

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 149
5382945

BETWEEN MADHUKAR SHYAM
 NARAYAN
 Applicant

AND TELECOM NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: No appearance for Applicant
 Emma Butcher and Shannon Kelly, for Respondent

Investigation Meeting: 9 January 2013

Submissions received: 24 January 2013 in writing from Applicant
 9 January 2013, orally and in writing from Respondent

Date of Determination 1 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Narayan was dismissed from his employment as a broadband help desk specialist on 14 March 2012. He had been employed since May 2010. He claims he was unfairly dismissed by his employer, Telecom New Zealand Limited (Telecom).

[2] He also claims Telecom failed to provide a safe and healthy work environment for him by not preventing personal comments being made to him and not safeguarding him from violent attack. Additionally, Mr Narayan says he was discriminated against by his employer due to his national origin, in that his employer treated his Fijian medical certificate differently from its treatment of New Zealand medical certificates.

[3] Other elements of Mr Narayan's claim are that Telecom bullied and harassed him in the way it handled the matter of the medical certificate, and it disclosed his personal information to third parties without his consent.

[4] Mr Narayan also says he was disadvantaged by Telecom withdrawing an offer of promotion he had received prior to the commencement of the disciplinary proceedings that led to his dismissal. As a result of Telecom's actions, Mr Narayan claims to have been humiliated and embarrassed. He seeks reimbursement of lost wages and compensation for hurt and humiliation.

[5] Telecom says it was justified in terminating Mr Narayan's employment for serious misconduct after it had completed a full and fair disciplinary investigation. As a result of Mr Narayan's conduct, its trust and confidence in him had been irreparably damaged. It denies withdrawing a promotion or transfer to a different role within its business and says that matter was put on hold while issues concerning the medical certificate were investigated and resolved. Telecom says this did not disadvantage Mr Narayan in his employment.

[6] Telecom says it provided Mr Narayan with a safe and healthy work environment and denies he was "attacked violently" by its representatives. It denies Mr Narayan's allegations of bullying, harassment and discrimination, and of having hurt or humiliated him by its actions. Telecom says it advised Mr Narayan steps would be taken to verify his medical certificate and he did not object to that.

Non-attendance by Applicant

[7] Following a telephone conference held by Authority Member Fitzgibbon with the parties on 19 September 2012, a Notice of Investigation Meeting was issued for 7 February 2013, continuing to 8 February 2013 if required. The Notice informed the parties an earlier date may be offered if spaces became available in the period between the end of November 2012 and early February 2013.

[8] The Authority emailed the parties on 20 November 2012 for the purpose of arranging a further telephone conference, suggesting 2 p.m. on 23 November 2012. This followed email contact between the parties and the Authority over setting an earlier date for the investigation meeting.

[9] Mr Narayan responded that the date proposed for the telephone conference was not suitable, and he was *not in the position to pressure my employer to get time off on such short notice*. The Authority emailed the parties directing that the telephone conference would take place on Friday 23 November 2012 at 2 p.m. to discuss rescheduling the investigation meeting. The email conveyed the Member's view that it would take 15 to 20 minutes at most for both parties to put their views to her. The reason given for wishing to reschedule was that a key witness for Telecom was due to give birth around the currently scheduled date. It was noted that a different Member would conduct the investigation meeting if an earlier date was set. If either party did not participate in the telephone conference, Member Fitzgibbon would make a decision on the matter based on the information she had available to her.

[10] Mr Narayan provided a 3 ½ page response to the Authority's email, suggesting *abuse of power and biasness* on the part of the Authority for *demanding a conference call at the request of Telecom wanting an earlier investigation date and knowing their reasons and my unavailability and reasons for same*. Mr Narayan said the Member had basically *given (him) the ultimatum to either risk (his) current employment, or risk losing (his) application*. He said he was unable to tell his employer he would be absent from work, when his employer had told him all leave for December and January had already been processed and he could not be excused from work on short notice even if it was for a few hours.

[11] Emma Butcher, Telecom's legal representative, clarified that it was Telecom's representative in the matter, Shannon Kelly, who was due to give birth around the time of the currently scheduled investigation meeting and, while Ms Kelly was prepared to give evidence if required, it was not Telecom's current intention that she do so. The respondent would be disadvantaged if Ms Kelly were not able to attend the investigation meeting because of her extensive involvement throughout the matter.

[12] The Authority left voice mail messages on the cell phones of both Mr Narayan and his legal representative, Ashika Bali, at the scheduled time of the telephone conference, confirming the Authority's expectation of their participation, and giving them 10 minutes to call back for that purpose. Further calls were made to Mr Narayan and Ms Bali at 2.10 p.m. to confirm the conference call would proceed without them.

The telephone conference commenced at 2.15 p.m. resulting in an Amended Notice of Investigation Meeting for 9 and 10 January 2013.

[13] Following receipt from Ms Bali of a notice to contest the decision to amend the date of the investigation meeting, and some further correspondence between the Authority and the parties, I advised the parties on 17 December 2012 that, if Mr Narayan provided affidavit evidence by 4 p.m. on 20 December 2012 of having been refused leave by his current employer for 9 and 10 January 2012, I would be amenable to changing the date of the investigation meeting to one mutually agreed by the parties. In that event I proposed to convene an urgent telephone conference on 21 December 2012 for the purpose of agreeing an alternative date.

[14] Ms Bali responded by notifying Mr Narayan's intention to lodge a complaint over the change of date of the investigation meeting. However, as no affidavit evidence was received from Mr Narayan about his inability to obtain leave, the parties were notified that the investigation meeting would proceed on 9 and 10 January 2013.

[15] Before commencing the investigation meeting on 9 January 2013 the Authority attempted to contact both Mr Narayan and Ms Bali, leaving messages on their mobile phones. The investigation meeting commenced at 10.15 a.m. by which time no responses to those messages had been received.

[16] While the investigation meeting was in progress Ms Bali responded to the Authority's voicemail message to confirm Mr Narayan would not be attending. She advised she had informed the Authority's Auckland office of that by email on Monday 24 December 2012. Her email had not been opened due to the absence on leave of the officer to whom the email was addressed, both at the time the email was sent, and at the date of the investigation meeting.

Evidence

[17] On 2 November 2012 Mr Narayan had provided a thirteen page, signed but not sworn, written witness statement. I have considered that statement in my consideration of this matter. As Mr Narayan did not attend the investigation meeting his statement was unable to be tested and this affects the reliance I can place on those parts of his evidence that are in dispute. Mr Narayan had the opportunity of providing a written response to the written submissions made by Telecom at the

conclusion of the investigation meeting and did so through his legal representative. I have considered the submissions made by Ms Bali on Mr Narayan's behalf.

[18] Three witnesses gave evidence for Telecom: Ricky Henry, Tania Breen and Richard Fuli. The Authority received a large bundle of documents agreed by the parties, which I have read and considered.

The employment relationship leading up to dismissal

[19] Mr Narayan had applied for annual leave over the 2011 Christmas period. There was some disagreement between the parties over the length of leave he requested, but it was common ground he had applied for leave to 31 December 2011, returning to work on 3 January 2012. That application was declined and he was subsequently approved leave from 6 to 24 December 2011 inclusive. He was required back at work on 27 December 2011.

[20] On the morning of 27 December 2011, Mr Narayan emailed his employer to advise he was sick (*I seem to have caught a bad virus*) and would not be able to make it to work that day *or tomorrow from the looks of things*. On 29 December 2011, Mr Narayan emailed his employer at 7.45 a.m. to advise he was *still sick as, not getting better. Will get a second opinion, Doc may have misdiagnosed*.

[21] He also noted it might be Tuesday (i.e. 3 January 2012) before he could resume work and he would inform his employer if things changed, which he thought to be highly unlikely at that point. The team leader on duty emailed Mr Narayan asking if he could come in to drop off his medical certificate that day (29 December 2011) or the next day. The duty team leader offered, if he was too unwell, to send a courier out to pick up his medical certificate. Mr Narayan who, apparently unknown to the team leader, was in Fiji at the time did not respond to that email.

[22] Mr Narayan presented for work on 3 January 2012 but did not actually commence work until the following day due to a roster matter. He told Mr Henry, who was then a Customer Care Manager for Telecom, that he had left his medical certificate in his hotel in Fiji. Mr Henry asked him to retrieve it, or get a copy, and he agreed to do so. Mr Narayan handed the medical certificate to his team leader, James Betton, on 17 January 2012. The certificate covered the period from 29 to 31 December 2011, and indicated Mr Narayan should be fit to resume duty on 1 January 2012. It did not cover his absence from work on 27 or 28 December 2011.

[23] Mr Henry saw the medical certificate when he returned from leave at the end of January 2012. He told the Authority he thought it looked odd as he could not see the name of the medical practice that had issued it or the stamp, or details, of the issuing doctor. This was information he was used to seeing on New Zealand medical certificates.

[24] Mr Henry also said he noticed the medical certificate had *Hospital/Dispensary* written on it. He asked Mr Narayan about the certificate and noted how it differed from those he was used to seeing. According to Mr Henry, Mr Narayan did not respond to that but looked *a bit confused*.

[25] Mr Henry also talked to Ms Breen, who was then a human resources consultant with Telecom, about the medical certificate. They decided Ms Breen would make some general inquiries in Fiji about the usual format for medical certificates. Mr Henry said that, if the response from the hospitals had been that Mr Narayan's medical certificate accorded with standard practice for such documents in Fiji, he would have had no further concerns about it.

[26] The two hospitals Ms Breen contacted in Fiji had different practices over the medical certificates they issued. Their responses left some questions over Mr Narayan's medical certificate unanswered so Mr Henry sought further information from him.

[27] He met Mr Narayan for that purpose on 31 January 2012, with Mr Betton also present at Mr Narayan's request. Mr Henry told Mr Narayan of his concerns about the medical certificate and asked for the name of the hospital he had attended, the name of the doctor who attended him, and contact details. He said this was to confirm the authenticity of the medical certificate. Mr Narayan provided those details the next day by email, giving the name of the hospital as the Colonial War Memorial Hospital in Suva and the name of the attending doctor as Dr Krishna Narayan.

[28] Before supplying that information to Mr Henry on 1 February 2012, Mr Narayan emailed Mr Henry about his concerns arising from the meeting of 31 January 2012. He had not been aware there was an investigation in place questioning his integrity and honesty and this came as an unpleasant surprise to him. He objected to the implications of Mr Henry's actions which he thought would have an impact on his reputation and character, both within Telecom and in Fiji. He was

concerned about his privacy being compromised by personal information being shared with the hospitals in Fiji which Ms Breen had contacted.

[29] Shortly after receiving this email, Mr Henry approached Mr Narayan at his desk and asked him to accompany him to a meeting room. The accounts of Mr Henry and Mr Narayan about the tone and content of that meeting differ. Mr Henry says it was a two minute meeting in which he informed Mr Narayan he would be happy to meet with him to discuss his concerns and Mr Narayan should book a time for a meeting if he wished to follow up on that. According to Mr Narayan, Mr Henry's behaviour in the meeting was bullying, angry, and threatening.

[30] When Mr Henry had not received a meeting request from Mr Narayan by 8 February 2012, he responded by email to the concerns raised by Mr Narayan. He assured Mr Narayan that none of his personal details had been disclosed in Ms Breen's general inquiries. He noted that Mr Narayan had not taken issue at the meeting on 31 January 2012 with his (Mr Henry's) request for specific details of the doctor and hospital he had attended, and had supplied those details the following day. Mr Henry advised he had asked Ms Breen to follow up on that information and she was currently doing so.

[31] Ms Breen's investigation of the medical certificate revealed that, while the hospital had a record of a medical certificate with the same unique reference number on it, that certificate had been issued in 2010 by a different doctor to a patient who was not Mr Narayan. Filomena Browne, the senior manager at the Colonial War Memorial Hospital with whom Ms Breen was liaising, advised that she intended to follow up this matter with Dr Narayan when he returned from leave on 7 February 2012. The hospital subsequently informed Ms Breen that the medical certificate Mr Narayan had provided to his employer appeared to be false.

[32] In light of this, Mr Henry sent a written invitation to a disciplinary meeting to Mr Narayan on 10 February 2012. The letter set out the background to the matter, included the employer's investigations to date, enclosed the email correspondence between the Colonial War Memorial Hospital and Ms Breen, and set out a number of Telecom's concerns. Those were that:

- (a) Mr Narayan may have dishonestly provided the company with a false medical certificate;

- (b) If his medical certificate was false, the company was concerned that he may not have been sick and unable to attend work between 27 and 31 December 2011, despite his emails to the contrary; and
- (c) Because Mr Narayan had advised Mr Henry on 7 January 2012 that he did not have a return flight booked when he left New Zealand to travel to Fiji, Telecom was concerned he had not intended to return to New Zealand to commence work on 27 December 2011. The company was concerned he may have done this even though he was aware his employer had agreed to give him three weeks' annual leave, not the four weeks he had requested.

[33] Mr Henry's letter referred to the company's Code of Ethics, reminding Mr Narayan that under that code he was required to conduct himself in a way that demonstrated his honesty was beyond question and required him to deal fairly and honestly with Telecom people. He noted that the meeting could result in disciplinary action being taken against Mr Narayan, and summary dismissal was a possibility. The letter strongly encouraged Mr Narayan to bring a support person or legal representative with him to the meeting, and encouraged him to avail himself of the free confidential EAP counselling provided by Telecom to its employees.

[34] The disciplinary meeting took place on 14 February 2012 and was attended by Mr Narayan, Ms Bali, Mr Henry, Ms Breen (who took notes), Hannah Sullivan, an employment lawyer with Telecom, and Mr Betton. Ms Sullivan attended following Ms Bali's suggestion that, due to the seriousness of the allegation around the medical certificate, someone with a legal background be present.

[35] Mr Narayan was invited to respond to the concerns that had been identified by the company in relation to the medical certificate, the genuineness of his illness, and his intentions regarding a return to New Zealand to commence work on 27 December 2011. Mr Narayan had prepared a written response to the allegations by way of a letter dated 14 February 2012 from which he read during the meeting.

[36] He disputed that he had applied for four weeks' leave and said he had only applied for three weeks. He said he was only required to get a medical certificate from 29 December to 31 December 2011 and he had complied with his employer's request to provide a medical certificate for that period. He expressed his concerns about his employer telephoning hospitals in Fiji and quoting the Medical Certificate reference number to *unauthorized people*. Mr Narayan also referred to his meeting of

1 February 2012 with Mr Henry, in which he said Mr Henry seemed *really angry and violent and was waving his hands in my face*.

[37] He denied that he may have acted dishonestly in providing his employer with a false medical certificate and said there was no evidence to suggest he had done so. He queried the credentials of the senior manager within the Colonial War Memorial Hospital upon whose information Mr Henry was relying. He expressed his strong view that Dr Narayan, as the author of the document, was the proper person to confirm the authenticity of the medical certificate. Mr Narayan queried whether Mr Henry had been conducting the investigation honestly and in good faith.

[38] In response to his employer's second concern that, if the medical certificate was false, Mr Narayan may not have been sick and unable to attend work between 27 and 31 December 2011, his response was to deny this and state that he was only required to give a medical certificate from 29 to 31 December 2011.

[39] With regard to the third allegation, Mr Narayan said he had a Fiji passport and there was no immigration requirement for him to book a return ticket. Whether he had booked a return ticket or not was irrelevant to his inability to return to work on 27 December 2011. He confirmed his intention had been to turn up at the airport on the day he intended to travel back to New Zealand with the hope of obtaining a seat.

[40] Ms Breen's notes of the meeting record that Ms Sullivan asked Mr Narayan about the timing of his first visit to the doctor, and the name of the medical practitioner he had consulted. Mr Narayan refused to answer any questions on this topic and said he was entitled to keep that information private. Ms Sullivan reminded Mr Narayan about the duty of good faith and what that meant for both parties. She reminded him of their mutual obligation to be active and responsive in their communication with each other. For the company's part, the purpose of the meeting was to explain its concerns to Mr Narayan and to give him an opportunity to respond to them. For Mr Narayan's part, that meant providing a response to their questions.

[41] Ms Sullivan noted that if Mr Narayan chose to withhold information the company considered relevant, it may not be helpful to him and Mr Henry would have to make decisions without the benefit of that information.

[42] At Ms Bali's request, Telecom agreed to email Mr Narayan with the documentation it would find helpful in corroborating his responses. It also undertook

to provide Mr Narayan with any new information that came to light that could be considered as part of its investigation.

[43] On 15 February 2012, Ms Breen emailed Mr Narayan and Ms Bali a list of documents it considered would be very helpful. These were:

- *Shyam's E ticket or other form of time stamped and/or dated travel documents;*
- *Any registration documentation from the War Memorial Hospital from Shyam's appointment on 29 December 2011;*
- *Any receipts in relation to Shyam's medical care during his stay in Fiji;*
- *Any documentation relating to Shyam's first visit to a doctor during his stay in Fiji; and*
- *Any other useful documentation.*

[44] Mr Narayan was asked to provide that further information by 5pm on Thursday, 16 February 2012. He did not do so. In his unsworn witness statement he said he was given no time to attend to the request as he was on call for the period up to the deadline. He noted some of the documents asked for by Ms Breen could only be obtained if he went to Fiji and he did not see how he could provide them in the timeframe. There is no indication in his statement, and no evidence supplied by Mr Narayan, that he advised Ms Breen of his difficulties or asked for additional time to provide the documents.

[45] On 16 February 2012 Ms Bali notified Telecom of Mr Narayan's intention to raise a personal grievance over the manner in which the investigation was being conducted and Telecom's treatment of him. The same day Mr Narayan sent an email to Mr Henry, Ms Breen and Ms Sullivan that he copied to the then Chief Executive of Telecom and various other managers of the company. The email conveyed Mr Narayan's comments on the disciplinary meeting of 14 February 2012, raised queries about Telecom's actions and set out 18 *personal grievances* against his employer including not being provided with a safe and healthy working environment, invasion of privacy, abuse of power, harassment, bullying, not being open minded when conducting the investigation, violent behaviour, and making false and unsubstantiated allegations against him. The subject line of the email was *TELECOM'S APPROACH – GUILTY UNTIL PROVEN INNOCENT*.

[46] In light of serious allegations made by Mr Narayan against Mr Henry, Telecom decided Mr Henry would step back from the investigation. The management of the process and the decision-making function would be taken over by Mr Henry's manager, Richard Fuli. Mr Fuli had joined Telecom just one week earlier. He was fresh to the matter and to the people involved.

[47] Mr Fuli contacted Mr Narayan to advise him of this change and to inform him that Telecom's senior employment and HR counsel would review his grievances and respond as soon as possible. He offered to meet with Mr Narayan and his lawyer the following week to discuss Telecom's allegations, Mr Narayan's responses to date, and any additional responses Mr Narayan wished to provide. If he did not wish to meet, Mr Narayan could provide any further responses in writing. Mr Fuli invited Mr Narayan to contact him directly if he had any questions.

[48] Mr Narayan confirmed he did not wish to participate in any further meetings. He said he was *severely stressed*, and had been prescribed strong medication but did not wish to take stress leave at that time. He felt humiliated and embarrassed at work over the promotion he had been refused and requested a response to his grievance letter by the end of the following day, 21 February 2012. Mr Narayan said he understood that, as well as responding to his grievances, Telecom would deliver its decision on his Medical Certificate issue, with its reasons.

[49] Ms Kelly, Telecom's Senior Employment and HR Counsel, wrote to Mr Narayan on 21 February 2012, responding to the personal grievances he had raised. Her letter noted the employer's right to make enquiries into concerns or allegations regarding an employee. It traversed the actions of Telecom to date in the investigation process which it viewed as fair and reasonable.

[50] Ms Kelly asked Mr Narayan to clarify and particularise some matters where the company had insufficient information to respond. She noted his transfer to another part of Telecom had been put on hold until the investigation was completed, and that he had been advised of this. The company viewed this as reasonable in the circumstances. Ms Kelly concluded by reminding Mr Narayan of the confidential EAP counselling and support Telecom provided to employees and providing details of how he could contact the service to arrange an appointment.

[51] It seems Mr Narayan did not provide Ms Kelly with the information she had sought. Mr Fuli referred in evidence to the steps he had taken to investigate the concerns Mr Narayan had raised about Mr Henry's alleged conduct towards him. Mr Henry had denied all the allegations and had requested information about specific instances of the purported conduct. Mr Fuli sought that information from Mr Narayan, but did not receive it and was therefore unable to complete his investigation.

[52] Mr Fuli met Mr Narayan briefly on 21 February 2012 to give him a written invitation to a disciplinary meeting to discuss a further serious issue that had been brought to Telecom's attention. This concerned information Mr Narayan had provided Telecom about his visit to Dr Narayan at the Colonial War Memorial Hospital in Suva on 29 December 2011.

[53] Ms Browne, the Hospital Manager, had informed Telecom that Dr Narayan had not been at work during the day of 29 December 2011, although he had been on call from 10pm that night. The hospital had no record of Mr Narayan attending the hospital that day or night. Ms Browne had confirmed all patients who attended the hospital were registered in the hospital's Patient Information System. Additionally, all patients needed a hospital card: if they did not have one, the hospital would create one for them. Ms Browne had checked the records and there was no record of Mr Narayan attending it on 29 December 2011. Ms Browne's email concluded that Mr Narayan had not been seen in the hospital on that date.

[54] Mr Fuli quoted from (and attached to his letter) the correspondence from Ms Browne. He asked Mr Narayan to advise him what time he met with Dr Narayan on 29 December 2011. Mr Fuli also noted in his letter to Mr Narayan that:

Given Ms Browne's comments, the company is concerned that contrary to your repeated statements to the company's representatives... you did not visit Dr Narayan at the Colonial War Memorial Hospital on 29 December as the CWHM's records do not support this. Shyam, I am concerned that you may have been dishonest with the company's representatives about this.

[55] Mr Fuli advised Mr Narayan that if Telecom's allegations were upheld his conduct may amount to breaches of the company's Code of Ethics and of Mr Narayan's employment agreement. Copies of those documents were attached to Mr Fuli's letter. Mr Fuli noted the possibility of dismissal as a disciplinary outcome and again offered EAP services. He said he would like to meet Mr Narayan to discuss the

employer's concerns and hear Mr Narayan's responses, but if Mr Narayan did not wish to meet, he could provide a written response by a specified time and date. Mr Fuli's letter ended by encouraging Mr Narayan to contact him directly if he had any questions.

[56] Mr Narayan did not wish to meet but provided a response in writing on 23 February 2012. The response reiterated his assertion that he had visited the Colonial War Memorial Hospital in Suva on 29 December 2011. He did not provide information about the time of his visit as requested by Mr Fuli. Mr Narayan asserted Dr Narayan had been on shift on that date and that he had approached the doctor directly at the hospital because he wanted to be seen urgently. He queried Telecom's ability to comment on hospital procedure at the hospital and noted that any failure in administration was an internal matter for the hospital.

[57] He said his lawyer was currently dealing with the Ministry of Health in Fiji over the matter and reiterated he had raised personal grievances against his employer. Mr Narayan's letter concluded by asking Mr Fuli to *deliver his decision based on the materials before him*.

[58] Mr Fuli said he reviewed all the material before him and reflected on Mr Narayan's and Ms Bali's responses before communicating with Mr Narayan on 6 March 2012. Mr Fuli's letter traversed the evidence from the company's investigation and Mr Narayan's responses, and lack of responses, to the issues and direct questions raised by Telecom. He noted his preliminary views on the 3 allegations that had been put to Mr Narayan.

[59] On the first allegation, his view was that the medical certificate was not genuine; that Mr Narayan did not attend the hospital on 29 December 2011; that he was dishonest with Telecom's representatives when he repeatedly advised them he had attended the hospital on that date; and that, on balance, it was more likely than not that he dishonestly provided the company with a false medical certificate. Mr Fuli noted that Mr Narayan had been asked to tell his employer what time of day he visited the hospital but had not responded to that request. He also noted advice from the hospital that Dr Narayan had since resigned from his employment at the hospital.

[60] Mr Fuli's preliminary view of the second allegation was that he was not satisfied illness had prevented Mr Narayan's attendance at work between 27 and 31

December 2011. In forming that view he had taken into account that Mr Narayan had been asked verbally and in writing to provide information and documentation relating to the doctor's visit he claimed to have made earlier in his illness. He had failed or refused to do so. Mr Fuli invited Mr Narayan one last time to provide that information before he formed his final view on that matter.

[61] On the third allegation, Mr Fuli advised he had formed the preliminary view Mr Narayan did not intend to return to New Zealand to commence work on 27 December 2011. He noted Telecom representatives had requested information and documentation from Mr Narayan about the date he had booked his return flight from Fiji to New Zealand and Mr Narayan had not provided this. Mr Fuli's preliminary view was that Mr Narayan had not provided the information because it might not support his version of events. He invited Mr Narayan to provide Telecom with the information before he made a final decision on that allegation.

[62] Mr Fuli informed Mr Narayan that, on the basis of the preliminary views he had formed on the allegations, Mr Narayan's conduct amounted to a breach of his contractual obligations to display personal and professional integrity and to comply with all Telecom policies. Under Telecom's Code of Ethics, Mr Narayan was required to conduct himself in a way that demonstrated his honesty was beyond question, and to deal fairly and honestly with Telecom people. Mr Fuli's preliminary view was that Telecom's trust and confidence in Mr Narayan as an employee had been irreparably damaged by his conduct and that it was likely Mr Narayan would be dismissed summarily for serious misconduct.

[63] Mr Fuli invited Mr Narayan to meet him on Friday 9 March 2012 to discuss his preliminary views and to hear any final responses, submissions or mitigating circumstances Mr Narayan wished him to consider. Mr Fuli would then reach a final decision on the allegations and the disciplinary outcome. He strongly encouraged Mr Narayan to bring a support person or legal representative to the meeting. If he was unable to attend, Mr Narayan was invited to provide written responses.

[64] Ms Bali responded on 6 March 2012 that she did not see any of Mr Narayan's responses to the allegations reflected in Mr Fuli's preliminary decision. She was busy at present and suggested the meeting be rescheduled to the end of the following week or to the week after that. After some further correspondence between the parties

Mr Fuli agreed to defer the meeting, and/or deadline for Mr Narayan's written responses, to Tuesday 13 March 2012.

[65] Mr Narayan's written responses of 13 March 2011 restated he had not been dishonest with his employer by providing it with a false medical certificate; and asserted Telecom had not been able to establish the medical certificate was not genuine. The hospital had confirmed Dr Narayan had signed the certificate and he (Mr Narayan) could not comment on whether it had been issued in accordance with the hospital's procedures. It was not up to *someone doing desk work at the hospital* to confirm a medical certificate issued by a registered medical practitioner.

[66] Mr Narayan suggested the evidence before Telecom supported his view in relation to the first allegation. He questioned Telecom's timing in making decisions when, he claimed, the hospital had not completed its investigations into the authenticity of the medical certificate, and Ms Bali was liaising with the Ministry of Health in Fiji over the matter. He did not respond to the request for information about the timing of his visit to the hospital.

[67] Regarding the second allegation, Mr Narayan simply referred back to his answer to the first allegation. He did not respond to Mr Fuli's request to provide any information or documentation about the doctor's visit he claimed to have made earlier in his illness.

[68] Mr Narayan denied the third allegation that he had not intended to return to New Zealand to commence work on 27 December 2011. In doing so he again denied he had sought 4 weeks' annual leave, although this had not been mentioned in Mr Fuli's letter. He provided with *much reluctance* his one way ticket to Fiji which showed he had booked his ticket on 26 November 2011 for a flight to Suva on 5 December 2011. Mr Narayan's letter concluded by asking Mr Fuli to *(p)lease provide me with your decision at your earliest due to the seriousness of the matter (in your own words)*.

[69] Mr Fuli says he considered Mr Narayan's response overnight. Before he made his decision the following day he received an email from Mr Narayan informing him he had stopped coming in to work because of Mr Fuli's *likely decision* to dismiss him summarily. He asked Mr Fuli to make a decision quickly and to deliver it to him by 5 p.m. that day.

[70] Mr Fuli telephoned Mr Narayan to inform him he had made a final decision and asked if Mr Narayan was comfortable with the decision being communicated by telephone, in view of his request for a decision that day. Mr Narayan confirmed that he was, and Mr Fuli advised he had decided to dismiss him summarily for serious misconduct. He verbally outlined the reasons, with an offer to put them in writing, which was accepted by Mr Narayan. That letter was sent to Mr Narayan on 28 March 2012.

[71] Mr Fuli's letter noted the information he had considered and balanced in reaching his final decision. This included Mr Narayan's explanations and responses; his discomfort at providing some information requested by his employer; the information obtained from the Colonial War Memorial Hospital; and Mr Narayan's choice not to provide information and/or documentation that could corroborate his version of events.

[72] Mr Fuli also noted that in reaching his decision he had taken into account the submissions and comments made by Mr Narayan at the meeting of 14 February 2012, and those made verbally to Mr Fuli regarding possible disciplinary action and mitigating factors. He had considered Mr Narayan's length of service and his comments about the promotion he had been offered before this matter arose.

[73] However, having reached the view that Mr Narayan's actions constituted a breach of his contractual obligations and the company's Code of Ethics and amounted to serious misconduct, Mr Fuli said the trust and confidence Telecom had in Mr Narayan was irreparably damaged. Because of that he had decided upon summary dismissal as the appropriate disciplinary outcome.

Issues

[74] I understand Mr Narayan's main concerns to be his dismissal and the disadvantage arising from the withdrawal (as he saw it) of the promotion he had been orally offered. His other claims form elements of the background to those major issues, or remedies in respect of them. One of those claims concerns the disclosure of Mr Narayan's personal information to a third party or parties. As this is a matter for consideration under the Privacy Act 1993, I have no jurisdiction to investigate it. The issues for the Authority to determine are:

- a. whether Mr Narayan was unjustifiably disadvantaged in his employment by Telecom's withholding of a promotion;
- b. whether Mr Narayan was unjustifiably dismissed; and
- c. whether Telecom, in the process it followed:
 - i. failed to provide a safe and healthy work environment for Mr Narayan;
 - ii. discriminated against him on the basis of his national origin; and
 - iii. bullied and harassed him.

The law

[75] Whether Telecom was justified in putting Mr Narayan's promotion on hold, and in subsequently dismissing him, must be determined on an objective basis by considering whether its actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.¹

[76] In reaching a decision I am required to consider, and have considered, the following factors specified in section 103A(3)(a) to (d) of the Employment Relations Act 2000:

- (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*
- (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*

¹ Section 103A Employment Relations Act 2000

- (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.*

[77] The Authority is constrained from determining a dismissal or an action to be unjustifiable 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.

[78] It is not the role of the Authority to substitute its assessment for that of the employer, but to determine whether a fair and reasonable employer could, in all the circumstances, have withheld Mr Narayan's promotion and subsequently dismissed him on 14 March 2012.

Discussion and findings

Was Mr Narayan disadvantaged in his employment by the withholding of a promotion?

[79] Mr Narayan says he was verbally offered a position with CTS² in January 2012. He became aware in February that some colleagues who had also successfully applied for positions with CTS already had their contracts and had been briefed on the training for the position. Mr Narayan made enquiries and was informed on 10 February 2012 by the Customer Care Manager for CTS that he had decided to put the offer on hold until the medical certificate issue had been sorted out. The manager told him he had decided this after speaking with Mr Henry, who was the releasing manager. He emphasised it was his own decision and not one Mr Henry had asked him to make.

[80] Mr Narayan says he had not been advised there was a disciplinary investigation into his medical certificate at that stage. However, it is clear to me that Mr Narayan was aware from his meeting with Mr Henry on 31 January 2012, and from Mr Henry's email of 8 February 2012, responding to Mr Narayan's concerns, that his medical certificate was the subject of an ongoing investigation.

² A part of Telecom

[81] I find Telecom acted reasonably in putting Mr Narayan's move to the new position on hold until that matter had been resolved. The move was, by Mr Narayan's account, due to take effect on 13 February 2012. Mr Narayan had a disciplinary meeting on 14 February 2012 and, if his employer had been satisfied with his explanations and responses, it is likely he would have been able to start in his new role without delay after that meeting. I agree with Telecom's submission that it would not have made sense for Mr Narayan to start in a new position, involving further training by the employer, while he was undergoing a disciplinary process.

[82] It follows that any disadvantage Mr Narayan suffered from Telecom's action in putting his promotion on hold was justifiable.

Was Mr Narayan unjustifiably dismissed?

[83] On the evidence before me I am satisfied Telecom conducted a fair and reasonable investigation before dismissing Mr Narayan. The investigation spanned several weeks, beginning when Mr Henry noticed something different about the medical certificate Mr Narayan had produced more than 2 weeks after it had first been requested by his employer. It was appropriate for him to make enquiries into the document and to inform Mr Narayan of his concerns. It was unfortunate that Mr Narayan appeared early in the process to take exception to his employer's actions rather than to co-operate fully in order to allay those concerns.

[84] When Mr Narayan was informed of the general and preliminary enquiries that had been carried out by Telecom's HR Consultant he went on the offensive, berating Mr Henry for the impact those inquiries would have on his reputation in Fiji and in Telecom and accusing him of snooping behind his back.

[85] After the manager of the hospital he had attended in Fiji informed his employer of problems with the medical certificate Mr Narayan had provided, he queried that person's credentials. In the investigation meeting of 14 February 2012 he refused to give information or documents that could have assisted his cause. He persisted with that approach after being advised of his obligation to be open and communicative by the Telecom lawyer who was present at the meeting at his own lawyer's suggestion.

[86] He was given a list of documents by his employer that it considered would be helpful to corroborate his version of events, but he refused to supply them and made it

clear he did not wish to attend further meetings with his employer. Mr Narayan's written responses to the concerns raised initially by Mr Henry, and later by Mr Fuli, focussed more on the failures he perceived in his employer's evidence than on providing information which could dispel his employer's concerns.

[87] Mr Narayan was fully and fairly informed of the allegations against him and given the opportunity to respond throughout the process. I am satisfied his responses were fully considered before any decisions were taken. After Mr Narayan had raised concerns over Mr Henry's handling of the investigation, Telecom properly escalated the management of the process and the decision-making function to Mr Henry's manager. Mr Fuli was new to the organisation and he brought both objectivity and the ability to consider the matter afresh with no prior knowledge of the key players.

[88] Ms Bali submitted Telecom did not prove its allegation that Mr Narayan may have dishonestly provided the company with a false medical certificate. She referred to the investigation of that matter being incomplete and to Ms Browne, who provided Telecom with information about the medical certificate as being *a person unidentifiable and considered unreliable by the Applicant*.

[89] I do not agree with those submissions. Telecom was not required to prove Mr Narayan dishonestly supplied his employer with a false medical certificate. It was required to conduct a reasonable investigation and it did so. The Court of Appeal in *Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Limited*³ stated that:

..the employer is not required to continue investigations indefinitely, only to carry out enquiries to a reasonable extent in all the circumstances of the case.

[90] I am satisfied from Ms Breen's evidence that she took sufficient steps to ensure she was in contact with the appropriate person from the Colonial War Memorial Hospital to provide information about Mr Narayan's medical certificate. Ms Breen pursued those enquiries as far as she could with the hospital, which was Dr Narayan's employer. Telecom was unable to contact Dr Narayan personally as he was on leave, and then resigned suddenly from the hospital while it was investigating Mr Narayan's medical certificate. While the investigation may have been curtailed, it

³ [1990] 3 NZLR, 549

had yielded sufficient grounds for Mr Fuli, as decision maker, reasonably to believe Mr Narayan had knowingly submitted a false medical certificate.

[91] Ms Bali also submitted Telecom had provided no evidence of its conclusion that Mr Narayan had not intended to return to New Zealand to commence work on 27 December 2011. Again I do not agree with her submission. Mr Fuli had reasonably concluded Mr Narayan's medical certificate was not genuine. Because of that he was not satisfied that Mr Narayan was unable to attend work on 27 December 2011 because of illness. Mr Narayan had originally sought leave over the New Year period with a return to work on 3 January 2012. He had gone to Fiji on a one-way ticket and had not booked a return flight to New Zealand before 27 December 2011, which was the day he was due back at work. He refused to supply details or documentation which could corroborate his claim to have been ill and sought medical advice earlier than 27 December 2011, or to show when he booked his return flight to Auckland. I find it reasonable for Mr Fuli to have concluded that Mr Narayan had not intended to return to work on that day.

[92] Mr Fuli's conclusions about Mr Narayan's actions are matters impacting on the trust and confidence necessary to sustain an effective employment relationship. I find his categorisation of Mr Narayan's conduct as serious misconduct to be a fair one. This leads to the question of whether dismissal was a reasonable disciplinary action in all the circumstances of the case.

[93] The Full Employment Court in *Angus & McKean v Ports of Auckland*⁴ provided guidance as follows:

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified. So, to use the present tense of "would" and "could", it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.

[94] Telecom could, after considering Mr Narayan's employment history and any other mitigating factors, have decided upon disciplinary action that fell short of dismissal. These may have been a final written warning or possibly withholding the internal promotion he had been offered. However, the relevant question for the

⁴ [2011] NZEmpC 160, at paragraph 23

Authority to determine is not whether Telecom could have chosen another fair and reasonable outcome, but whether dismissal was one of the fair and reasonable outcomes available to it.

[95] I accept Mr Fuli, as the decision maker, considered Mr Narayan's actions to have irreparably destroyed the employer's trust and confidence in him and I find it was open to Telecom to dismiss Mr Narayan for serious misconduct based on the evidence before me.

Did Telecom fail to provide a safe and healthy work environment for Mr Narayan?

[96] Mr Narayan's Statement of Problem claims Telecom failed to provide him a safe and healthy working environment *by failing to prevent personal comments being made to me and by failing to ensure I wasn't attacked violently*. In his witness statement he refers to a meeting with Mr Henry on 1 February 2012 during which he claims Mr Henry *appeared really angry with me*. He also referred to Mr Henry *waving his hands violently at my face* while repeatedly asking him "*what's your problem*".

[97] Mr Narayan also said in his witness statement that, following that meeting, Mr Henry approached him at his desk and said "*this time you'd better have your girlfriend or partner present*".

[98] Mr Henry denied any violence or aggression on his part in that encounter with Mr Narayan. He said there was no hand waving and it was a short conversation that came to a natural ending within minutes. The meeting had taken place in a room with clear glass walls visible to a number of employees. Mr Henry said he had returned to Mr Narayan's desk shortly afterwards as he had forgotten to mention 2 matters in the meeting. He denied making the comments alleged by Mr Narayan above.

[99] Ms Bali made no submissions on this matter. In the absence of compelling evidence to the contrary, I have no reason to doubt Mr Henry, who presented as a calm and reasonable witness. On the basis of the evidence before me I find no substance to Mr Narayan's claim to have been subjected to personal comments and violent attacks.

Did Telecom discriminate against Mr Narayan on the basis of his national origin?

[100] Mr Narayan's claim relates to the treatment Telecom gave to his medical certificate. In his Statement of Problem he claims Telecom *adopted a different approach when dealing with my matter, given I had obtained the Med Cert from Fiji, to that in New Zealand.* In his witness statement he queried Telecom's request on 29 December 2011 that he drop off his medical certificate or, alternatively that Telecom could send a courier to pick it up. Mr Narayan said this was not normal Telecom procedure and he couldn't imagine the company asking another employee to drop off a medical certificate on the day the employee was sick.

[101] The Team Leader who had made the request of Mr Narayan did not give evidence. However, Mr Henry told me he had discussed the matter with the Team Leader and they had agreed on the request. At the time, Mr Henry did not know that Mr Narayan was in Fiji. He and the Team Leader knew Mr Narayan lived close by and thought it reasonable that either Mr Narayan drop in the medical certificate or Telecom would have a courier uplift it. Mr Henry said it was not an uncommon practice in Telecom.

[102] Ms Breen confirmed it was quite common in call centres, especially when they were short staffed or during busy periods, to send a courier to pick up an employee's medical certificate. I also asked Ms Breen whether it was common for Telecom to query an employee's medical certificate. She informed me it was company policy to require medical certificates and they were not normally questioned. However, they were usually on letterhead and had the stamp of the issuer unlike Mr Narayan's medical certificate.

[103] Ms Bali made no specific submissions on this matter. I find, on the evidence before me, there is no basis for Mr Narayan's claim that Telecom's treatment of his medical certificate constituted discrimination against him.

Was Mr Narayan bullied and harassed by Telecom?

[104] Mr Narayan bases this claim on the manner in which Telecom handled the investigation and disciplinary process. He says he was repeatedly warned that he would be dismissed for serious misconduct, and was constantly asked to meet strict deadlines for responses. He was not given time off work to do this. He also claims to have felt bullied by repeated questioning in the investigation meeting of 14 February

2012, which he attended with his legal representative and his Team Leader as a support person.

[105] I find no basis for Mr Narayan's claim. Once Telecom had commenced a disciplinary investigation it was appropriate for it to alert Mr Narayan to possible outcomes. That may have been unwelcome information for him, but it was not bullying behaviour on the part of the employer.

[106] None of the deadlines requested by the employer were unreasonable, and there is no evidence that Mr Narayan was refused extensions when he sought them. There is evidence Mr Fuli encouraged him to take time off if he needed to, and evidence that Mr Narayan took advantage of this. An employer is entitled to put questions to an employee in the course of an investigation and Mr Narayan was both supported and legally represented at the 14 February 2012 meeting of which he complains.

Summary of findings

[107] Mr Narayan was not unjustifiably disadvantaged in his employment by the withholding of a promotion. His employer reasonably put the promotion on hold pending the outcome of its disciplinary investigation.

[108] Telecom did not unjustifiably dismiss Mr Narayan. It dismissed him following a fair and reasonable process in which he had the opportunity to respond to the allegations against him and to have those responses considered before the decision to dismiss was made. His service with Telecom and other mitigating factors were fairly considered before the disciplinary outcome was decided. Dismissal was one of the disciplinary outcomes fairly and reasonably available to Telecom in all the circumstances.

[109] In the process of investigating the matter that led to Mr Narayan's dismissal, Telecom did not fail to provide him with a safe and healthy working environment; did not discriminate against him on the basis of his national origin; and did not bully or harass him.

Determination

[110] Mr Narayan was justifiably dismissed and his personal grievance fails.

Costs

[111] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority