012. In the event that Mr Lawrie decided that neither option was suitable, Mr Batterton said he needed to advise Air Liquide of his medical prognosis as to a date when he would be fit to return to work, and also requested a medical certificate to explain Mr Lawrie's absences to the date of his proposed return.

[80] Mr Batterton said Mr Lawrie had advised that he would be returning to work on 13 February 2012 and that he would obtain contact details from his counsellor.

[81] Ms Brimble said and she had left the meeting expecting Mr Lawrie to return to work on 13 February 2012 and that she would receive the counsellor's contact details from him.

Events post-10 February 2012

[82] Mr Batterton said Mr Lawrie did not return to work on Monday 13 February 2012, however he had received a text message from Mr Lawrie to say that he had been advised by his counsellor's manager that Ms Brimble could not be provided with any details unless a disclosure of information authorisation which had been signed by himself and Ms Brimble was provided.

[83] Mr Batterton said Mr Lawrie had asked if he could provide the disclosure of information authorisation when he returned to work the following day, however Mr Lawrie had never returned to work

[84] Ms Brimble said she and Mr Batterton had discussed Mr Lawrie's continued absence after the meeting on 10 February 2012 and that they were concerned that they had not received any medical recommendations on when Mr Lawrie might be able to return to work.

[85] On or about 16 February 2012 Ms Brimble said she and Mr Batterton had decided that they would try to arrange a formal meeting with Mr Lawrie to discuss his absences and to seek any medical recommendations from him. Ms Brimble said she and Mr Batterton had also decided that they should make Mr Lawrie aware that Air Liquide might at some stage need to consider the termination of his employment. Accordingly they had decided to invite Mr Lawrie to a formal meeting on 22 February 2012.

[86] Ms Brimble said that on 17 February 2012 she had conducted an assessment of the number of days Mr Lawrie had taken off work, although this had been difficult due to Mr Lawrie failing to put his leave applications on the Preceda website. However Ms Brimble said she had ascertained that Mr Lawrie had taken 54.5 days off work, and that 26.5 days were sick leave days, although Air Liquide had also allowed Mr Lawrie to use his annual leave for sick leave absences.

[87] Mr Batterton said he had written to Mr Lawrie on 17 February 2012 inviting him to attend a meeting on 22 February 2012 with a support person if he wished to do so, and advising:

Since commencing your employment with Air Liquide New Zealand (ALNZ) you have had 25 annual leave days (five of which were unpaid due to no available leave and some of which were used to cover sick leave) and 25.5 sick days. (18.5 of which have been unpaid due to no available paid leave) all of which has been used prior to you completing your first anniversary on the 23 February 2012.

In effect, you were absent for a total of 51.5 days out of a total of 241 available work days.

[88] Mr Batterton said he had couriered this letter to Mr Lawrie on 17 February 2012, however he had received no response until 21 February 2012 when Mr Lawrie had sent an email saying he would be unable to attend the meeting on the date proposed and he would revert to Mr Batterton with alternative dates and times for a meeting.

[89] Mr Lawrie said that on 17 February 2012 he had been to see a specialist doctor/counsellor who had advised him not to return to work because the way in which he was being treated by Air Liquide was making his condition worse.

[90] Following receipt of this advice Mr Batterton said he had been contacted on 24 February 2012 by Mr Dean Organ who stated that he was acting as Mr Lawrie's legal representative and he could attend a meeting on 29 February 2012. Mr Organ advised Mr Batterton that Mr Lawrie was unwell and unable to attend work. Acting on legal advice, Mr Batterton had sought clarification from Mr Organ as to whether Mr Lawrie would be attending this meeting.

[91] Mr Batterton said he received a text message from Mr Lawrie on 27 February 2012 advising he was unfit for work, and that texts conveying this information were received daily thereafter.

[92] On 28 February 2012 Mr Lawrie had still not attended for work and Mr Batterton said he had not received confirmation from Mr Organ or Mr Lawrie as to whether or not Mr Lawrie would be attending a meeting. However from 29 February 2012 Air Liquide had started to receive medical certificates stating that Mr Lawrie was absent from work for a period of two weeks, which was open to review. However there was no clear medical information provided by Mr Lawrie as to when or for how long he would continue to be absent.

[93] As the continuing absence of Mr Lawrie was creating difficulties for the other employees in the customer service team which had been compounded by Mr Lawrie's failure to provide clear medical information about his return to work, Mr Batterton said he had written to Mr Lawrie on 28 February 2012 setting out Air Liquide's concerns and requesting up to date medical information regarding when he would be fit to resume work full time.

