

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA20/09
5104294

BETWEEN TONY KONELIO OPETAIA
 Applicant

AND TRANS OTWAY LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Mary Baily Gibson, Counsel for Applicant
 Mark Beech and Amy Scott, Counsel for Respondent

Investigation Meeting: 12 August 2008

Submissions received: 10 October 2008 from Applicant
 6 November 2008 and 5 January 2009 from Respondent

Determination: 24 February 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tony Opeteia was employed from early October 2005 as a Storeman/Freezer Hand by Trans Otway Limited (Trans Otway) in Marlborough. Trans Otway is involved in the transportation of refrigerated freight.

[2] On 14 November 2005 Mr Opeteia was appointed by Trans Otway to the position of A.M. Nightshift supervisor. Mr Opeteia duly received and signed a job description for his new position on 14 November 2005.

[3] A new Branch Manager was appointed at Trans Otway, William Smith, from 30 October 2006. Mr Opeteia did not undertake his A.M. Nightshift Supervisor role again after a meeting with Mr Smith and the South Island Manager of Trans Otway, Kerry Brett, on 21 November 2006. Mr Opeteia did, after three days when he was stood down, undertake some daytime driving work for Trans Otway. He then

resigned from his position by letter dated 17 December 2006 with his resignation effective from 29 December 2006.

[4] Mr Opetaiia says that he was unjustifiably dismissed from his position and that he was disadvantaged in his employment when he was unjustifiably stood down and then demoted following the meeting on 21 November 2006. Mr Opetaiia also says he was not paid for sick leave and three of his accrued days in lieu were deducted when he had not requested or taken them as leave.

[5] Trans Otway does not accept that there was any unjustified action on its part that caused Mr Opetaiia disadvantage, or that he was dismissed, actually or constructively. It does not accept that Mr Opetaiia is due any money for leave entitlements. Trans Otway say that Mr Opetaiia's problem was lodged on the basis of an actual dismissal claim and there was no constructive dismissal claim except in final submissions from Ms Baily Gibson Ms Scott, in final submissions, asked for an opportunity if the Authority was to consider the matter on the basis of a constructive dismissal, to make further submissions and the Authority agreed to that request. Further submissions were duly provided on behalf of the respondent.

[6] Although not in its statement in reply, Trans Otway says that Mr Opetaiia received an overpayment in his final pay and wants the Authority to make an order in terms of this. Ms Baily Gibson submits that the issue of reimbursement of any overpayment should be the subject of a separate claim.

The issues

- Was Mr Opetaiia dismissed at the meeting on 21 November 2006 and/or did he agree to a new position?
- If Mr Opetaiia was dismissed from his employment on 21 November 2006, then was that dismissal unjustified?
- If Mr Opetaiia was not dismissed at the meeting on 21 November 2006, then did he agree to undertake a new position driving during the day for Trans Otway?
- Were there actions on the part of Trans Otway in standing Mr Opetaiia down and demoting him from his position that were unjustified and did they disadvantage Mr Opetaiia?

- Did Trans Otway breach express or implied terms of its employment agreement with Mr Opetaiia that caused him to resign in circumstances that amount to an unjustified constructive dismissal?
- If Mr Opetaiia was unjustifiably constructively dismissed or there were unjustified actions that caused him disadvantage then what remedies is he entitled to and are there issues of contribution?
- Is Mr Opetaiia owed \$248 for unpaid sick leave on 27 and 28 November 2006?
- Were three accrued days in lieu three days incorrectly removed from Mr Opetaiia and is he entitled to reimbursement in the sum of \$372 for those days?
- Should the Authority make any order in terms of the alleged overpayment to Mr Opetaiia in his final pay?

Was Mr Opetaiia dismissed at the meeting on 21 November 2006 and/or did he agree to a new position?

[7] Mr Opetaiia and Mr Smith met on 13 November 2006 to discuss Mr Opetaiia allegedly not following instructions and to talk about changing hours of work to the nightshift. Mr Opetaiia raised some issues and concerns with Mr Smith about how he felt others were undermining his role as Night Supervisor.

[8] On 15 November 2006 Mr Opetaiia received two letters from Mr Smith. One letter was dated 13 November 2006 and confirmed the new nightshift start time changes were effective as of Monday 13 November 2006. The other letter was dated 14 November 2006 and referred to the discussion between Mr Smith and Mr Opetaiia on 13 November 2006. Mr Opetaiia was invited in the letter to attend a meeting to be held in Mr Smith's office at the depot on 21 November 2006. The areas of concern which were to be discussed at the meeting were set out in the letter as:

1. *Your position as Night Supervisor. (raised by you).*
2. *Failing to follow instructions set in place by me.*
3. *Authorization of the use of the company vehicle for personal use.*

4. *Time management of company employees in your charge.*
5. *Sub standard work performance.*

[9] Mr Opetaiia was advised he could have a support person or a representative present at the meeting and that full consideration would be given to his explanation before a decision was made. The letter concluded by advising Mr Opetaiia that if the allegations were established disciplinary action may be taken and his employment may be in jeopardy.

[10] Mr Opetaiia reasonably concluded that the meeting that was to take place on 21 November was in the nature of a disciplinary meeting. He went to the Marlborough Community Law Office and spoke to a case worker at the centre, Kaye McIlveney, who agreed to come along to the meeting with Mr Opetaiia as his support person. Ms McIlveney has a law degree and has practised law, but does not currently have a practising certificate.

[11] Ms McIlveney took notes at the meeting, although accepted that as the conversation went quickly, she could not keep up. Ms McIlveney said that a few days after the meeting she expanded her notes using her rough notes as a guide. Both the rough and expanded notes were made available at the investigation meeting. Mr Smith took some issues with the content of the notes and felt that there was a lot more discussed than appeared in them.

[12] I have considered the rough notes alongside the expanded notes prepared some days later and sent to Mr Opetaiia by Ms McIlveney at the time he sought legal advice in early December 2006. I conclude that the expanded notes are not dissimilar to the rough notes. In the absence of any other notes or records of the discussion, I find that Ms McIlveney's notes are the most reliable record of what occurred during the meeting.

[13] There were many issues discussed at the meeting. When allegations were put to Mr Opetaiia about his performance, not following instructions and other matters, he had an opportunity to give an explanation. Mr Opetaiia said that he expected some further investigation about his explanations to be undertaken because of the nature of his explanation. In this case however because of the way matters progressed, the most important part of the meeting was the outcome. There is a dispute about that.

[14] I find it more likely than not that the outcome was that set out in the notes. That outcome was also consistent with the evidence given by Mr Opetaiia and Ms McIlveney. The notes reflect that after a short break towards the end of the meeting, Mr Brett advised Mr Opetaiia along the lines that the role was too big for him and that he was the wrong person in it. He referred to Mr Opetaiia's performance leaving a lot to be desired. The notes record Mr Opetaiia responding to Mr Brett's wide ranging criticism suggesting training and more support. Mr Opetaiia also made reference to the short time, about three weeks, that Mr Smith had been a manager. Mr Smith, although firmly in his evidence of the view that the intended outcome was to offer Mr Opetaiia another position, accepted that Mr Brett did not use a good choice of words.

[15] I find that Mr Brett advised Mr Opetaiia that there were two options available. These options are recorded both in the notes Ms McIlveney took at the time and her expanded notes. The two options were to relieve Mr Opetaiia of his duties or to demote him. Ms McIlveney said in her evidence, and this was consistent with her expanded notes, that she clarified the meaning of the first option with Mr Brett and was told that it was *to sack him*. I accept Ms McIlveney's evidence about that.

[16] I have considered giving my findings in terms of the two options put towards the end of the meeting, whether there had in fact been a discussion about a new role or position for Mr Opetaiia. Ms Scott submits on behalf of Trans Otway that Mr Opetaiia agreed to take a new position at that meeting because he accepted that the role was too difficult for him and that he was then stood down after the 21 November 2006 meeting to enable rostering for his new role.

[17] There is a dispute in the evidence as to how Mr Opetaiia came to stop undertaking his supervisory role. Mr Opetaiia said that there was no discussion of a new position at the meeting and he did not say that he could not do the role. Mr McIlveney said in her evidence that she could not recall discussion about a new position at the meeting for Mr Opetaiia or that he could not undertake the role. Mr Smith accepted in his evidence that Mr Opetaiia did not say that he did not want to do the Supervisor's role any more. He said that although he thought Mr Opetaiia did agree that the Supervisor's role was beyond his capabilities, he accepted that Mr Opetaiia did not actually say that he agreed the role was beyond his capabilities.

[18] Mr Smith agreed under questioning at the investigation meeting in terms of any discussion at the meeting on 21 November 2006 about a new position *-nothing was set in concrete at the time of the meeting – there was no definite role in mind.* Mr Smith said in his evidence that he did not think that Mr Opetaiia could understand what was not being done on the nightshift. He felt that best position that suited Mr Opetaiia was a dayshift driving role and he emphasised that time was a factor in sorting out the nightshift and that performance plans take time. He said that it was easier to bring in a new supervisor from Christchurch.

[19] I accept that a different position than the supervisory role for Mr Opetaiia was probably in the minds of Mr Smith and Mr Brett because one of Trans Otway options for Mr Opetaiia was a demotion. The other was that he would lose his job. I find it less likely though that there was a discussion about another position for Mr Opetaiia at that meeting beyond presenting an option of demotion. I have reached that conclusion because there was no definite role that Mr Smith or Mr Brett had in mind. Had there been a discussion about a new position then it would have been very unlikely two options would have been presented to Mr Opetaiia at the end of the meeting and unlikely that as was agreed, Mr Smith and Mr Brett wanted to seek legal advice following the meeting.

[20] Having reached the conclusion that there was no discussion about a new position with Mr Opetaiia at the 21 November meeting, I do not find that Mr Opetaiia agreed to a new role at that meeting. For completeness I do not find that Mr Opetaiia told Mr Brett and Mr Smith that he could not perform his existing role but rather he indicated areas where he felt he could benefit from training and support.

[21] The meeting ended on the basis that the company wanted to make a decision which of the two options would be implemented. After the meeting Mr Opetaiia was asked to stand down overnight while the company obtained some legal advice. Mr Opetaiia was advised that he would be telephoned the next day on 22 November at 1.00pm with a decision. The evidence does not support that Mr Opetaiia was dismissed from his position at the meeting on 21 November 2006.

If Mr Opetaiia was not dismissed at the meeting on 21 November 2006 then did he agree to undertake a role driving during the day for Trans Otway?

[22] Mr Smith telephoned Mr Opetaiia at 1pm on 22 November, as arranged. He said in evidence that he advised Mr Opetaiia the company had not reached a decision

as to exactly what position Mr Opetaiia could be moved to. Mr Opetaiia did remember Mr Smith asking *could you drive*. I conclude that the possibility of a position driving was probably put forward by Mr Smith during the telephone call that there was nothing definite about what that position would entail. Mr Opetaiia was still expecting a decision that had been promised about the two options.

[23] Mr Opetaiia continued to remain stood down until Friday 24 November when he was telephoned again by Mr Smith and was told that there was work on the dayshift driving commencing on Monday 27 November. Mr Smith indicated that the role was at least 40 hours per week. Dave Conway, the day time supervisor, also telephoned Mr Opetaiia about driving during the day. Mr Opetaiia said that Mr Conway asked if he could drive as they were short. Mr Opetaiia said that he considered he was simply being asked to help out and that the day time driving was temporary or of a casual nature. He said that when he advised Mr Conway that he was stood down waiting for a decision Mr Conway just laughed.

[24] Mr Opetaiia did not go into work on 27 or 28 November as he said he was too unwell to do so. Mr Opetaiia advised Mr Conway that he was unwell. The company felt that Mr Smith should have been contacted. Mr Opetaiia provided a medical certificate for his absence on 27 November but he says that he was not paid for either that day or 28 November 2006. Trans Otway say that he was paid for 27 November which absence was supported by a medical certificate unlike 28 November which the medical certificate indicated was the day for return to work.

[25] On Wednesday 29 November 2006 Mr Opetaiia undertook working as a day driver for Trans Otway. Mr Opetaiia said that he remained confused as to his employment status and talked to another employee who he described as 2IC to Mr Conway, Christine King, about when he was going to receive a decision from the meeting on 21 November 2006. Mr Opetaiia said Ms King told him that she would make some inquiries.

[26] Mr Opetaiia obtained some legal advice. On Monday 4 December his lawyer, Marianne Startup wrote to Mr Smith and advised amongst other matters that there was currently an unsatisfactory situation of uncertainty over Mr Opetaiia's employment since the meeting on 21 November 2006. Ms Startup said in her letter that from that date her client had been called in to work sporadically and had been advised in relation to a query that legal advice had not been received yet. Ms Startup said that

her client needed to know the company's position as the delay of almost two weeks had put stress upon him and his family. Ms Startup recorded that Mr Opetaiia welcomed open dialogue to address any issues but that the current situation was untenable.

[27] I questioned during the Authority's investigation meeting whether a response to that letter had ever been received from Trans Otway. Ms Baily Gibson produced a letter dated 13 December 2006 from Carolyn Crisp, the Human Resource Manager at Trans Otway, which was sent to Ms Startup but was not contained in the bundle of documents. Mr Opetaiia said in his evidence that he did not see this letter before he handed in his resignation on 17 December 2006 because there was a change of lawyers.

[28] The letter from Ms Crisp stated that Mr Opetaiia's employment status had never been discussed and that the only issues discussed with him were his duties as a night shift operator which he was not coping with. Ms Crisp said that the target was to support Mr Opetaiia in another role in the company. Ms Crisp said in her letter that Mr Opetaiia agreed that this was the case and that there was a discussion of alternative duties with him and a driving position on the day shift was offered to him and he accepted it. Ms Crisp finally advised that Mr Opetaiia's future will remain with Trans Otway unless there are performance concerns within his current role as a driver and then normal procedures would be followed.

[29] On 17 December 2006 Mr Opetaiia tendered his resignation for his employment giving two weeks notice with his last day being 29 December 2006. Mr Opetaiia said in his letter of resignation that he was giving notice due to the stress and unfair work practices that the company had put him and his family through, especially through Christmas. Mr Opetaiia obtained alternative employment on 15 January 2007.

[30] I do not find in conclusion that Mr Opetaiia agreed to undertake a new position for the company driving during the day shift during or following the meeting on 21 November 2006.

Were there actions on the part of Trans Otway that were unjustified and disadvantaged Mr Opetaiia,

Standing down

[31] Mr Smith said that the stand down of Mr Opetaiia was to enable rosters to be changed and that it was undertaken for Mr Opetaiia's benefit from a health and safety perspective so that he would not go immediately from night to day shift. Mr Smith said that the stand down was not a punitive action. I have found that there was no discussion with or agreement by Mr Opetaiia to change his position from his supervisory role to another role at the meeting of 21 November. I find that Mr Opetaiia was stood down to enable Mr Smith and Mr Brett to decide which of the two options would be implemented in terms of Mr Opetaiia's employment after seeking legal advice.

[32] Mr Opetaiia was stood down for three days on 22, 23 and 24 November. Mr Opetaiia was paid for those three days. The Employment Court judgment of *Graham v. Airways Corporation NZ Limited* [2005] 1 ERNZ 587 provides that each case about the justification for suspension of employment must take into account both broad principles of procedural fairness and the particular circumstances of the employment, including the consequences of both suspending and not suspending for the employee and employer. Under the test in s.103A of the Employment Relations Act 2000 the Authority is required to answer the question as to whether an action is justifiable by determining on an objective basis whether the action is what a fair and reasonable employer would have done in all the circumstances at the time it occurred.

[33] Mr Opetaiia's employment agreement did not provide for suspension so there was no contractual basis for it. Mr Opetaiia had not agreed to a change of role at the end of the meeting on 21 November 2006. I find that viewed objectively a fair and reasonable employer would not have suspended Mr Opetaiia for the three days in question. The only basis for doing so was to seek advice. Mr Opetaiia had not received previous warnings about his performance.

[34] Whilst Mr Opetaiia did not object at the time to being stood down until the decision was delivered the following day, there was no other option put to him and the stand down period was longer than initially anticipated. I find that the suspension was unjustified and that Mr Opetaiia was disadvantaged because he was prevented from undertaking his usual work and was abruptly and without good basis removed

from the workplace in his supervisory role for that period. It made Mr Opetaiia feel less secure about his employment. There was also a degree of humiliation as to what the other workers on the night shift thought with respect to his absence.

[35] Mr Opetaiia has a personal grievance that he was unjustifiably suspended from his employment which disadvantaged him. Mr Opetaiia is entitled to remedies for this personal grievance. I do not find that he contributed to the personal grievance.

[36] I order Trans Otway Limited to pay to Tony Opetaiia the sum of \$1,500 without deduction under s.123 (1) (c) (i) of the Employment Relations Act 2000 by way of compensation.

Demotion

[37] The events that gave rise to the alleged grievance that Mr Opetaiia was unjustifiably demoted and the claim that Mr Opetaiia was unjustifiably constructively dismissed overlap and in my view are inextricably intertwined. I shall consider them together in terms of the claim for unjustified constructive dismissal. If there are to be remedies then in my view it is appropriate that there be a global award.

Did Trans Otway breach terms of its employment agreement with Mr Opetaiia that caused him to resign in circumstances that amounted to an unjustified constructive dismissal?

[38] I have concluded that Mr Opetaiia did not agree to a change in his role from supervisor to that of driver. The change that Trans Otway unilaterally imposed on Mr Opetaiia was not simply a change to his duties or other matter in the job description which his employment agreement recognised could be changed by consultation. The change was a fundamental change in Mr Opetaiia's role from that of supervisor to driver. The employment agreement to which Mr Opetaiia was a party specifically provides in clause 2 (d) that the employee will be required to carry out the duties in the job description. Clause 26 of the employment agreement requires any amendment or variation to the employment agreement to be in writing signed by both Mr Opetaiia and Trans Otway. Such a change to Mr Opetaiia's employment agreement occurred when in 2005 when Mr Opetaiia became a supervisor and signed a new job description. There was nothing provided in writing or signed by Mr Opetaiia and Trans Otway reflecting the change in his role from supervisor to dayshift driver and

he did not agree to the same. I find that Trans Otway breached the terms of Mr Opetaiia's employment agreement by unilaterally varying his role.

[39] I also find that Trans Otway breached the duty of good faith it had under s.4 of the Employment Relations Act 2000 to be active and constructive in maintaining productive employment relationships in which the parties are among other things, responsive and communicative. Trans Otway did not as it had promised give Mr Opetaiia a clear decision following the meeting on 21 November 2006. There was no discussion or openness about what had happened to his supervisory role and he was just told that there was day time driving work available. The actions by Trans Otway damaged the relationship of trust and confidence that Mr Opetaiia was entitled to have in Trans Otway.

[40] I have considered whether the breaches led to Mr Opetaiia resigning from his position. Mr Opetaiia said in his letter of resignation that he resigned because of the stress and unfair work practices that the company had put him through. He said in his evidence at the Authority's investigation meeting that he felt that he had been unfairly treated by the company and that this had caused him stress and there was no outcome or decision from the disciplinary meeting. I accept that the breaches by Trans Otway directly led to Mr Opetaiia resigning.

[41] I then considered whether Mr Opetaiia by undertaking some day time driving work can be said to have affirmed his employment agreement in knowledge of the breaches. Mr Opetaiia undertook driving duties for two weeks and three days before he tendered his resignation. During the two week and three day period Mr Opetaiia's lawyer sent a letter which described his current situation as untenable and requested Trans Otway advise Mr Opetaiia of his position. Mr Opetaiia gave the notice period in his employment agreement of two weeks only from 17 December 2006. I do not find that Mr Opetaiia affirmed his employment and knowledge of the breaches in those circumstances.

[42] The next issue to consider is whether the resignation by Mr Opetaiia was reasonably foreseeable. Ms Scott submits that to an objective observer it would not have been foreseeable that Mr Opetaiia was not prepared to continue in his employment. She submits that Trans Otway considered Mr Opetaiia to be content and in its view the terms of employment had improved for him because he stayed on the same rate of pay and was working during the day shift in a less demanding role. Ms

Scott described Ms Startup's letter of 4 December 2006 as simply asking for clarification of Mr Opetaiia's role which Trans Otway had provided.

[43] I do not accept that Ms Startup's letter can be seen as simply seeking clarification of Mr Opetaiia's role. The letter made it clear that Mr Opetaiia considered the current situation with his employment was untenable and that he was awaiting a decision about his position. To an objective observer in the position of Trans Otway it would have been clear that Mr Opetaiia did not consider that he had agreed to a new role at that point because he was still waiting for a decision. There was no direct discussion with Mr Opetaiia about his situation with the company between 4 December and the response from Mr Crisp on 13 February 2007 to enable them to conclude that he agreed to the change in his role, was no longer awaiting a decision and was content in the driving role. Even if Mr Opetaiia had seen Ms Crisp's letter it did not deal with the issues that he was concerned about. Trans Otway employed someone else in Mr Opetaiia's supervisory role one week after 21 November 2006. His hours in his driving role were considerably less than in his supervisory role. On 17 December 2006 Mr Opetaiia tendered his resignation.

[44] The breaches by Trans Otway were very serious. I find in conclusion that it would have been reasonably foreseeable to an objective observer in Trans Otway's position that Mr Opetaiia would not be prepared to put up with the situation where he had not received a decision about his supervisory role as promised and had without his agreement and without any open discussion been unilaterally demoted to a drivers role.

[45] Mr Opetaiia has a personal grievance that he was unjustifiably constructively dismissed and he is entitled to remedies.

Remedies

Contribution

[46] The Authority is required to consider whether Mr Opetaiia's actions contributed towards the situation that gave rise to his personal grievance and, if the actions so require, reduce the remedies that would have otherwise have been awarded.

[47] There were some issues that were raised with Mr Opetaiia about his performance and following his instructions during the 21 November meeting. I do not

find that they were matters for which a fair and reasonable employer would have dismissed Mr Opetaiia. Mr Opetaiia gave an explanation to them and then awaited a decision about the two options. There was no decision as promised but a unilateral variation to his role. I do not consider in those circumstances that Mr Opetaiia contributed to the situation that gave rise to his personal grievance.

Lost wages

[48] Mr Opetaiia gave evidence that he had lost two weeks wages. I consider that he should be reimbursed for the lost remuneration on the basis of his average hours of work as set out in Ms Baily Gibson's submissions of 66.8 hours per week. Ms Crisp in her written evidence took issue with 66.8 hours as an average. I find that she incorrectly took separate hours worked on a public holiday for the same pay period as a separate pay period on two occasions for a six week period. This obviously had a significant effect on how she calculated the average hours worked.

[49] I have calculated the lost wages for two weeks at 66.8 hours at \$15.50 per hour. That is a sum of \$2,070.80 gross.

[50] I order Trans Otway Limited to pay to Tony Opetaiia the sum of \$2,070.80 gross being reimbursement of lost wages under s.123 (1) (b) of the Employment Relations Act 2000.

Unpaid sick leave

[51] I accept Ms Crisp's evidence that Mr Opetaiia was reimbursed for his sick leave for 27 November 2006 in the pay period ending 30 December 2006. I do not find that Mr Opetaiia was paid for sick leave taken on 28 November 2006. My understanding as to the reasons Trans Otway would not pay was because the medical certificate provided was only for 27 November 2006. Mr Opetaiia's employment agreement however does not require a medical certificate to be provided except after three consecutive days. Mr Opetaiia explained to my satisfaction that he was unwell on 28 November 2006 and therefore was therefore entitled to be paid sick leave for that day. I have calculated the payment based on 8 hours at \$15.50 per hour being \$124.00 gross.

[52] I order Trans Otway to pay to Tony Opetaiia the sum of \$124.00 gross being unpaid sick leave for 28 November 2006.

Deduction of alternative leave days

[53] The pay records for the period ending 12 November 2006 show that Mr Opetaiia had a balance of seven alternative leave days. For the following pay period ending 19 November 2006 Mr Opetaiia still had a balance of seven alternative leave days, but for the next pay period ending 26 November 2006 pay records show that Mr Opetaiia's had a balance of four alternative leave days and three days had been taken. There is no evidence to support that Mr Opetaiia either requested or took these days. They may have been deducted for the period that Mr Opetaiia was on bereavement leave or for the three days Mr Opetaiia was suspended for. I do not need to make any conclusions about that given that there is no evidence that Mr Opetaiia took these days. Mr Opetaiia is entitled to an order that he be paid for the three alternative leave days.

[54] I order Trans Otway to pay to Tony Opetaiia the sum of \$372.00 gross being alternative leave days incorrectly deducted.

Compensation

[55] I heard from Mr Opetaiia and from his wife Kimihia Opetaiia-Tahana about the effect on Mr Opetaiia on the way that he was treated. Mr Opetaiia presented as a quiet and dignified man. He explained in his evidence that he felt belittled and that his personal reputation was tarnished as a result of the way that he was treated. He gave evidence that others had lost their jobs at Trans Otway because of drug or theft allegations and felt that people may have viewed his situation the same way. I accept that may have been his view but I am not satisfied that that was as a result of anything directly said by anyone from Trans Otway.

[56] I do accept Mr Opetaiia felt that he had been pushed to one side and blamed for things after he had worked so hard for Trans Otway. Mrs Opetaiia-Tehana said that her husband did not eat, communicate or sleep for a period of time when things changed. She considered him to be depressed. Mrs Opetaiia-Tehana said that while Mr Opetaiia was working long hours she did not see a lot of him but she did not mind because she knew that he loved his job.

[57] I find the effect on Mr Opetaiia over the way he was treated was significant. I do not accept the submissions of Ms Scott that the evidence supports an award of less than \$5,000 would be justified for compensation if the Authority got to this point. I

find that Mr Opetaiia clearly felt betrayed and humiliated by Trans Otway's actions and even on the day of the Authority investigation meeting was still wanting a decision from the company.

[58] I assess compensation which takes into account the unjustified disadvantage claim in terms of the demotion of Mr Opetaiia in the global sum of \$8,000.

[59] I order Trans Otway Ltd to pay to Tony Opetaiia the sum of \$8,000 without deduction being compensation under s.123 (1) (c) (i) of the Employment Relations Act 2000.

Overpayment

[60] On the day of the investigation meeting Ms Crisp provided a breakdown of the overpayment which she said was made to Mr Opetaiia in his final pay. The figures provided were in excess of \$4,000. In final submissions on behalf of the respondent Ms Scott submits that the amount overpaid is \$1,616.00. There was an attempt to see if there could be some agreement reached about the matter. Agreement was not able to be reached. In the circumstances a claim will have to be made in that regard and that it would not be appropriate for me to make an order as part of this determination.

Costs

[61] I reserve the issue of costs. I would encourage the parties to see if agreement can be reached about costs, failing which Ms Baily Gibson has until Friday 13 March 2009 to lodge and serve submissions as to costs and Mr Beech and Ms Scott have until Friday 3 April 2009 to lodge and serve submissions on behalf of the respondent as to costs.

Summary of findings and orders made

- I have found that Mr Opetaiia was unjustifiably suspended from his employment and have awarded him in terms of that personal grievance the sum of \$1,500 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000. I did not find that Mr Opetaiia contributed to that personal grievance.
- I have found that Mr Opetaiia was unjustifiably constructively dismissed.

- I have not found that Mr Opetaiia contributed to the personal grievance.
- I have ordered Trans Otway to pay lost wages to Mr Opetaiia in the sum of \$2,070.80 gross under s.123 (1) (b) of the Employment Relations Act 2000.
- I have ordered Trans Otway to pay compensation to Mr Opetaiia for the unjustified constructive dismissal in the sum of \$8,000 without deduction which sum also takes into account the unjustified action claim for demotion under s.123(1)(c)(i) of the Employment Relations Act 2000.
- I have ordered Trans Otway to pay unpaid sick leave to Mr Opetaiia in the sum of \$124.00 gross for his absence because of sickness on 28 November 2006.
- I have ordered Trans Otway to reimburse Mr Opetaiia for incorrectly deducting alternative leave days in the sum of \$372.00 gross.
- I have not dealt with the overpayment matter which was not raised in the statement in reply and could not be agreed upon. If that matter is to be pursued it will have to be the subject of a separate claim.
- I have reserved the costs, encouraged the parties to attempt to reach agreement failing which I have timetabled for a response.

Helen Doyle
Member of the Employment Relations Authority