

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Gary Rowe (Applicant)  
**AND** Toll NZ Consolidated Limited (Respondent)  
**REPRESENTATIVES** Geoff Davenport, for Applicant  
Gretchen Stone, for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 22 and 23 November 2006  
**FURTHER INFORMATION  
AND SUBMISSIONS  
RECEIVED** 5, 8 and 18 December 2006  
**DATE OF DETERMINATION** 12 April 2007

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Mr Rowe was employed by Toll NZ Consolidated Ltd, and its predecessors, as a locomotive driver for 43 years until his summary dismissal for serious misconduct on Friday, 29 July 2005. His dismissal followed a disciplinary investigation into an operating incident in which he was involved. The grounds for the finding of serious misconduct are set out in the letter of dismissal of 26 August 2005 as follows:

*"The meeting [15 August 2005] was called to discuss the allegation that you were involved in a Signal Passed at Danger Incident, including a subsequent setting back movement without the required authority. Immediately following this incident, you failed to follow the correct reporting procedure, later denying the allegation when approached by your manager. Following another Signal Passed at Danger incident in which you were involved, the correct procedures were made aware to you in a letter from Brendon Judd, Toll Rail Linehaul manager dated 18 June 2004."*

[2] Mr Rowe says his dismissal was unjustified and that Toll failed to maintain its contractual obligations to him in relation to health and safety. He seeks awards to reimburse lost wages consequent to his dismissal as well as future salary loss and compensation for distress.

[3] Toll says Mr Rowe's dismissal was lawful in that it was procedurally and substantively justified.

[4] The parties have attended mediation.

**The Law**

[5] Section 103A sets out the applicable test for justification:

*"...the question of whether a dismissal or an action was justifiable must be determined, in an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred."*

[6] The following summary of the section 103A principles, as articulated in *Air New Zealand v Hudson*<sup>1</sup>, is set out in *Angel v Fonterra Co-operative Group*<sup>2</sup>:

- “1. Justification for dismissal must be determined on an objective basis from the point of view of a neutral observer. It is not enough that an employer makes a decision which falls within an acceptable range of responses.
1. The standard against which the actions of an employer are objectively judged is that of a fair and reasonable employer.
2. The Court may reach a different conclusion from the employer provided it is the result of an objective inquiry rather than a substitution of the Court's decision.
3. The inquiry into justification must focus on all the circumstances which were relevant at the time of the inquiry and the dismissal.”

[7] The Authority must look at the relevant circumstances at the time of the dismissal and objectively assess whether the employer's actions were fair and reasonable given those circumstances.

### **The employment agreement**

[8] Mr Rowe's terms of employment were set out in a collective employment agreement<sup>3</sup> which imported Toll policies. For the purposes of this determination the most relevant policies are those entitled “fair treatment”, “medical retirement” and “personal grievance – notes for guidance of managers”.

### **Mr Rowe's health in 2005**

[9] Mr Rowe had a number of health issues which were present and known to Toll during his employment.

[10] Mr Rowe is diabetic and suffers hypertension. These conditions were managed to a large degree by prescribed medication and diet.

[11] In 2005 Mr Rowe suffered a recurrence of depressive symptoms which had first occurred in 2000. Mr Rowe's unchallenged evidence was that in early 2005 he was not coping with the freight shift roster he worked, that he was tired, felt very low and that he was not coping at work.

[12] On 26 April 2005 Mr Rowe went to see a doctor contracted to Toll, Dr Sewell, who diagnosed him with borderline clinical depression, referred him to a psychologist and advised him to discuss this situation with his own doctor. Mr Rowe was off work on stress leave at this time. He had commenced stress leave following a meeting on 22 April 2005 with his manager Brendan Judd (who then held the position of Auckland Locomotive Operations Manager) regarding an allegation that Mr Rowe had falsified timesheets. It appears Mr Judd referred Mr Rowe to the Toll doctor for a medical assessment.

[13] After his appointment with Dr Sewell Mr Rowe contacted Toll's employee assistance programme, SEED, who referred him to a psychologist, Simone Powell. Mr Rowe attended a counselling session with Ms Powell on 5 May 2005. Ms Powell wrote to SEED on 10 May:

*“Thank you for your referral of Mr Rowe, who was seen for one session on the 5<sup>th</sup> of May 2005. Mr Rowe is a 61-year-old man who has worked for Toll as an automotive engineer for 44 years. He presented with heightened stress related to the workplace and a range of underlying depressive symptoms that made him unfit for return to work.*

*Mr Rowe's stress levels and depressive symptoms appeared related to changes within his work environment.*

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<sup>1</sup> (2006) 3 NZELR 155

<sup>2</sup> CC13/06, 13 December 2006, Judge Shaw, at paragraph 73

<sup>3</sup> Tranz Rail and Tranz Scenic Collective Agreement 2003 - 2005

*He reported changes to his shift work in August last year, which he stated led to irregular sleep and eating patterns, consequent problems with his diabetes and associated fatigue, reduced ability to cope and low mood. Further exacerbating these changes were issues relating to management and conflict within the workplace.*

*Due to these factors, the changes within the organisation and the impact upon Mr Rowe's psychological and physical health he has indicated that he does not wish to return to work and would like to negotiate his permanent termination of his employment."*

[14] Ms Powell's letter was then copied to Toll. The management issues and workplace conflict referred to in Ms Powell's letter relate to Mr Rowe's ongoing poor relationship with Mr Judd and the timesheet issue. Mr Rowe attended two more counselling sessions with Ms Powell in May 2005. On 1 June 2005 Ms Powell wrote to SEED:

*"Since my last report I have seen Mr Rowe on one further occasion. Since my last interview with him he has been put on anti-depressant medication which should begin within two to three weeks to assist his low mood. Consequently, Mr Rowe however, continues to demonstrate high levels of stress and feels unable to return to work. Cognitive/behaviour strategies were nevertheless provided to Mr Rowe to assist him in the interim.*

*Discussion with Mr Rowe focused upon ways in which he may be able to cope with a pending disciplinary meeting with his employers. Naturally the greater opportunity he has to be on his medication prior to this meeting the more likely it will assist him in being able to cope. Up until now he reports that the prospect of the meeting, especially at short notice, has been too overwhelming for him.*

*Mr Rowe however indicated that he is likely to feel more able to cope with this meeting if given adequate warning, has a support person(s) with him and has the opportunity to take a break during the meeting if he becomes distressed or overwhelmed in any way. Due to personality differences (and the effect this has upon his mood/affect) he has indicated that he would prefer to liaise directly with Andrew Radich (HR manager), instead of Mr Brendon Judd, in arranging this meeting, if at all possible."*

The disciplinary meeting Ms Powell refers to concerns the allegation of falsifying timesheets.

[15] On 26 May 2005 Mr Rowe visited his own doctor, Dr Guy, who diagnosed him with depression based on his consultation with Mr Rowe and Dr Sewell's report. Dr Guy prescribed Mr Rowe with a three month prescription for anti-depressant medication and a relaxant medication, explained to him that he needed to complete the course and that he should return to him for a review in three months time. Dr Guy also issued Mr Rowe with a medical certificate stating that Mr Rowe was unfit for work from 26 May until 26 June 2005.

[16] On 6 June Mr Rowe visited the Toll doctor, Dr Cameron, for a second opinion. Dr Cameron wrote to Shane Koolen, Toll's health and safety manager, advising that Mr Rowe was not in a fit state for locomotive engineer duties or operative work, that he was suffering from mild mood disturbance, that he should continue with his antidepressant medications and counselling sessions and have a medical review in two weeks. In his report to Mr Koolan Dr Cameron records that he has spoken with Ms Powell and she assessed Mr Rowe as unfit for operative duties at present.

[17] On 26 June Mr Rowe visited Dr Cameron again who recorded in a letter to Mr Koolan dated the same day that Mr Rowe had finished taking the prescribed antidepressant medication one week ago, that his reported mood was normal and that he felt totally fit for driving and that Dr Cameron's assessment of functional tests, mood, focus and memory were normal and that Mr Rowe should have a follow up session with Ms Powell before he resumed driving locomotives. Mr Rowe said in evidence that he wanted to return to work. He also said that he had not stopped taking his antidepressant medication at the time recorded by Dr Cameron and that he continued to take it until a month prior to the investigation meeting. Mr Rowe said he did not receive a copy of Dr Cameron's 26 June letter.

[18] On 30 June Mr Rowe attended a further session with Ms Powell where they discussed strategies for managing stress and shift sleep patterns. Ms Powell recalled discussing ongoing monitoring of Mr Rowe's health with Dr Cameron. Dr Cameron said he could not recall this but that it is likely that they had such a discussion. There is no dispute that Toll did not implement any ongoing monitoring of Mr Rowe following his return to work. Ms Powell did not provide a further report to Toll and there was no request from Toll for any further information from Ms Powell. The roster did not change.

[19] Soren Low, Regional Manager Toll Rail Northern, became involved in the timesheet issue following Mr Rowe's expression of concern about Mr Judd to Ms Powell. Mr Low said in evidence that at the end of this process, mid June, he asked Mr Rowe if he wanted to explore medical retirement further and he said he did not wish to. This evidence was unchallenged and I accept this was Mr Rowe's expressed view prior to his return to work. Mr Low also said in evidence that, at this stage, he understood Mr Rowe had been diagnosed with depression, that he was stressed and anxious, that medical certificates had been issued for Mr Rowe and that he had been prescribed and was taking anti-depressant medication.

[20] Mr Rowe returned to work in early July to normal duties on the freight roster. He said the timesheet issue was now behind him (no disciplinary action had been taken against him), he relaxed a bit and felt alright to return to work.

[21] Mr Judd said that when Mr Rowe's medical clearance was communicated to him he would have contacted the roster centre to roster Mr Rowe onto duties. Mr Rowe recalled that Mr Judd telephoned him to say the clearance to return to work had come through and that he, Mr Rowe, then contacted the roster centre. Mr Rowe said that during that conversation he discussed the roster and how it was impacting on him with Mr Judd and that Mr Judd said the roster would be kept separate for those having difficulty with the roster; they would work one shift type per week. Mr Judd said he could not recall this conversation and that the only roster to return Mr Rowe to was the freight roster. Mr Rowe did not raise the roster issue again until the disciplinary investigation, which is the subject of this employment relationship problem.

## **The disciplinary investigation**

### **(i) 1 August 2005 meeting**

[22] Mr Rowe was telephoned on Monday 1 August 2005 by Mr Judd with a request that he meet with him later that day at 3pm. Mr Judd said he told Mr Rowe that he wished to meet with him to discuss an incident which had occurred the previous Friday. Mr Rowe said Mr Judd asked him to come to his office at 3pm and when he asked what for Mr Judd said he preferred not to discuss it over the telephone. Mr Rowe agreed to meet with Mr Judd at 3pm on Monday, 1 August.

[23] Mr Judd said that at the outset of the meeting he asked Mr Rowe if he would like to bring a representative to the meeting and that Mr Rowe declined the offer. Mr Rowe says Mr Judd did not make such an offer and that he was not provided with adequate information as to the nature and purpose of the meeting prior to the meeting so that he could prepare or organise a representative.

[24] Mr Judd had a witness present with him at the meeting, Nigel Craig, Regional Health and Safety Manager. Mr Judd said he had a witness present because he and Mr Rowe had a poor relationship and the meeting provided a training opportunity for Mr Craig. Mr Rowe said he did not know who Mr Craig was, but thought he was a manager and that he was introduced to him by his first name.

[25] Mr Judd told Mr Rowe that there had been an allegation of a SPAD A (Signal Passed at Danger – Category A) the previous Friday in respect of Train MP28 and asked Mr Rowe for his view. There is no dispute that Mr Rowe was driving Train MP28. Mr Judd's notes of the meeting were later typed up. Mr Rowe's reply to Mr Judd's question is recorded as follows:

*"Gary stated that he drove MP 27 across to Hemopo and changed over onto MP 28, travelling passenger with Graham Robinson and took over driving duties when the Te Rapa LE exited the cab at that depot.*

*Gary then stated that as he proceeded up the main line, he observed a group of "three or four Maori's" dragging what appeared to be a fridge or dryer and a stainless steel sink unit across the tracks. He then stated that he made an emergency brake application to stop in time to avoid hitting them. Gary stated that he did not advise anyone of the presence of the alleged trespassers as he has done so in the past and "nothing gets done". He made no mention of 6 Signal being at Stop while 533 entered the yard. Gary also stated that he heard the Te Rapa signalman ask 533 if his train was in clear."*

[26] Mr Judd then concluded the meeting. Mr Judd said it was clear to him that the incident required further investigation because he had received differing versions of the movement of Train MP28; one version from Mr Rowe and another from Paul Watene, the Te Rapa Linehaul Operations Manager, whose reporting signalman had advised him of a "dropped track" or unexplained track occupancy on the signal panel on Friday 29 July 2005 – the reason reported for the "dropped track" was that Train MP28 had passed a stop signal while the signal displayed stop.

[27] At the conclusion of the meeting Mr Judd told Mr Rowe that he would have to investigate further and that Mr Rowe should have a representative present because it was potentially a serious issue.

[28] From Mr Judd's evidence I understand the purpose of the meeting was to gather information for the purposes of investigating the incident; Mr Judd had some information from the signalman via his line manager, the next step was to put the issue to the locomotive driver concerned at the earliest opportunity.

[29] Later that evening, at about 9pm, Mr Rowe telephoned Mr Judd at home and told him that he had been involved in a SPAD A on Friday 29 July. Mr Rowe told Mr Judd that he was bending down to make a cup of tea when he approached the signal, that when he looked up he saw the signal was red, thought he would not be able to stop in time and applied the emergency brake and then backed the train. Mr Rowe maintained that he had been distracted by people moving a large object across the tracks. Mr Judd asked Mr Rowe why he had not immediately reported the incident. Mr Rowe replied that he thought he had "gotten away with it."

[30] Mr Judd told Mr Rowe that the issues should be discussed at a meeting and that Mr Rowe could bring a representative. Mr Judd then contacted Mr Lowe and Greg Hight, Operational Risk and Compliance Manager, with this further information.

#### **(ii) 4 August 2005 meeting**

[31] This meeting was convened to enable Mr Hight to gather further information from Mr Rowe for the purposes of the investigation report. Mr Rowe attended with his RMTU representative Owen Christophper. Mr Rowe answered Mr Hight's specific questions. In particular he told him that there were no risks associated with his prescribed medications and that his doctor was aware of his position as a locomotive driver and Mr Rowe described his eating and sleeping patterns prior to the incident.

[32] In his evidence Mr Hight said there was very little discrepancy between Mr Rowe's description of the incident and the Tranz log event recorded information. He also said the facts of the incident were cut and dry and that Mr Rowe's explanation did not point to any factors which required further investigation. Mr Hight said, therefore, it was not necessary to interview Mr Rowe again. He then prepared an investigation report and an incident summary. Both documents were provided to Mr Low by 15 August 2005.

#### **(iii) 15 August 2005 meeting**

[33] Mr Rowe attended a formal disciplinary meeting with Mr Lowe and Belinda Bell, Toll HR, on 15 August 2005. He was represented by Mr Christopher and Scott Wilson from the RMTU. The elements of the allegation of serious misconduct were outlined; that Mr Rowe had passed a signal at danger, that he had set the train back without authorisation, that he did not report the SPAD A or set back and that he denied the allegation when confronted by his manager. Mr Rowe was advised that the investigation could result in his dismissal.

[34] Mr Hight's incident summary was then distributed and a break taken for Mr Rowe to read and consider it. Mr Low had Mr Hight's investigation report but this was not provided because Toll's policy at the time was not to provide it. Mr Hight's explanation for this policy was that the investigation report contained information which is not intended for general distribution

and looks at overall safety issues whereas the incident summary looks at the incident itself.

[35] Mr Low also had Mr Judd's typed notes of the 1 August meeting and his notes of his discussion with Paul Watene. These notes were not provided to Mr Rowe or his representatives prior to the meeting on 15 August or before the dismissal meeting on 26 August.

[36] Mr Rowe provided a response to the allegations of serious misconduct put to him by Mr Low. This explanation, as it relates to the SPAD A, was consistent with those provided to Mr Judd and Mr Hight. He raised concerns about the manner in which the 1 August meeting was convened and his lack of representation.

[37] Mr Low referred to the June 2004 incident Mr Rowe had been involved in which concerned a similar incident when Mr Rowe had run a red light and failed to report it. Mr Low said Mr Rowe had not received a warning for that incident, but had received further training and written advice that any further incidents of that nature would be deemed serious misconduct and could lead to dismissal.

[38] Mr Rowe then said he had raised his concerns about the freight roster with Mr Judd and had asked to be removed from that roster, he described it as a "shit" roster to work, that it had been a huge change and that the shift work did not help him manage his diabetes. Mr Low queried how the roster could impact on running a red light and the conscious decision not to report that SPAD A. Mr Low made a note to ask Mr Judd about the roster change request.

[39] Mr Wilson raised the possibility of medical retirement for Mr Rowe with Mr Low. Mr Low says Mr Wilson said Mr Rowe would accept a final written warning and medical retirement and that this was raised in relation to Mr Rowe's diabetes. Mr Low also recalled Mr Wilson mentioning tablets plural in reference to the prescription medicines Mr Rowe was taking. Mr Wilson said he raised the issue of medical retirement in relation to the range of health issues Mr Rowe had at the time including his depression. He said he talked about the cocktail of drugs Mr Rowe was prescribed as a polite way of raising the issue with Mr Rowe in the room. Mr Wilson said everyone present knew what he meant by cocktail of drugs; that everyone knew Mr Rowe was a diabeto and was taking prescription medicines for his psychological problems. Mr Wilson said he raised the final written warning as a bridge to medical retirement. Mr Low undertook to look into medical retirement. No process as to how this matter was to be advanced was discussed.

#### **(iv) 26 August 2005 meeting**

[40] The parties reconvened on 26 August for a meeting which ended in Mr Rowe's dismissal for serious misconduct.

[41] Prior to the meeting Mr Low had informally signalled to Mr Wilson that it was unlikely that medical retirement would be a "runner". Mr Wilson said he took from this that there would be a formal response to those issues at the meeting on 26 August and an opportunity to formally respond. This was not expressly discussed.

[42] Mr Low had discussed the issue of medical retirement with Gary Taylor, Group General Manager, who asked if there was any evidence that Mr Rowe was ill. Mr Low responded that there was no such evidence. Mr Low told Mr Taylor that no explanation for the conduct based on illness had been put forward and from that Mr Low determined that medical retirement was not an option for Mr Rowe. Mr Low expanded on his evidence at the investigation meeting and said that there was no evidence of a medical condition which rendered Mr Rowe incapable of performing his duties.

[43] There is some dispute as to whether Mr Rowe was given an opportunity to provide any further explanation at the outset of the meeting on 26 August. Mr Low says it is likely that he would have as that is his general practise. Mr Rowe, Mr Wilson and Mr Christopher say he did not and that he advised almost immediately at the outset of the meeting that his decision was to dismiss. The contemporaneous notes of Ms Bell and Mr Wilson support this later evidence

recording that Mr Low summarised the allegation and investigation to date and then advised of his decision.

[44] There then followed questions from Mr Rowe's representatives as to what consideration Mr Low had given to lesser penalties and disparate treatment of allegedly similar incidents was also raised. Mr Wilson's notes of the meeting record that in response Mr Low said there was no evidence that Mr Rowe was ill to support medical retirement and that this was a very serious situation made more serious by Mr Rowe's denial and the previous similar incident the year before.

## Discussion

### (i) Did this alleged conduct amount to serious misconduct?

[45] At the investigation meeting I asked Mr Low how Mr Rowe's conduct amounted to serious misconduct. He said that Mr Rowe had failed to follow operational rules that he was aware of when he passed a signal at danger, reversed without authorisation and then failed to report those incidents and when confronted with this he initially denied that he had passed a signal at danger to his manager and that this had damaged Toll's trust and confidence in him as an employee.

[46] These elements formed one allegation of serious misconduct; the breaches of operational rules coupled with a denial of those breaches.

[47] Mr Low said that Mr Judd put to Mr Rowe that he had passed a signal at stop and that Mr Rowe had denied that that had occurred. Mr Low said that that was what Mr Judd had advised him had occurred. This is not what is recorded in Mr Judd's contemporaneous notes of the meeting with Mr Rowe on 1 August. The explanation Mr Rowe initially provided did not deny the SPAD occurred.

[48] Toll has a fair treatment policy which it was bound to follow:

*"When an employee's manager...believes that a breach of the expected standards may have occurred these steps must be taken:*

1. *The manager will conduct a full investigation to ensure the facts of the matter are correct and complete;*
2. *The employee will be advised at the earliest opportunity, by the manager, that a preliminary investigation has been carried out into the matter, which needs to be discussed, that the Company views the matter as serious, and if the allegations are proven he potential consequences, such as dismissal (sic). The employee is to be advised of the entitlement to help at a meeting to discuss the issue (e.g. union representation, Whanau support). If necessary, the manager will give assistance to the employee to obtain union representation;*
3. *At the meeting the manager will make a full disclosure of all information being taken into account and allow time for the employee and his/her representative to discuss the matter in private and prepare a response;*

*..."*

[49] Mr Judd was conducting a preliminary investigation into a serious safety issue which had the clear potential for disciplinary consequences for Mr Rowe. At the investigation meeting Mr Judd described the 1 August meeting as a opportunity for Mr Rowe to "fess up". I am satisfied that in relation to the 1 August meeting the fair treatment policy should have been followed.

[50] The explanation provided by Mr Rowe to Mr Judd should be seen in the context of the 1 August meeting and how that meeting was convened. In his evidence Mr Judd says he telephoned Mr Rowe and asked him to meet with him to discuss an incident the previous Friday. On Mr Judd's evidence alone, he failed to specify the incident in question or explain to Mr Rowe that the purpose of the meeting was to allow him to provide an explanation. Mr Rowe was not given a fair opportunity to organise a representative prior to the meeting, he was not told what information Mr Judd had received from Mr Watene other than the barest statement as to date, time, location and the bare fact that a SPAD A had occurred. At the 1 August meeting Mr Judd had information which indicated Mr Rowe had run a red signal, moved forward and reversed the train. This was not put to Mr Rowe prior to the invitation to provide

an explanation and falls short of the requirement under the fair treatment policy for full disclosure of information.

[51] Mr Judd's contemporaneous notes of the meeting do not record that he asked Mr Rowe at the outset of the meeting if he wished to have a representative present and that he declined that invitation. I think it likely that these notes accurately record what occurred during the meeting given they were made at the time. It was a breach of the fair treatment policy not to alert Mr Rowe to his right to have a representative present. This breach was compounded given Mr Rowe and Mr Judd's poor relationship, the steps Mr Judd had taken to ensure he had a witness present and Ms Powell's report which detailed how such meetings could be fairly managed given Mr Judd and Mr Rowe's interpersonal issues.

[52] Looking at the plain words of Mr Rowe's initial explanation to Mr Judd on 1 August, as recorded in Mr Judd's notes, and the circumstances in which the meeting was convened, a reasonable basis does not exist for Mr Low to have concluded that Mr Rowe denied the allegation that a SPAD A occurred to his manager.

[53] This finding is fatal to the conclusion that Mr Rowe's conduct amounted to serious misconduct; Mr Rowe's alleged denial was coupled to the breaches of rules.

[54] All material relevant to Mr Low's investigation was not disclosed to Mr Rowe during the disciplinary investigation. Mr Judd's notes of the 1 August meeting were a key record of a central feature of the allegations faced by Mr Rowe. They ought to have been provided to him to enable him to fully consider the allegation he was facing. Mr Hight's full report was not given to Mr Rowe, though Mr Low had a copy and it formed part of his deliberations. At the very least the existence of this document and its contents should have been disclosed to Mr Rowe so he could be satisfied that the incident summary fairly summarised the issues. Likewise, Mr Watene's information and the Tranz recorder summary should have been disclosed and that information provided to Mr Rowe. These were further breaches of the fair treatment policy which are relevant to a consideration of whether Toll's investigation was fair and reasonable.

[55] A key issue between the parties concerns Mr Rowe's health and whether the state of his health was a relevant circumstance in the disciplinary investigation. Mr Rowe's diabetes and hypertension were chronic conditions known to Toll. There is no dispute between the parties that in the months before Mr Rowe's return to work from sick leave that he suffered depressive symptoms. There is also no dispute that those depressive symptoms were work related; Ms Powell's reports and the letters of Drs Sewell and Cameron record that the cause of Mr Rowe's ill health was work related and those reports and letters are unchallenged.

[56] Mr Rowe returned to work in early July 2005 following one month of sick leave. He returned with a medical clearance. Mr Rowe's return to work was not monitored by Toll and he did not discuss the state of his health with any representative of Toll prior to the disciplinary investigation (other than the disputed discussion with Mr Judd regarding the freight roster). The issue of Mr Rowe's health was raised in the disciplinary investigation on 15 August when Mr Rowe raised his concerns about the roster and its impact on him and Mr Wilson suggested medical retirement be explored. Mr Low undertook to look at medical retirement and later determined it was not an option because there was no medical evidence to support such a claim. That Mr Low undertook to look at medical retirement implies that it was a possibility; if Mr Low was not aware that a basis for medical retirement may exist then he would have said that to Mr Wilson at the outset. Mr Low did not look further at the question of the roster because he was not satisfied that this could have impacted on Mr Rowe's actions which were the subject of the disciplinary investigation. On 25 August, the day before the dismissal meeting, Mr Rowe visited his own doctor, Dr Guy, who was of the view that he was suffering significant levels of stress and depression. This information was not relayed to Mr Low.

[57] Clause 14.3 of the collective employment agreement provides:

*“Termination for incapacity*

*14.3 Your employment may be terminated by the employer by giving such notice as is appropriate in the circumstances, if, in the view of the employer, you are incapable of the proper performance of your duties as a result of your medical condition. Before the employer takes any termination action relating to your incapacity, you will undergo a medical examination by a registered medical practitioner (determined after consultation with you) nominated by the employer and at the expense of the employer. The employer will take account of any resulting report or advice from its own and/or your medical practitioner before making a termination decision.”*

[58] Any assessment of medical incapacity under clause 14.3 would have to be made on a fair basis. Mr Low’s conclusion that there was no evidence to support a claim of medical retirement was not put to Mr Rowe prior to his dismissal. I accept that it was flagged to Mr Wilson that medical retirement may not be successful, however this was not put to Mr Rowe’s representative in a manner which invited comment or enabled Mr Rowe to reply. Mr Rowe did not know what, if any information Mr Low had considered, before he concluded there was no evidence that Mr Rowe was ill. Mr Low did not have a fair or reasonable basis upon which to rule out medical retirement.

[59] All the medical witnesses accepted that depressive symptoms may oscillate and given Dr Guy’s evidence, it appears this is what occurred after Mr Rowe returned to work in July 2005. It cannot be said that Toll ought to have known that Mr Rowe’s health issues could manifest in this manner. However, the fact of Mr Rowe’s ill health, the recent reports of that ill health and the unchallenged causes of that ill health were well known to all the Toll managers involved in the disciplinary investigation. They were relevant background to the consideration of the disciplinary issues being investigated because Mr Rowe’s recent period of ill health had been linked to work issues which remained in July 2005 ie, the roster and his relationship with Mr Judd. I am further troubled by Mr Rowe’s uncontested evidence that he did not see Dr Cameron’s clearance letter prior to his dismissal. This was another piece of information which was in Toll’s possession and which Mr Rowe was unable to comment on, the contents of which he says are incorrect.

[60] Mr Low gave evidence that he carefully considered a number of alternatives to dismissal and discounted them on the basis that they were not practically available or Mr Rowe’s serious breach of trust and confidence made them unworkable. Mr Rowe did not know what alternatives to dismissal Mr Low had considered or why he had discounted them. Again, this information was not put to Mr Rowe to comment on.

[61] I have been asked to consider the impact of the freight roster on Mr Rowe’s health and safety at work and find that Toll’s failure to address the concerns raised in Ms Powell’s report breached Toll’s obligations to provide Mr Rowe with a safe workplace. There can be no doubt that the roster was raised as a factor contributing to Mr Rowe’s stress and depressive symptoms (refer Ms Powell’s first report). Why no action was taken is unclear. It appears that attention moved to the timesheet disciplinary issue and when that was successfully navigated the roster issue was not reconsidered by Toll. When Mr Rowe raised the roster issue at the disciplinary meeting on 15 August Mr Low discounted it because he did not accept that the roster could cause Mr Rowe to breach known work rules. It is unfortunate that Mr Low did not then take the opportunity to review Ms Powell’s report as to the impact of the roster on Mr Rowe’s health, of which he was aware, because he would then have had a clearer understanding of how the roster acted as a stressor for Mr Rowe.

[62] The issue of disparity of treatment has also been raised as a criticism of Mr Rowe’s dismissal. The strongest claim relates to the manner in which Toll approached the SPAD A incident Mr Rowe was involved in in June 2004. Mr Davenport submits that the July 2005 SPAD A could not reasonably be seen as serious misconduct when a similar incident was not treated as such the preceeding year. It is clear from Mr Judd’s 18 June 2004 letter that the matter was taken seriously by Toll, that Mr Rowe was required to undertake training and put on notice that a repeat incident could lead to his dismissal for serious misconduct. The events in July 2005 were different from those in June 2004 because in addition to the breaches of work rules this allegation of serious misconduct had an element of dishonesty, which is dealt with above. As I understand the evidence of Mr Low this additional element raised serious issues about trust and confidence which do not appear to have been present in June 2004.

[63] For the reasons set out above Mr Rowe's dismissal was not justified. The serious process flaws identified above undermined Mr Low's finding that Mr Rowe had initially denied the SPAD A to Mr Judd. There was no reasonable basis for that finding. The repeated failure to disclose information relevant to the disciplinary inquiry so Mr Rowe could comment breached Toll's good faith obligations and its own fair treatment policy, casting further doubt on the conclusions reached. Mr Rowe's ill health was raised during the disciplinary investigation and Toll unreasonably failed to fairly consider the potential impact that recent ill health may have had on the SPAD A incident and Mr Rowe's subsequent actions. If that inquiry had been made Toll may have had a reasonable basis to say Mr Rowe's ill health was not a factor. However, that inquiry was not made and that failure has rendered the conclusions reached vulnerable to criticism.

### **Remedies**

[64] Mr Rowe has established that he has a personal grievance and he is entitled to a consideration of the remedies he seeks.

[65] Mr Rowe seeks compensatory damages of \$20,000 for hurt and humiliation consequent to his dismissal. In his evidence he said that his depression and ill health has worsened since his dismissal, that he has had suicidal thoughts and that his confidence is shattered. He says that he is devastated to have lost his employment after 43 years of service.

[66] I am satisfied that Mr Rowe's dismissal has had a profound effect on his life and wellbeing. Mr Rowe is entitled to an award of \$15,000 pursuant to section 123(1)(c)(i) and I so order.

[67] Mr Rowe also seeks reimbursement of lost wages from date of dismissal until date of determination and future lost salary. He receives a sickness benefit and has been unable to look for work. I accept that is the case. Mr Rowe is entitled to be reimbursed for lost wages from date of dismissal for a period of nine months, to be calculated on the basis of \$66808.99 which represents Mr Rowe's average annual earnings over the two years preceding his dismissal.

[68] I have assessed the award of lost wages at this rate because it is clear that Mr Rowe contributed to the circumstances leading up to his dismissal and it is appropriate that the remedies should reflect that contribution. He was driving the locomotive that passed a signal at danger, moved the locomotive forward and then reversed it without permission. Mr Rowe then choose not to report this incident because he thought he had "gotten away with it". While I accept Mr Rowe's evidence that he was not well at the time and have found that the issue of Mr Rowe's health ought to have been fairly considered by Toll in its disciplinary investigation that must be balanced against Mr Rowe's many years of experience as a locomotive driver, his understanding of the safety issues around SPAD As and reporting of such events.

### **Costs**

[69] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so, Mr Davenport should file and serve a memorandum as to costs within 21 days of the date of this determination. Ms Stone should file and serve a response within a further 14 days. Mr Davenport should file and serve any response within a further 14 days.