IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 467
3327700

	BETWEEN	RICHARD LYONS Applicant
	AND	ROTORUA LAKES COUNCIL Respondent

Member of Authority:	Helen van Druten
Representatives:	Dave Cain, advocate for the Applicant Drisana Sheely, counsel for the Respondent
Investigation Meeting:	2 May 2025 at Rotorua
Submissions received:	2 May 2025 from the Applicant 2 May 2025 from the Respondent
Determination:	1 August 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Richard Lyons says that he was unjustifiably dismissed from his position as recreation planner at Rotorua Lakes Council (RLC) on 23 January 2024.

[2] RLC says that Mr Lyons was dismissed after he had failed to attend work regularly and without timely communication for almost three months. They had lost trust and confidence in the employment relationship and he was dismissed for serious misconduct.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mr Lyons, Mr Pitkethley as Mr Lyons' manager and Ms Sally Rison, HR Business

Partner. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

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

The issues

[5] The issues requiring investigation and determination were:

a. Was Mr Lyons unjustifiably dismissed by RLC?
b. If RLC's actions were not justified (in relation to dismissal), what remedies should be awarded, considering:
    i. Lost wages under ss 123(1)(b) and 128 of the Employment Relations Act 2000 (the Act); and
    ii. Compensation for hurt and humiliation under s 123(1)(c)(i) of the Act.
c. If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr Lyons that contributed to the situation giving rise to his grievances?
d. Should either party contribute to the costs of representation of the other party?

Background

[6] RLC provides council services to residents across Rotorua and the surrounding areas. According to RLC, it is one of the largest employers in Rotorua. Mr Lyons was employed as a recreation planner within the operations team. His role had responsibility for developing strategies and partnering with multiple entities to deliver places to play for recreation and sporting development. The position was based at the Civic Centre in Rotorua.

[7] Mr Lyons commenced employment with RLC on 17 August 2023. He reported to the Active and Engaged Communities Manager, Mr Rob Pitkethley and was provided with a written employment agreement and a role description.

[8] Mr Lyons was employed on a full time 40 hours per week basis, working Monday to Friday from 8 am to 5 pm. Mr Pitkethley did allow some flexibility with work start and end times, provided that this did not impact on the team or the services they provided.

[9] In evidence, Mr Lyons said that he had chosen the role with RLC as he had worked in this kind of role before. In hindsight, he admits that it was not the right role for him and did not have the flexibility that he needed. Mr Lyons lived in Tauranga so each day he commuted approximately an hour to Rotorua. With his living situation at the time, this created logistical family difficulties. Even though it was not discussed at interview, Mr Lyons accepted the job expecting to be able to work two days each week from home. When that was not an option given to him, he described himself as "stretched thin" delivering full time hours in Rotorua.

[10] Mr Lyons also had existing health issues that sometimes impacted his ability to work and he described himself as "vague" and "cloudy" at times. He was seeking medical support and said that this failed him and he was not getting what he needed to enable him to adequately manage these issues. Mr Lyons said RLC were accommodating and offered internal and external support but agreed he was not able to deliver the work hours that he had agreed to deliver when he accepted employment.

[11] From the outset, RLC expressed concerns about both the frequency of Mr Lyons' absences and his lack of timely communication when he was absent. Between 17 August 2023 (Mr Lyons' employment start date) and 5 November 2023, Mr Lyons was absent for 9 days (excluding one day taken as annual leave in lieu of sick leave) then fully absent from 6 November 2023 through to 23 January 2024 (Mr Lyons' employment end date). Mr Lyons was therefore absent for over 50 percent of his scheduled workdays in the five months of his employment.

[12] RLC also provided a timeline of at least 24 scheduled workdays over that period where Mr Lyons had either communicated his absence after his start time or not communicated his absence at all. There was regular and appropriate follow up and communication by Mr Pitkethley, either by email or text message throughout Mr Lyons' employment. These emails and texts were all provided and timestamped to evidence Mr Lyons' lack of effective and timely communication about his absences.

Medical certificates

[13] On 23 November 2023, Mr Lyons emailed Mr Pitkethley a medical certificate for an absence of 11 days from 6 November 2023 to 18 December 2023 and advised he would be in the next day. Mr Pitkethley queried the inconsistency and requested a corrected medical certificate six times over the following few days and was repeatedly sent the same medical certificate by Mr Lyons.

[14] On 5 December 2023, Mr Lyons provided an unsigned medical certificate for an absence of 30 days for the same time period but still with an error in the calculation of days. Mr Pitkethley again pointed this out and on 7 December 2023 Mr Lyons sent a medical certificate for 63 days absence from 6 November 2023 to 8 January 2023.

[15] On 10 December 2023, RLC received an email from Mr Lyons' doctor confirming that "the likely timeframe for recovery at this point is unknown…" and that a gradual return to work would likely be required. No timeframe for a return to full duties was provided or indicated by the doctor.

[16] Mr Lyons did not return to work on 9 January 2024 and emailed RLC that he would send another medical certificate. No certificate was received by RLC after several texts about absences so on 15 January 2024, Mr Pitkethley sent a text message requesting the medical certificate. He received this from Mr Lyons on 16 January 2024 advising that he would be fit to resume work on 23 January 2024.

Letters and emails

[17] RLC's first formal communication raising its concerns was on 21 November 2023 when Mr Pitkethley emailed Mr Lyons a letter inviting him to a meeting on 23 November 2023 to discuss concerns about his absences. The purpose of the meeting was outlined in the letter to:

a. "Discuss the concerns…and give you an opportunity to respond to them;
b. Reiterate clear expectations…for you to meet the requirements of your contract;
c. Discuss the initiation of an Attendance Improvement Plan if required;
d. Discuss the…Code of Conduct Policy; and

e. Discuss any support … going forward."

[18] The letter confirmed that the meeting was not intended to be a disciplinary meeting and a support person was welcome. Mr Lyons did not attend. A similar letter sent on 28 November 2023 with a further attempt to meet on 29 November 2023 was also unsuccessful.

[19] The next letter was sent on 1 December 2023 for a meeting on 5 December 2023. The purpose of the meeting was again unchanged though it added a summary of Mr Lyons' absences to date and emphasised it was "extremely important that we meet with you". Mr Lyons was encouraged to bring along any relevant medical certificates. The letter also emphasised that the matter was serious and a "potential outcome of the process may be termination of employment". Mr Lyons attended the meeting.

[20] On 6 December 2023, RLC sent a letter to Mr Lyons summarising the meeting, outlining RLC's expectations and outlining a return-to-work plan. This plan included weekly meetings with Mr Pitkethley and asked Mr Lyons to send through suggested hours of work to accommodate more flexibility for his 40 hours worked per week. If approved, these would be recorded in a contract variation. The following day, Mr Lyons provided a medical certificate to 8 January 2024.

[21] Between 9 and 16 January 2024 Mr Lyons did not attend work and replied with one text in reply to Mr Pitkethley's texts. A medical certificate was received on 16 January 2024.

[22] The fourth letter was emailed to Mr Lyons on 17 January 2024 for a meeting on 23 January 2024. Mr Lyons had emailed in reply on 22 January 2024 and confirmed he would be returning to work the next day. Both the email and the letter of 17 January 2024 sent to Mr Lyons gave him the option to reschedule the meeting to a more suitable time if he wished and that Mr Pitkethley could come to Tauranga to meet closer to Mr Lyons' home if travel was an issue for him.

[23] The 17 January 2024 letter was titled an "investigative/disciplinary meeting" and its purpose was "to discuss allegations concerning misconduct and serious misconduct". The letter listed six occasions where Mr Lyons had allegedly failed to

attend and/or contact RLC as required to advise of his absence. It also alleged a breach of the code of conduct, specifically:

a. failure to follow standard procedures;
b. absence from duty…without authority;
c. unacceptable levels of absenteeism;
d. failing to report by telephone…; and
e. lost trust and confidence in the employment relationship.

[24] Underlined in the 17 January 2024 letter was notification that "if you fail to attend this scheduled meeting the outcome of this process may be termination of your employment with Rotorua Lakes Council".

[25] Mr Lyons did not attend the 23 January 2024 meeting and emailed Mr Pitkethley just after the meeting had started advising that he would not attend but planned to be at work the next day.

[26] RLC held the meeting in Mr Lyons' absence and later that same day advised him by email and letter of his summary dismissal. The letter outlined the details of his termination of employment and upheld all the allegations outlined in the written invitation to the meeting.

[27] A personal grievance was sent to RLC on 4 April 2024.

Relevant Policy and Employment Agreement wording

[28] Clause 33.3 of Mr Lyons' employment agreement related specifically to misconduct. It provided that:

> In the event of misconduct or where the employee's performance is unsatisfactory, the employers aim will be to help the employee…should this not be achieved…one months' notice of termination of employment. Where serious misconduct occurs, with due process being applied, the employer may terminate employment immediately and without notice.

[29] The RLC code of conduct was provided with the initial employment documentation, signed by Mr Lyons and also sent to him again on 6 December 2023. This code was referenced in the terms of his employment agreement and sets out standards of behaviour and obligations of all employees. Within this document, "failure to follow standard procedures" and "unacceptable levels of absenteeism or poor

timekeeping" are listed as examples of misconduct. The process for addressing these is outlined as a progressive warning system with a verbal warning, written warning and then dismissal on the "Third Offence".

[30] Comparatively, serious misconduct within the code is defined as "conduct which seriously damages the credibility or integrity of RDC or the employment relationship".[1] The list is not exhaustive but includes actions relating to safety, drugs, alcohol and theft as key themes within the list. There is a catch-all of "such other serious misconduct as the Council considers warrants dismissal".

Relevant Law

[31] It is not disputed that Mr Lyons was dismissed from his employment. The issue is whether that dismissal was justified.

[32] The statutory test of justification is set out in s 103A of the Act. Whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering 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 occurred.

[33] In determining this, the Authority must consider whether the employer:

a. Sufficiently investigated the allegations against the employee;
b. Raised the concerns with the employee;
c. Gave the employee a reasonable opportunity to respond; and
d. Genuinely considered any explanation given by the employee.[2]

[34] The Authority may also consider any other factors it thinks appropriate.[3]

[1] In this context, RDC refers to Rotorua Lakes District Council.
[2] Employment Relations Act, s 103A(3).
[3] Employment Relations Act, s 103A(4).

Analysis and Findings

Prior to 17 January 2024

[35] Until the 17 January 2024 letter, RLC undertook a robust process to address its concerns about Mr Lyons's absences. Multiple texts were sent to Mr Lyons which showed genuine attempts to communicate with him, care for his wellbeing and an aim to get him back to work. Clear expectations were set and RLC was active and communicative with Mr Lyons.

[36] The letters from RLC were also clear and included all relevant information for Mr Lyons to understand the purpose of the meeting, a summary of the meeting was provided and multiple postponements gave Mr Lyons every opportunity to attend and provide feedback to address RLC's concerns.

Decision of 23 January 2024

[37] While RLC took appropriate steps prior to 17 January 2024, s103A of the Act requires consideration of what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes the letter sent on 17 January 2024 and subsequent decision to dismiss Mr Lyon in his absence.

[38] The facts leading to the meeting on 23 January 2024 are not disputed. The parties agreed that Mr Lyons had failed to meet the obligations imposed on him by the employment agreement which he had agreed to undertake. He was absent over 50 percent of his total scheduled workdays by 23 January 2024. It is also not disputed that RLC made multiple attempts to address Mr Lyons' conduct with him both informally and formally. On those facts, there were unequivocally grounds for the employer to consider this as misconduct and I agree with counsel for RLC who submitted that a fair and reasonable employer could reasonably conclude (*prima facie*) that the applicant's conduct amounted to repeated misconduct.

[39] While there may be a range of responses open to an employer in response to Mr Lyons' actions, the Authority must consider whether the decision made by RLC and how it was done was that of a fair and reasonable employer in all the circumstances. No persuasive evidence was presented to suggest that the process itself undertaken by RLC

resulted in Mr Lyons being treated unfairly or that the deficiencies were more than minor. Considerations of evidence included:

a. RLC outlined the allegations clearly in writing to Mr Lyons and kept excellent records of all communications with him so they were able to review this information prior to any decision. RLC evidenced this in the decision letter to Mr Lyons where it summarised the considerations of each allegation and relevant information.
b. Mr Lyons was very aware of the concerns about his absenteeism and he knew the employer's expectations about reporting absences;
c. RLC provided Mr Lyons multiple ways to respond to those allegations, including giving him the option to hold the 23 January 2024 meeting in Tauranga or reschedule it to a time that suited Mr Lyons;
d. Throughout the process, Mr Lyons was given an opportunity to have support people attend his meetings with him;
e. Mr Lyons had a reasonable opportunity to respond before he was dismissed. He told Mr Pitkethley he would be at work on the 23 January 2024 the day prior and had given no indication he may be too unwell to attend the meeting;
f. the letter sent on 17 January 2024 was titled both an investigative and a disciplinary meeting. As Mr Cain rightly points out, these are different types of meetings and each has its purpose and potential outcome. This was misleading and unhelpful but as the letter underlined and emphasised that Mr Lyons' employment may be terminated, this error did not result in Mr Lyons being treated unfairly.[4]

[40] Substantively, however, the decision to dismiss without notice raised concerns. Firstly, the purpose of the meeting as outlined in the letter was to seek Mr Lyons' response to allegations of misconduct and serious misconduct. Of the five alleged breaches listed in the letter, four of these are directly extracted from the code of conduct document as examples of misconduct, not serious misconduct:

a. Failure to follow standard procedures;
b. Absence from duty…without authority;

[4] Employment Relations Act, s 103A(5).

c. Unacceptable levels of absenteeism;
d. Failing to report by telephone to your supervisor

[41] Despite the alleged breaches being listed as misconduct under the code of conduct, RLC decided to summarily dismiss Mr Lyons for serious misconduct based on a breach of trust and confidence. Not all serious misconduct results in dismissal. The court set out a two-step approach in *Emmanuel v Waikato District Health Board*, where the first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.[5]

Were Mr Lyons' actions capable of amounting to serious misconduct?

[42] On the basis that the code of conduct outlines a defined and progressive warning process for addressing misconduct "offences", I can only conclude that there was something else that caused RLC to determine that Mr Lyon's actions were more than misconduct. Particularly for a document that is designed to guide behaviour in the workplace, it would be disingenuous of RLC to list examples of misconduct and outline a supportive and stepped process to address these actions, then to ignore that process without any other exacerbating factors to warrant disregard of those processes.

[43] RLC had a clear process in place for managing misconduct and the code of conduct had been referred to word-for-word listing the alleged breaches in the letter of 17 January 2024. The actions of Mr Lyons were listed as examples of misconduct and his actions did not align with other types of serious misconduct given as examples by RLC in its code of conduct. There was no event that would support putting aside that process, taking different action for Mr Lyons and a finding that his actions amounted to serious misconduct.

[44] An employer cannot ignore its own progressive processes and then collate repeated misconduct into serious misconduct warranting summary dismissal. As a fair and reasonable employer, RLC had a duty to address the misconduct and follow its own progressive warning system it communicated to its employees. There were no warnings given prior to Mr Lyons' dismissal and a finding of serious misconduct warranting

[5] *Emmanuel v Waikato District Health Board* [2019] NZEmpC at [59] and reaffirmed in *Waitoa v Chief Executive of the Ministry of Social Development* [2021] NZEmpC 113.

summary dismissal was disproportionate to the absences and failure to communicate at that time and in those circumstances.

[45] The size of RLC as an organisation must also be considered.[6] RLC is a large, well-resourced organisation with the benefit of human resources support.

[46] While I am mindful that the Authority is not to impose a 'right' decision on the employer as that is not the test, there were other outcomes available to RLC from the meeting and a large employer would reasonably know to canvas these options. RLC had earlier received information from Mr Lyons' doctor that Mr Lyons was not well and there was no definitive date for a return to full duties. Any no-fault termination on the basis of medical incapacity was never explored. Similarly, a warning would have given Mr Lyons formal notice that his ongoing absences and lack of communication was not sustainable and not accepted. Thirdly, based on his doctor's email, I am unsure that Mr Lyons was well enough to process that his employment was at real risk. RLC's obligation to consider all relevant circumstances known to the employer at the time of dismissal and possible alternatives to dismissal, was not met.

[47] I find that the actions of Mr Lyons as alleged were not capable of amounting to serious misconduct. The decision by RLC to summarily dismiss Mr Lyons on 23 January 2024 on the grounds of serious misconduct was out of proportion to the allegations made and did not follow the documented RLC process. Applying the Act's s 103A(2) test of justification to the facts as found, a fair and reasonable employer could not have dismissed Mr Lyons as RLC has done in all the circumstances therefore this amounted to an unjustified dismissal.

Remedies

[48] Having found Mr Lyons was unjustifiably dismissed, he is entitled to an assessment of remedies under the Act. In respect of his grievance, Mr Lyons sought compensation for humiliation, loss of dignity, and injury to his feelings and reimbursement of lost wages.

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[6] *E tu Inc v Singh* [2024] NZEmpC 84.

[49] The ability to award remedies is set out in s 123 of the Act and provides that the Authority may, in settling the grievance, provide for either, or both, remedies sought by Mr Lyons. As Chief Dallas recently noted, the word *may* when setting out s 123(1) of the Act is deliberate.[7] There is no automatic right to either remedy despite a grievance being established.

Compensation under s 123 of the Act

[50] Section 124 of the Act requires any contributing behaviour by the employee to be considered, including "the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance".

[51] I accepted Mr Lyons evidence that he did the best he could getting to work when he could. He had personal and work challenges at the time and prioritised his health. There is no criticism of that priority. However, Mr Lyons had also agreed with his employer that he would deliver 40 hours per week of his expertise as a recreation planner. When it became evident that he was unable to do that, he owed an obligation to actively and constructively communicate this to his employer to maintain a productive employment relationship. As a direct result of his failure to do so, RCL spent considerable resources including Mr Pitkethley's many unnecessary hours following up if Mr Lyons was attending work and reorganising the team at a busy time of year to cope with Mr Lyon's absence.

[52] One of the distinguishing features of Mr Lyons's situation was his failure to provide any level of certainty for RLC. Despite Mr Pitkethley's best efforts as evidenced in the many texts provided to the Authority, he regularly did not know if Mr Lyons would be working that day. As detailed in [12] above, most of Mr Lyons' texts were sent after his start time or only in response to texts from Mr Pitkethley and most of his medical certificates were short term and inaccurate. He knew the expectations of his employer to advise of absences and chose not to follow those clear and reasonable instructions. That was Mr Lyons' decision and it was entirely within Mr Lyons' control to communicate as Mr Pitkethley required.

[7] *Stewart v Open Country Dairy Limited & Ors* [2025] 330 at 80.

[53] Despite his illness and other commitments, Mr Lyons had the opportunity to maintain a productive employment relationship. RLC had provided external mental health support and agreed on a return-to-work plan to accommodate Mr Lyons needs where practicable. In verbal evidence, Mr Lyons said that he knew "working at RLC was not working and [he] needed a break". Instead, he chose not to respond to attempts to contact him on a scheduled workday, failed to advise he was not attending the meeting on 23 January 2024, failed to suggest an alternative time and location, did not follow clear procedures to report his absences, did not provide medical certificates when requested and was absent without authority for large portions of time.

[54] On the basis that the actions of the employee entirely contributed to the situation giving rise to the grievance, no monetary award for compensation is made.

Claim for lost wages

[55] As also outlined in *Stewart,*[8] the mandatory language in s 128 of the Act must be properly contrasted with the discretionary language contained in s 123 of the Act.

[56] Applying this to Mr Lyons, his actions met the definitions of misconduct within the code of conduct. However, by making a decision to terminate Mr Lyons without notice, he was deprived of the opportunity to improve, however unlikely given his mental health at the time. The available process in the code of conduct was a progressive warning process. If that process resulted in termination of employment, it would have been termination with notice.

[57] Mr Lyons is awarded four weeks' pay at his ordinary hourly rate.

[58] I do not consider any reduction for contribution is appropriate.

Filing fee

[59] As Mr Lyons has been successful with his grievance claim, it is appropriate that he is reimbursed $71.55 in respect of the Authority filing fee.

Orders

[60] Rotorua Lakes Council is ordered, within 28 days of this determination, to make payment to Mr Lyons, being:

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[8] Above n 7, at [83].

a. Lost wages under s 123(1)(b) and 128 of the Act of $7,500.
b. Reimbursement of the Authority filing fee of $71.55.

Costs

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[62] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Lyons may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, RLC then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[63] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[9]

Helen van Druten
Member of the Employment Relations Authority

[9] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.