[94] Mr Batterton said he had explained to Mr Lawrie in the letter that Air Liquide could not continue to hold his position open indefinitely and it might need to consider the termination of his employment if he did not provide clear information on how long his absence would continue. Mr Batterton said that Mr Brandon had both couriered and emailed this letter to Mr Organ.

[95] Mr Batterton said Air Liquide had received a response by email from Mr Organ the following day stating that Mr Lawrie was unable to attend meetings since he was unwell and on sick leave. Attached to the email was a medical certificate from Dr Brandon Nementzik which was dated 23 February 2012 and stated that Mr Lawrie had been seen by Dr Nementzik on 17 February 2012 and was unfit to attend work from 31 January 2012 to 1 March 2012. The medical certificate also stated that Mr Lawrie's fitness to attend work was *subject to review*.

[96] Mr Batterton said he had been concerned that the email from Mr Organ did not provide any substantive medical information in relation to Mr Lawrie's prognosis or return to work options. Accordingly he had written to Mr Lawrie by letter dated 29 February 2012 reiterating the request for medical information which could either be provided in written form or by Mr Organ attending a meeting as Mr Lawrie's representative.

[97] In response Mr Batterton said Mr Organ had sent an email attaching a letter dated 1 March 2012 and setting out an unjustifiable disadvantage claim on behalf of Mr Lawrie.

[98] Mr Batterton said he had responded by letter dated 1 March 2012 in which he had written that Air Liquide would like the opportunity to address the personal grievance concerns prior to making a decision to terminate his employment, and again requested medical information.

[99] On 2 March 2012 Mr Batterton said he had received an email from Mr Lawrie with a medical certificate attached. The medical certificate which had been signed by Dr Nementzik and dated 1 March 2012 said Mr Lawrie was unfit for work from that date until 16 March 2012, but again this was *subject to review*.

[100] Mr Brandon sent a letter on behalf of Air Liquide on 16 March 2012 which explained that unless Mr Lawrie was able to produce clear medical information as to how and when he would be able to resume working, Air Liquide might need to consider terminating his employment.

[101] Ms Brimble said that on 16 March 2012 she had carried out a further assessment of the number of days Mr Lawrie had taken as sick leave. Ms Brimble said she had been able to ascertain that at that stage Mr Lawrie had been absent for 458 hours or 57.27 days, although one of those might have been a planned annual leave day.

[102] On 19 March 2012 after discussing the situation with Ms Brimble, Mr Batterton said he had written to Mr Lawrie by letter dated that day. In the letter Mr Batterton acknowledged a text message from Mr Lawrie received that day saying he was still unfit to resume work and would provide a further medical certificate, and had written:

... We are uncertain as to when you will be returning to work.

As you will appreciate, it is becoming difficult for Air Liquide to continue to holding your position open. The pressure of the increased workload falls on the other staff in the customer services team and some employees are working increased hours to manage this workload. We have been unable to utilise temping staff to cover your workload because of the specialised nature of your role in customer services. As outlined in my previous correspondence to you, we are considering ending your employment. We would, however, like to give you the opportunity to provide us with any information relating to your medical situation which you believe is relevant to when you might be able to resume your normal duties.

Ideally, we seek information from your doctor which gives us a clear indication as to when you are likely to be fit to resume full duties, what return to work options are available, or what means of support we can provide to assist with your return to work.

[103] Mr Batterton said that on 21 March 2012 he had received an email from Mr Lawrie with a further medical certificate dated 20 March 2012 and signed by Dr Nementzik attached. The email stated that Mr Lawrie was unfit for work from 16 March until 2 April 2012; however this was *subject to review*.

[104] On 22 March 2012 Ms Brimble said an email from Mr Organ had been received by Air Liquide stating that if Mr Lawrie's employment was terminated, there would be an immediate application for reinstatement.

[105] On 22 and 23 March 2012 Ms Brimble said she and Mr Batterton had discussed the situation regarding Mr Lawrie and the effect his continued absence was having on the rest of the customer service team employees and the Air Liquide workload.

[106] Ms Brimble said that at that stage the calculations she had made showed that Mr Lawrie had been absent from work for 62.27 days or 61.27 days, however Air Liquide had no clear information on how long Mr Lawrie's absences would continue, or a rehabilitation plan with which they could work.

[107] Mr Batterton said following these discussions he had reached the decision to terminate Mr Lawrie's employment. Mr Batterton had written to Mr Lawrie by letter dated 24 March 2012 stating:

We have sought medical information from you as to when you could resume full duties, or what alternative return to work options where [sic] possible. We have not received any such information from you, which places us in a difficult position to continue holding your position open. We don't have any certainty as to when or how you can return to the workplace, and we are unable to hold your position open indefinitely, and without any clear timeframes to plan for your absence. Accordingly, it is with regret that we have decided to terminate your employment.

...

In accordance with the termination provision of your employment agreement we consider that you are unable to perform your duties for a period that is unreasonable, and we are giving you 2 weeks' notice of the termination of your employment. As we don't expect that you will be working during your notice period this notice is on an unpaid basis. In the event that you do become fit for work towards the end of your notice period, after 2 April 2012, please advise us as soon as possible and provide us with supporting medical information.

[108] Mr Batterton said he had not received any further communication from Mr Lawrie or any further medical documentation for the period 3 April until 6 April 2012, nor did Mr Lawrie return to work.

Determination

Was Mr Lawrie unjustifiably terminated from his employment with Air Liquide?

The Law

[109] The law is clear that an employer is not bound to hold a job open indefinitely in the case of an employee who is no longer able to perform the duties for which they were employed. In *Hoskin v Coastal Fish Supplies Ltd*¹ Judge Horn made the statement: “*There can come a point at which an employer ... can fairly cry halt*” which has been regularly cited since that time that. Similarly in *Canterbury Clerical Workers IUW v Andrews & Beaven Ltd*² Judge Castle stated:³

... it is well established law that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period ...

However such a decision must be justifiable.

[110] The test of justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- (1) *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test 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) *In applying the test in subsection (2), the Authority or the court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

¹ [1985] ACJ 124

² [1983] ACJ 875

³ *Ibid* at 877

- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
 - (a) minor; and*
 - (b) did not result in the employee being treated unfairly.*

[111] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Air Liquide must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[112] Mr Lawrie's lateness and absenteeism had commenced less than one month into his employment and had continued thereafter. At the time of the termination of his employment Mr Lawrie had been absent for approximately 62 working days during a period of employment of some 13 months.

[113] This significant level of absenteeism had created operational problems for Air Liquide, especially in circumstances in which, until the latter part of his employment, Mr Lawrie had not provided medical information in order for it to assess the duration of Mr Lawrie's absences and make arrangements accordingly.

[114] Mr Lawrie informed Mr Batterton that he was suffering from depression on 18 January 2012. An employer managing a situation in which an employee is suffering from medical incapacity is required to carry out a full and fair investigation into the employee's true medical position, encompassing their present state of health, future prognosis and the

expected length of time away from the workplace. The Employment Court in *Barry v Wilson Parking NZ*⁴ stated:

Finally, even if genuinely relying on the incapacity, the employer had to act with justice in a way that was fair to the employee. What this amounts to, speaking generally, is that the employer has to wait a reasonable time to give the injured employee an opportunity to recover (what is reasonable being a question of fact in each case) and after it has to inquire in a fair and open-minded way whether the employee has any realistic prospects of returning to work within a further reasonable time. This necessarily has to include seeking information from the injured employee, making it known at the time that the information may be used for the purposes of a decision to discontinue the employment relationship. This is to ensure that the employee understands the seriousness of the issue and will have a motive for ensuring that the information is as full and accurate as he or she can make it be. It would not be reasonable to expect so diligent a response to a mere casual inquiry after the employee's health. Sometimes an employer can safely act on information volunteered by the employee such as periodic medical certificates but, in general, will need to inquire from the employee in case there have been any recent developments, especially if the information held is stale. Once armed with all the necessary information, the employer has to consider whether (balancing fairness to the employee and the reasonable dictates of its practical business requirements) it is prepared to keep the employee's position open for the indicated period of time.

[115] I consider from all the information available that Air Liquide did not make any precipitous decision to terminate Mr Lawrie's position. On the contrary I find that Air Liquide made multiple requests for medical information to enable it to manage Mr Lawrie's absence, and to assist with his recovery, indeed these were requests which it was expected to make, in accordance with the expectations as set out in *Barry v Wilson Parking NZ*.

[116] However following the meeting on 10 February 2012 at which the initial request for information was received, Mr Lawrie did not provide anything other than the medical certificates from Dr Nementzik which were for periods of two weeks duration and were open-ended in nature. These were insufficient for Air Liquide to be able to plan for Mr Lawrie's absences, or to provide an idea of the realistic prospect of Mr Lawrie being able to return to work.

[117] Despite continued efforts by Air Liquide to engage with Mr Lawrie or Mr Organ to obtain information throughout March 2012 which would have assisted it in making a decision as to whether or not to continue to hold Mr Lawrie's position open, such information was not forthcoming.

⁴ [1998] 1 ERNZ 545 at 549

[118] I have considered whether Air Liquide could have utilised the ‘Medical Examinations and Tests’ provision in the Employment Agreement to obtain a medical prognosis. In this context I note that the section gives Air Liquide a discretionary right to ask the employee to see a registered medical practitioner and thereby obtain a medical report.

[119] In considering this issue I have examined that the interactions between Mr Batterton and Ms Brimble towards Mr Lawrie and have found that they are characterised by a supportive attitude. In all the meetings held with Mr Lawrie there are reminders to him of the availability of EAP counselling, to be provided at the Air Liquide’s expense, and requests for some medical information in order that Air Liquide can support him with his rehabilitation. This attitude is exemplified in the letter dated 19 March 2012 written towards the latter stage of Mr Lawrie’s employment, in which Mr Batterton had written: “... *or what means of support we can provide to assist with your return to work.*”

[120] Given this approach, I accept that Air Liquide preferred to obtain the medical information with the co-operation of Mr Lawrie rather than by utilising a contractual right which could have been invasive and possibly damaging to a mentally ill employee.

[121] Further, although Mr Lawrie said he would have cooperated with the requirement had Air Liquide chosen to exercise their discretionary right to have him examined by a medical practitioner, this assertion I find to be at odds with Mr Lawrie’s persistent non-cooperation when requested to provide Air Liquide access to medical information voluntarily.

[122] I note that it is not unusual in this type of situation for medical professionals to communicate with employers. Medical practitioners with the permission of the employee can, and do, provide information to employers without disclosing intrusive personal information which is helpful to an employer in managing an employee’s absence.

[123] At the Investigation Meeting Dr Nementzik acknowledged that the provision of medical information may assist an employer in dealing with Mr Lawrie’s depression. However Mr Lawrie persistently refused to cooperate with the requests by Air Liquide for such information.

[124] I find that Air Liquide followed a fair procedure before reaching the decision to terminate Mr Lawrie’s employment. There were repeated attempts to meet with Mr Lawrie, or in his absence with Mr Organ, and to obtain medical information to assist with the decision of whether or not it would be reasonable to continue to hold Mr Lawrie’s position open for a

continued period of time, however these meetings and the requested medical information did not eventuate.

[125] I have considered the effect of Mr Batterton informing the customer service team of the nature of Mr Lawrie's illness. I note that the issue was discussed between Mr Batterton and Mr Lawrie prior to the disclosure being made, and although I accept that Mr Lawrie's condition may have made him vulnerable to being pressurised, there is no suggestion either that Mr Batterton did pressurise Mr Lawrie or was anything other than supportive at the time the suggestion was discussed. There is also no evidence that Mr Lawrie indicated that he had any discomfort with the suggestion, either during the meeting or after the meeting when Mr Batterton consulted him before speaking to the customer services team .

[126] Similarly I have considered the effect of the meeting on 10 January 2012 and have found that to have been supportive in nature. The suggestion made by Mr Batterton that Mr Lawrie take three weeks absence I accept was made for two reasons: (i) to assist Mr Lawrie with recovery, and (ii) to enable Air Liquide to consider appointing a temporary employee to assist with the operational difficulties Mr Lawrie's continued absence had created.

[127] The suggestion by Ms Brimble that Mr Lawrie might consider doing some temporary employment I find to have been misguided but intended helpfully given Air Liquide's lack of understanding about what was causing Mr Lawrie's absenteeism, and the suggestion was swiftly withdrawn when Mr Lawrie rejected it.

[128] Whilst I consider that the suggestions of three weeks absence by Mr Batterton and of temporary work by Ms Brimble to have been unhelpful in the circumstances, they were not a planned prelude to dismissal and I consider that taken within the context of the overall meeting, as defects in the process they were minor and did not result in any unfairness in the treatment of Mr Lawrie by Air Liquide.

[129] I determine that the decision by Air Liquide to terminate Mr Lawrie's employment was a decision a fair and reasonable employer could have made in all the circumstances at the relevant time.

Was Mr Lawrie unjustifiably disadvantaged in his employment with Air Liquide?

[130] Mr Lawrie is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[131] The elements of s103 (1) (b) are:

- An action
- The action was unjustifiable
- The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

Was Mr Lawrie unjustifiably disadvantaged in his employment by bullying?

[132] Bullying is defined on the Ministry of Business Innovation and Employment Health and Safety website page as: "*offensive, intimidating, malicious or insulting behaviour, an abuse of power that undermines, humiliates or injures the recipient*".

[133] At all the meetings which Mr Betterton and Ms Brimble held with Mr Lawrie EAP support was offered as acknowledged by Mr Lawrie, it was made clear to him that Air Liquide would pay for such counselling support, and enquiries were made as to how Air Liquide could assist him with any problems he might have been experiencing, including whether or not there were problems in the workplace affecting him.

[134] As previously stated I have found that the meeting on 18 January 2012 was held at Mr Lawrie's request, and that there was no evidence that Mr Lawrie had been bullied into agreeing that the customer services team be informed of his illness. I also note that the decision to inform the customer services team was made with the intention of enlisting the support of those employees for Mr Lawrie.

[135] I do not find that these actions constitute bullying, but rather consider them the actions of a supportive employer.

[136] I determine that Mr Lawrie was not unjustifiably disadvantaged by bullying on the part of Air Liquide.

Was Mr Lawrie unjustifiably disadvantaged in his employment by the requirement to disclose confidential information?

[137] The evidence of Mr Batterton and Ms Brimble is that whilst they had enquired whether there had been anything in the workplace affecting Mr Lawrie's health, they had not asked him to disclose confidential information about his health.

[138] I find that at the meeting with Mr Batterton on 18 January 2012 which had been held at his request, Mr Lawrie had voluntarily revealed that he was suffering from depression.

[139] I further find that the request made by Ms Brimble on 10 February 2012 to be able to speak with Mr Lawrie's counsellor had been a request, not a requirement to disclose confidential information.

[140] The requests for medical information following the meeting on 10 February 2012 were those a fair employer would be expected to make in circumstances of medical incapacity as set out in *Barry v Wilson Parking NZ*.

[141] I determine that Mr Lawrie was not unjustifiably disadvantaged by the requirement to disclose confidential information.

Was Mr Lawrie unjustifiably disadvantaged in his employment by the disclosure of information to other employees?

[142] I have addressed this issue in paragraph [125].

[143] Mr Batterton said that the disclosure had been made with the intention of making the customer service team more sympathetic towards Mr Lawrie and his on-going absences, which had necessitated the team members working increased hours, and perhaps understandably becoming frustrated with the situation as a result.

[144] Mr Batterton further stated that the disclosure had had the desired effect in that the customer services team had reacted positively.

[145] I determine that Mr Lawrie was not unjustifiably disadvantaged by the disclosure of information to other employees.

Was Mr Lawrie unjustifiably disadvantaged in his employment by the initiation of a disciplinary process without basis?

[146] I do not find that Air Liquide initiated any disciplinary process with Mr Lawrie. The meetings held on 29 September and 25 November 2011 were formal in nature in that Ms Brimble took detailed notes, however they were not disciplinary meetings. Similarly the meeting on 10 February 2012 was stated to be an informal meeting.

[147] The letters from Mr Batterton proposing meetings on 22 February and 2 March 2012 inform Mr Lawrie that Air Liquide require medical information in order to make a decision on whether or not it can continue to hold his position open. I do not find that either of these letters indicate that the proposed meetings are to be disciplinary in nature.

[148] I determine that Mr Lawrie was not unjustifiably disadvantaged by the initiation of a disciplinary process without basis.

Was Mr Lawrie unjustifiably disadvantaged in his employment by an attempt to coerce him to resign?

[149] In examining the course of dealings between the parties I am unable to conclude that Air Liquide attempted to coerce Mr Lawrie to resign. On the contrary I find that Air Liquide made every attempt to assist and support Mr Lawrie with his illness and made every attempt to obtain medical information to assist it to do so.

[150] I find the suggestion by Ms Brimble that Mr Lawrie might like to try temporary employment, and that of Mr Batterton that Mr Lawrie take a three week period of absence, although misguided, were intended to be helpful rather than intended to coerce him to resign, and they had been not pursued immediately Mr Lawrie had made it clear he was happy to continue working at Air Liquide.

[151] I determine that Mr Lawrie was not unjustifiably disadvantaged by an attempt to coerce him to resign

Summary

[115] I determine that Air Liquide acted as a fair and reasonable employer could have acted in respect of Mr Lawrie's disadvantage claims and I determine that Mr Lawrie was not unjustifiably disadvantaged by Air Liquide.

Costs

[152] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority