

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 160
5440302

BETWEEN

JENNIFER TUNNICLIFFE
Applicant

A N D

PEGASUS STATIONS LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Carlton Mateer, Advocate for the Applicant
Anna Smith, Counsel for the Respondent

Investigation Meeting: 11 May 2015 at Hamilton

Submissions received: 11 May 2015 from the Applicant
11 May 2015 from the Respondent

Date of Determination: 8 June 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Ms Jennifer Tunnicliffe, is claiming unjustifiable disadvantage on the basis that the Respondent, Pegasus Stations Limited (PSL), did not act as a fair and reasonable employer in that (i) PSL raised a disciplinary issue on the basis that Ms Tunnicliffe failed to disclose certain medical problems on the job application forms she completed at the time of her application for employment., and (ii) PSL did not allow Ms Tunnicliffe to withdraw her resignation after the full medical report commissioned by PSL was disclosed to her.

[2] Ms Tunnicliffe is also claiming that she was unjustifiably constructively dismissed by PSL.

[3] PSL denies that it unjustifiably disadvantaged or constructively dismissed Ms Tunnicliffe, and claims that she resigned of her own free will.

Issues

[4] The issues for determination are whether or not Ms Tunnicliffe was:

- Unjustifiably disadvantaged by PSL
- Unjustifiably constructively dismissed by PSL

Background facts

[5] ExxonMobil (Mobil) is the world's largest publicly traded international oil and gas company and operates in New Zealand through a number of companies including: Pegasus Stations Limited (PSL). PSL is responsible for employing frontline staff who work at Mobil service stations.

[6] Ms Tunnicliffe responded to an advertisement by PSL for a Retail Frontliner. At the time she did so, she was working in the bakery of a Countdown supermarket in Auckland. That position required her to lift bags of flour each weighing up to 20 kg, however as a result of a wrist injury, she was at the time of her application to PSL on restricted duties.

[7] The advertised PSL position was attractive to her as it entailed working at the Mobil service station in Mercer which was closer to her home than the Countdown supermarket. The duties were also similar to those she was undertaking at the Countdown, and Ms Tunnicliffe confirmed that she knew the position involved lifting tasks.

[8] Following receipt by PSL of her application form and a telephone interview, Ms Tunnicliffe attended a face-to-face interview with Ms Rhonda Beale on 6 August 2013.

[9] The application form which had been completed and signed by Ms Tunnicliffe on 6 August 2013 included at section s.6 entitled “*Medical*”, a number of questions which related to whether or not the applicant had had an injury or any other medical condition caused by gradual process injury, disease or infection that might be aggravated or contributed to by any task of the job for which they were applying. The questions had required completion of yes/no answers and Ms Tunnicliffe had answered ‘no’ to all of them.

[10] As a result of questions posed to Ms Tunnicliffe, and observations made by Ms Beale during the face-to-face interview, Ms Beale completed a section under s.6 “*Medical*” and added the words: “*injured tendon in left wrist has received physio but all good now has a brace to wear if needed*”.

[11] Under s.9 of the form entitled “*Declaration*”, it included the following statement to be signed by the applicant:

I... declare that to the best of my knowledge, the answers to the questions in this application are correct. I understand that if any false information is given, or any material fact suppressed, I may not

be accepted, or if I am employed, I may be dismissed. I also understand that any false information given in s.6, the medical portion of this form may result in my loss of entitlement for any compensation from ACC.

[12] Ms Tunnicliffe had entered her name at the required point and signed and dated the Declaration form on 6 August 2013 prior to the face to face meeting.

[13] Ms Tunnicliffe had subsequently been offered and accepted employment with PSL and provided with an individual employment agreement (the Employment Agreement). The Employment Agreement stated at:

Clause 6(b):

You are employed to work at Mercer station and agree that you may be transferred to any station within the 135 region.

Clause 14:

- (a) *Two weeks' written notice shall be given by either you or us of the termination of your employment.*
- (b) *Where your employment is terminated without the required notice, that notice shall be paid by us or forfeited by you as the case may require.*
- (c) *In the event that you fail to give the full notice period required under clause (a), you agree that a penalty payment of an amount equivalent to two weeks' wages may be deducted by the company from any final pay (including holiday pay) that may be owed to you.*

Clause 20(b):

You may be required to attend a medical examination from a doctor nominated by us. We will meet all costs associated with this examination. The purpose of such an examination is to ascertain whether you are capable of working in a particular position, or carrying out particular duties, or working in the environment without risk to the health and safety of either yourself or others.

[14] The Employment Agreement had been signed and dated by Ms Tunnicliffe on 13 August 2013.

[15] Ms Tunnicliffe was employed as a Retail Frontliner with effect from 13 August 2013. Her duties involved working as a cashier and serving customers at a service station. The position also entailed lifting gas bottles which were available for purchase by customers.

[16] Her employment at PSL commenced with induction and training. It was envisaged that following the successful completion of her training, Ms Tunnicliffe would be working at

the Mercer service station and in that position she would be undertaking extensive periods of solo working.

PSL/Mobil Training

[17] PSL required all trainees to be trained at an assigned training site; all territories in PSL had one training site. In the territory within which Ms Tunnicliffe worked, there were three training sites, one of which was Mobil Avalon Drive in Hamilton. Ms Tunnicliffe was trained at Mobil Avalon Drive because this was the closest training site to her home.

[18] The training schedule was set over a minimum of a two week period, depending on the trainee's ability. It consisted of computer-based training, paper-based training, and hands-on practical training for both computer service and support tasks including cleaning, stocking, inward goods procedures and the manual handling of products for sale.

[19] The first day of training involved a training site induction covering health and safety acknowledgments, including critical safety devices, hazard and incident reporting, personal protective equipment, and others. From the second day onward, the trainees would begin e-learning which was a computer-based training tool consisting of 11 key modules to support the new employee in his or her role of sales associate.

[20] The trainee would also begin practical tasks in between completing the e-learning programme guided by a senior staff member and the site manager. Once the trainee completed the full induction programme, the training site manager completed the documentation in order to assign the trainee to their base site manager. In order to complete the documentation and sign it off, the training site manager had to be satisfied that:

- (a) The trainee could begin safely working at their base site;
- (b) They were competent and skilled enough to work in sole charge; and
- (c) They had completed all training site documentation correctly.

[21] The training programme undertaken by Ms Tunnicliffe also involved routine loss prevention operation (LPO) sessions. Involved in the LPO sessions were LPO observations completed by Mobil Safety Officers, which involved a staff member observing another staff member performing a task to ensure that it was being performed safely.

[22] Ms Victoria Bray, at that time the Territory Manager for the Waikato/Bay of Plenty PSL retail sites, explained that the LPO observations were completed at random and were part of the standard PSL/Mobil policy which underpinned the Mobil safety policy aim of ensuring a safe working environment.

PSL Safety Policy

[23] Ms Bray, further explained that PSL and Mobil had safety on site as their prime priority and focus. As part of the requirements to ensure safety, on site managers such as Ms Rapaea were required to complete three LPO's in respect of the trainee, the majority of which were carried out on manual handling tasks.

[24] Each month as a company, and as a territory, PSL would review LPOs and Loss and Near Loss Incident reports in order to share learnings across the service stations chain with a view to minimising injury.

[25] Part of the policy included all employees using the Personnel Protective Equipment required when completing various tasks onsite. A requirement was that all employees wear a 'high vis' vest at all times when arriving at site and entering and leaving the store.

29 August 2013

[26] On 29 August 2013, a Safety Officer at Mobil Avalon Drive performed a routine LPO and observed Ms Tunnicliffe lifting a gas bottle. A standard gas bottle weighs 9kgs. The Safety Officer stopped Ms Tunnicliffe performing the lift shortly after she had begun because she observed that Ms Tunnicliffe appeared to have an issue using one of her knees and she had concerns for Ms Tunnicliffe's safety.

[27] As a result she consulted Ms Wendy Rapaea, who was at that time employed by PSL and whose duties included managing the operation of Mobil Avalon Drive. In that position, Ms Rapaea's responsibilities included running the e-learning programme.

[28] Once she had been informed of the Safety Officer's concerns, Ms Rapaea spoke to Ms Tunnicliffe and also instructed her to stop lifting the gas bottle in order to prevent injury. She said this was in accordance with standard PSL policy which was to stop an LPO when any safety concerns arose.

[29] Ms Rapaea took Ms Tunnicliffe into the service station office to demonstrate the correct way to lift a gas bottle using an empty cardboard box to do so. Once Ms Tunnicliffe started to demonstrate the lifting of the gas bottle, Ms Rapaea identified that Ms Tunnicliffe was using an incorrect lifting technique and noticed some issues with the use of one of her knees, so she questioned Ms Tunnicliffe about this. Ms Rapaea said Ms Tunnicliffe had confirmed that she did have issues with the use of the knee in question.

[30] Ms Tunnicliffe, who said she had mentioned her knee condition to Ms Beale during the face-to-face interview, said it had not caused her any problems, and that she did not believe she had been 'favouring' it during the LPO on 29 August 2013.

[31] Following the discussion with Ms Tunnicliffe, Ms Rapaea telephoned Ms Bray, to whom she reported, who advised her to call PSL and Mobil's Medical Assistance Hotline (MAH).

[32] She did so and spoke to a health nurse called Estelle based at the office of Dr Whiteside in Wellington. Dr Whiteside was PSL and Mobil's specialist doctor and managed all medical cases for PSL. In the course of doing so, he engaged the service of other doctors in designated areas of New Zealand to ensure there was support for all PSL and Mobil sites and locations.

[33] After a local doctor had seen a PSL or Mobil employee for a workplace assessment, he or she would report the findings back to Dr Whiteside who would in turn forward a report of the findings to Mr John Masters, PSL's Performance Support Manager, who would then report back to the appropriate territory manager.

[34] Ms Bray explained that where Dr Whiteside identified issues for PSL employees, they would work with the employees to consider the options of how they could safely do the work in question. In addition, if an employee hurt themselves outside of work whilst employed, PSL would call MAH to seek medical advice and whether or not it needed to take any precautions in order not to aggravate an injury.

[35] Following the advice of the health nurse Estelle, a referral to a local PSL doctor, Dr Leong, was made and Ms Rapaea accompanied Ms Tunnicliffe to an appointment with Dr Leong the following day, 29 August 2013. Dr Leong's report was sent directly to Dr Whiteside in Wellington.

[36] Ms Rapaea said she had placed Ms Tunnicliffe on restricted duties when she returned to her training programme at Mobil Avalon Drive. Restricted duties meant that Ms Tunnicliffe could not perform any manual handling which was standard practice if there was the potential that those tasks could cause harm to the employee.

[37] Ms Rapaea said she could not sign off Ms Tunnicliffe's training until she was confident that she could safely perform all the required tasks.

Health and safety discussions with Ms Tunnicliffe

[38] One of the safety requirements for all PSL employees was to wear a ‘high vis’ vest at all times when arriving at a site and entering or leaving a site store even when visiting another site. A ‘high vis’ vest was not required to be worn inside the store.

[39] Ms Rapaea said there were several occasions in early September 2013 when Ms Tunnicliffe did not wear her ‘high vis’ vest on the service station forecourt. The incidents were recorded as “*near loss*” incidents. Following the first two incidents on 4 and 5 September 2013, Ms Rapaea spoke to Ms Tunnicliffe regarding the requirement to wear a ‘high vis’ vest and why it was so important.

[40] Ms Tunnicliffe agreed that the matter had been discussed and that she had understood why it was important to wear a ‘high vis’ vest and when to wear it.

[41] A third incident occurred on 9 September 2013, and another *near loss* form was completed. As Ms Tunnicliffe had failed to wear a ‘high vis’ vest on three occasions and Ms Rapaea said she was concerned Ms Tunnicliffe had not taken their recent discussion seriously, she had written up a PSL Performance Management Communication Checklist document that set out the incidents and the coaching she had given Ms Tunnicliffe on the matter.

[42] Ms Rapaea said that this was the first step on what could become a disciplinary process, the next stage of which was that the PSL human resource department to review the document. As a result of the HR review, Ms Tunnicliffe may have been invited to a formal meeting to discuss the incidents and the importance of safety. However, due to Ms Tunnicliffe’s resignation a few days later, the matter was not taken any further.

[43] There was also an incident on 10 September 2013 involving Ms Tunnicliffe losing a piece of sticking plaster which had covered a small injury that had occurred at her home and Ms Tunnicliffe being advised to report the incident relating to the injury. Ms Tunnicliffe said she had not understood why it was necessary to report a minor injury which had not occurred at work.

[44] Ms Bray explained that since even minor injuries which had occurred at home could be aggravated by duties in the workplace, it had been Mobil and PSL policy that these had to be reported.

6 September 2013 discussion

[45] On 6 September 2013 Ms Rapaea, who had obtained a copy of Ms Tunnicliffe's application documents and reviewed them, noted that Ms Tunnicliffe had answered 'no' to all the questions in the medical section of the form.

[46] She had met with Ms Tunnicliffe to discuss her situation, advising that she did not yet have an update from Dr Whiteside, and asked why she had not disclosed the issues with her knee on the application form. Ms Tunnicliffe said that she had told Ms Beale, the interviewing manager.

[47] Ms Rapaea said she had then inquired why only Ms Tunnicliffe's wrist was noted on the application form, however, Ms Tunnicliffe said she did not declare anything on the application form and that Ms Beale had only written down the issue with her wrist.

12 September 2013 discussion

[48] On 12 September 2013, Ms Rapaea said that she had been advised by a staff member that she had observed Ms Tunnicliffe going to serve a customer with a gas bottle, which would have involved her lifting it. The staff member had stopped Ms Tunnicliffe because she was on restricted duties.

[49] Ms Rapaea said she spoke to Ms Tunnicliffe and re-emphasised the importance of safety and that she was not allowed to do any manual handling because of her knee and wrist.

[50] Ms Tunnicliffe had expressed her frustration because she did not want to be on restricted duties and felt that as a result her training could not be completed and she would not be able to move from Mobil Avalon Drive to the Mercer site.

[51] A file note concerning the meeting dated 12 September 2013 stated:

- *Jenny not allowed to do any manual handling because of her knee and wrist*
- *Restricted to do any manual handling*
- *Safety #1 priority stressed by Wendy*
- *It is frustrating Jenny because she cant do anything*
- *She is stuck @ Avalon Drive*

[52] Ms Bray had been visiting Mobil Avalon Drive on 12 September 2013. She said Ms Tunnicliffe had spoken to her and told her she was frustrated because she had not been signed off to work at the Mercer site.

[53] Ms Bray said that it had also been her and Ms Rupaea's wish to get Ms Tunnicliffe signed off restricted duties as it was impacting on other employees who had to work double shifts as a result. She added that PSL had invested money and time in training Ms Tunnicliffe and on that basis it was preferable for Ms Tunnicliffe to be able to resume normal working.

[54] Dr Whiteside had sent an email to PSL on 4 September 2013 to Ms Bray, however because in her position she was frequently travelling, she had not received and consequently not read the email on that date.

[55] However, following her conversation with Ms Tunnicliffe on 12 September 2013, and knowing that Ms Tunnicliffe was anxious about the outcome of the doctor's report, she had called into her base office following her visit to Mobil Avalon Drive on 12 September 2013 and had accessed the email in which Dr Whiteside stated:

...

I understand Jennifer commenced employment with PSL on 13 August this year, and has been having ongoing medical problems with her right knee as well as her left wrist, both of which had been treated in the past and should have been noted at the time of her employment. The right knee injury occurred as a non-work injury, 16 years ago and causes intermittent locking of the knee and limited knee extension. This could affect her ability to stand for long periods, kneel or carry stock at the PSL site when the knee pain occurs from time to time.

...

There are clearly significant muscular skeletal function limitations involving both Jennifer's right knee as well as left wrist, although a further up to date orthopaedic specialist opinion and left wrist x-ray (ultrasound) would assist in clarifying her current fitness level. Alternatively if necessary, a functional assessment by an experienced physiotherapist would be helpful.

It is likely that based on the current medical assessment Jennifer will need to remain on restricted work duties for the foreseeable future.

13 September 2013 discussion

[56] Ms Bray visited Mobil Avalon Drive the following day, 13 September 2013, in order to provide an update to Ms Tunnicliffe regarding Dr Whiteside's findings.

[57] Ms Bray explained to Ms Tunnicliffe that Dr Whiteside had advised that she needed to be kept on restricted duties for the foreseeable future and that PSL had some concerns about her ability to safely complete some of the tasks which were being asked of her, explaining that Ms Tunnicliffe's health and safety was of paramount importance both her and to PSL.

[58] Ms Bray said she advised Ms Tunnicliffe that at the Mercer service station she would be in a sole charge position and that it was her concern that Ms Tunnicliffe would not have any support during her shift to complete the required tasks, including lifting gas bottles.

[59] Ms Rapaea was also present at the meeting on 13 September 2013 but said that neither she nor Ms Bray took any notes as it was in the nature of an informal meeting to provide Ms Tunnicliffe with an update on her situation rather than a formal meeting.

[60] Ms Tunnicliffe said that during the meeting on 13 September 2013, she had been advised that PSL had received the information from Dr Whiteside and as a result PSL understood that she was considered not fit to do the job for which she had been employed. It had not been mentioned to her that she should be kept on restricted duties pending a full report or further examination

[61] She had asked for a copy of Dr Whiteside's report however neither Ms Bray nor Ms Rapaea had it with them. Ms Tunnicliffe said she had asked if she needed to resign, but had been told that that was her choice. Ms Bray had mentioned that options would need to be considered, but had not discussed with her what options were available.

[62] Ms Bray said that she had explained the contents of Dr Whiteside's email to Ms Tunnicliffe and that he had advised that she needed to be on restricted duties for the foreseeable future. She had explained that PSL had some concerns about her ability to safely complete some of the tasks it required of her, and that as safety was of paramount importance, she did not want to put her in a situation in which she might come to some harm. This included concerns about Ms Tunnicliffe being in a sole charge position in which she would have no assistance to complete the required tasks.

[63] At this stage in the discussion Ms Bray said she recalled Ms Tunnicliffe becoming annoyed and making comments indicating that she was well enough to undertake the required tasks. At that point Ms Tunnicliffe had said she felt that she had been left with no alternative but to resign and had said that she was leaving, to which Ms Bray had responded that she found this difficult to understand.

[64] Ms Bray agreed that she had mentioned that both parties needed to consider their options, but since it was not a formal meeting and she had intended only to provide Ms Tunnicliffe with an update following receipt of the email from Dr Whiteside, she had given no consideration as to what the options would be prior to meeting with Ms Tunnicliffe, or to have considered what the next steps were to be.

[65] Ms Tunnicliffe had been asked her response that she was leaving was to be her resignation and she had answered in the affirmative. Ms Rapaea then handed her a piece of paper and on the piece of paper Ms Tunnicliffe wrote:

To whom it may concern.

As at the 13-9-13 I will no longer be working at Mobil.

Yours faithfully,

J Tunnicliffe

[66] Ms Tunnicliffe had left the Avalon Drive site and returned home. The drive to her home took approximately 45 minutes. Once she arrived home, she had received a telephone call from Ms Rapaea who asked whether she wished to confirm that she had wanted to resign and what date she meant to resign on.

[67] Ms Rapaea said that she had considered that Ms Tunnicliffe who had been angry and frustrated at the meeting that day, may have had time to reconsider her position during her drive home, and further that as the note written by Ms Tunnicliffe was ambiguous, clarification of her intentions were required.

[68] She had telephoned Ms Tunnicliffe who confirmed that she wanted to resign, adding that she had no choice. Ms Rapaea had advised her that she did have a choice and that that choice was hers, and requested that she reconfirm her intention in respect of her employment, to which Ms Tunnicliffe said: "*I am resigning*".

[69] Ms Rapaea then advised Ms Tunnicliffe that she would process the resignation through the PSL payroll department. She had made a note on the note written by Ms Tunnicliffe which read: "*Rang Jenny 13/9/13 12.15 to ask if this is her letter to resign. She answered yes.*"`

[70] She also made a handwritten note, dated 12.15 on 13/9/2013 relating to the telephone conversation which included, "*she (Ms Tunnicliffe) said when she gets the medical report she will take the matter further.*"`

[71] PSL subsequently received a note from Ms Tunnicliffe dated 13 September 2013 which stated:

To whom it may concern. Please can you arrange a copy of the doctor's report to be released and sent to me at the address PO Box 134 Meremere.

Events after 13 September 2013

[72] Ms Tunnicliffe said she had spoken to her representative Mr Mateer on 14 September 2013, who had advised her to request a meeting with Ms Rapaea and Ms Bray which he would attend with her. The intention of the meeting was to discuss Ms Tunnicliffe's resignation and the medical details which had yet to be disclosed to her.

[73] On 16 September 2013, Ms Tunnicliffe telephoned PSL and requested the meeting to be held on Friday, 20 September 2013. As a result, Ms Rapaea said she contacted the PSL payroll department on 17 September 2013 to halt the payroll processes necessary to terminate Ms Tunnicliffe's employment. Due to the unavailability of Ms Bray, the meeting was not held until 23 September 2013.

[74] On 18 September 2013, Ms Bray received an email from Mr Masters containing Dr Whiteside's formal report.

[75] Ms Tunnicliffe said she had received a letter signed by Ms Bray on 19 September 2013. It was dated 18 September 2013 and stated:

We are concerned that your medical condition is actually something different from what we relied upon to employ you. Your application for employment form had circled "no" to the question about illness or injury. It was not until your face to face interview that the interviewer picked up that you had a wrist injury. You assured her that there was no problem and that you knew your limitations of what you could do. You did not mention your 16 year old knee injury at all.

We consider your omission to tell us about the knee injury was very serious, and also that if we had not picked up the wrist injury by chance you would not have told us about that either.

The job requires long periods standing and lifting. We were concerned that these injuries could have affected your ability to stand for long periods, kneel and/or carry stock when pain occurs from time to time. This was verified when you were observed on 29 August 2013 lifting a LPG gas bottle. You were clearly favouring the knee. You were instructed by Wendy Rapaea not to carry out any manual handling for your own safety.

...

The company doctor reported back that although you had been treated by an orthopaedic specialist in the past, the nature of your injuries could affect you using the keyboard, performing restocking duties or lifting product as well as changing the sign for price changes.

That is why I met with you on Friday 13 September to tell you I had the doctor's report back and to tell what it contained. I explained that the company needed to consider its options as did you. We did not get to have a formal meeting later to discuss this in more detail which would have been the next stage. Instead you wrote your note you no longer worked for the company and left. Your manager later phoned you to ask what you meant by it and you confirmed it was your resignation.

You have asked for a copy of the doctor's report. I explained that could be arranged but I needed your written consent for the report to be released to your doctor but you appeared reluctant to have the report sent to your doctor.

Meeting on 23 September 2013

[76] The meeting on 23 September 2013 was attended by Ms Tunnicliffe accompanied by Mr Mateer, and Ms Rapaea and Ms Bray. Ms Rapaea attended the meeting to take notes, and Ms Bray was the decision-maker.

[77] Ms Tunnicliffe said she was given a copy of the medical report at the beginning of the meeting which was the first time she had seen the report from Dr Whiteside.

[78] Ms Bray said that she had sent a copy of the medical report prior to the meeting to Ms Tunnicliffe at the PO Box address that she had given together with a copy of the letter dated 18 September 2013. However as both had been returned unopened and undelivered to the Mobil Avalon Drive,, she had allowed sufficient time at the beginning of the meeting for Ms Tunnicliffe and Mr Mateer to fully read and consider the report. Once they had had sufficient time to do so, the meeting commenced.

[79] Ms Tunnicliffe said that when she read the report from Dr Whiteside, she became aware that he had not declared that she was not fit to work, and he had made a suggestion to assist to assist in clarifying her current fitness level. No final decision had been made as to her fitness to return to work.

[80] Mr Mateer had asked on Ms Tunnicliffe's behalf for her resignation to be withdrawn because there had been a misunderstanding. Ms Bray agreed at the meeting to consider Ms Tunnicliffe's request for reinstatement.

[81] After considering the matter, Ms Bray wrote to Mr Mateer on 30 September 2013, and advised that she had considered the request and that her decision was not to reinstate Ms Tunnicliffe. In the letter dated 30 September 2013, Ms Bray had stated:

...

During the meeting you said that Jennifer's resignation was a misunderstanding and asked if Jennifer could be reinstated. You said that Jennifer would like the opportunity to demonstrate that she has no physical issues limiting her carrying out the work required of a sales associate.

I undertook to consider this request and come back to you.

I have reconsidered the doctor's report and what you have said, and also that SM Wendy Rapaea observed Jennifer showing discomfort when carrying a gas bottle.

In the circumstances, I do not believe reinstatement is appropriate so her resignation stands.

[82] On 10 October 2014, Ms Tunnicliffe submitted a Statement of Problem to the Authority. The parties subsequently attended mediation but this did not resolve the issue.

Determination

Was Ms Tunnicliffe unjustifiably disadvantaged by PSL?

Unjustifiable disadvantage in employment

[83] Ms Tunnicliffe is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

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

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

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[85] Ms Tunnicliffe must therefore establish that there was some unjustifiable action by PSL which affected her terms and conditions of employment to her disadvantage.

[86] The leading cases in this area are *Wellington Area Health Board v Wellington Hotel IUOW*¹ and *Victoria University of Wellington v Haddon*². These cases clarify that the section of the Act governing disadvantage grievances is directed at grievances arising out of the employment activity or from the “*on the job situation*”.

[87] In *Tranz Rail Ltd v Rail & Museum Transport Union (Inc)*³ the Court of Appeal commented that:⁴ “*Broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of the employment contract*”.

[88] However it is not sufficient for an employee to be subjectively dissatisfied with their circumstances, there must be an act or omission by the employer leading to disadvantageous consequences to the employee as stated by the Chief Judge (then Judge Colgan) in the Employment Court case *Bilkey v Imagepac Partners*:⁵

Although I find Ms Bilkey continued to feel distressed and resentful that she had not been offered ongoing employment of indefinite duration ... a personal grievance claim depends upon an act or omission having disadvantageous consequences to the employee and not merely the employer’s subjective dissatisfaction at her circumstances.

[89] In this case Ms Tunnicliffe claims that PSL was adversely influenced during the meeting held on 13 September 2013 by her not having disclosed information about her medical condition regarding her wrist and knee prior to employment, and that this resulted in PSL acting in such a way, namely by misleading her in respect of the medical report from Dr Whiteside, to disadvantage her leading to her resignation.

[90] Ms Tunnicliffe further claims that PSL acted unreasonably by not allowing her to withdraw her resignation.

Non-disclosure of information

[91] Ms Rapaea had discovered on 6 September 2015 following a review of Ms Tunnicliffe’s application documents that she had answered “*No*” to all the questions on the

¹ [1992] 2 ERNZ 466

² [1996] 1 ERNZ 139

³ [1999] 1 ERNZ 460

⁴ *Ibid* at para [26]

⁵ Unrep AC65/02, 7 October 2000 at para [33]

medical section of the application form. At the meeting on that day with Ms Tunnicliffe, she had queried the non-disclosure but had not indicated that there was any disciplinary action to be taken in respect of this non-disclosure.

[92] The issue of non-disclosure of medical information was not alluded to in the meetings held with Ms Rapaea on 12 September 2013, or at that held with Ms Rapaea and Ms Bray the following day, 13 September 2013, neither of which was designated as a disciplinary meeting.

[93] There is no indication that Ms Rapaea or Ms Bray were influenced during the meeting on 13 September 2013 by either by the application form non-disclosure issue, or indeed by the infringements of the safety requirements to wear a 'high vis' vest when on site. The latter of these concerns may have subsequently given rise to a disciplinary matter had Ms Tunnicliffe not resigned her employment, but even so, there is no reason to believe that that situation may have given rise to the termination of her employment..

[94] The evidence given by Ms Rapaea and Ms Bray refer to an anxiety and frustration on the part of Ms Tunnicliffe regarding her inability to cease being on restricted duties. The restricted duties were mandated by safety considerations which Ms Tunnicliffe acknowledged at the Investigation Meeting were of paramount importance to PSL.

[95] The meeting held on 13 September 2013 was in response to the frustration and concern at being on restricted duties expressed the previous day by Ms Tunnicliffe. It appears from the interactions between her and Ms Rapaea and Ms Bray that their relationship was a good one, sufficiently so for Ms Bray to make a special visit to her base office on 12 September 2012 in response to Ms Tunnicliffe's expressed frustration at the situation to check if there was any response from Dr Whiteside.

[96] Whilst the disclosure of the suggestion by Dr Whiteside of further medical investigation may have influenced Ms Tunnicliffe's level of frustration and the decision to resign, this would not have altered her situation as regards her continuance on restricted duties.

[97] What had been of concern to Ms Tunnicliffe had been her inability to commence the position at the Mercer Service Station as envisaged when she applied for employment at PSL, which position was attractive to her given its closer location to her home. I note that during the time when she had been on restricted duties, there had been no adverse impact on the substantive terms of her employment i.e. remuneration, which remained the same.

[98] The situation as regards her being kept on restricted duties would not have altered until and if, the further medical assessments had cleared her for the full range of duties required by the position for which she had applied.

[99] In the interim, her current terms and conditions of employment, being those of restricted duties, would have continued: “*for the foreseeable future*”. I find that this decision was not based upon the non-disclosure of information contained in the job application form completed by Ms Tunnicliffe

[100] Rather the restriction placed on Ms Tunnicliffe was in order to safeguard her from injury. In this sense the action taken by the PSL cannot be held to be an unjustifiable action, but rather it was justifiable on safety grounds to maintain Ms Tunnicliffe’s safety in her work place.

[101] I do not find that Ms Tunnicliffe was unjustifiably disadvantaged by the non-disclosure of information contained in the job application form completed by Ms Tunnicliffe.

Refusal to allow withdrawal of resignation

[102] An employee is usually entitled to resign from their employment on a unilateral basis. The Employment Agreement made provision for this at clause 19.1 which states: “*Unless agreed otherwise, either party may terminate the employment under the Agreement by giving two weeks’ notice of termination in writing to the other ...*”

[103] The Employment Agreement also makes provision for the situation in which the agreed notice is not provided at clause 19.3: “*If the Employee fails to give notice of termination to the Employer then any pay for the requisite notice period will be forfeited.*”

[104] The agreement of the employer to such unilateral notice is not required; the employee responsible for the unilateral act, in this case resignation, is simply telling the employer what is going to happen. As observed by Goddard CJ in *Stiffe v Wilson & Horton*:⁶

Where either party to an employment agreement gives notice, it is well settled that the contract will terminate according to the tenor of that notice. It is not open to either party to withdraw or vary that notice without the consent of the other.

⁶ 5/12/00 AC 94/100, AEC 106/00 at para 21

[105] There is no obligation on the employer to dissuade the employee from leaving, although they may choose to do so in some cases. An employee who has resigned has not been dismissed.

[106] Ms Tunnicliffe resigned in what was clearly an emotional state. In *Boobyer v Good Health Wanganui Ltd*⁷ the Employment Court said that in this type of case that the employer cannot safely insist on what the employee may have said:

This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once “the heat of the moment” had passed and taken with it any “influence of anger or other passion commonly having the effect of impairing reasoning faculties”.

[107] It is agreed that Ms Tunnicliffe was frustrated and in an emotional state when she tendered her resignation during the meeting on 13 September 2013. In that situation, the employer acts reasonably in allowing the employee a ‘cooling down’ period.

[108] Ms Rapaea telephoned her later that same day to confirm whether or not she wished to resign. The telephone call took place shortly after Ms Tunnicliffe returned to her home, following a drive of some 45 minutes.

[109] In that situation I do not consider that Ms Tunnicliffe she would have had sufficient time to ‘cool down’ and reconsider her position. Consequently her reconfirming her decision to resign during that telephone call despite Ms Rapaea confirming that any decision to make was hers alone, I consider to have been made whilst she was still under the influence of: *“anger or other passion commonly having the effect of impairing reasoning faculties”.*

[110] Ms Tunnicliffe consulted Mr Mateer the following day, Saturday 14 September 2013, and she requested a meeting with Ms Rapaea on Monday 16 September 2013. In these circumstances I consider Ms Tunnicliffe acted in a timely manner once she had had sufficient time to cool down and consider her position.

[111] I find that in the circumstances PSL acted unjustifiably when accepting a decision to resign made by Ms Tunnicliffe when she was clearly upset and not thinking rationally.

[112] I determine that Ms Tunnicliffe was unjustifiably disadvantaged by PSL refusing to allow her to withdraw her resignation.

⁷ (unreported) WEC 3/94

Was Ms Tunnicliffe unjustifiably constructively dismissed by PSL?

[113] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[114] As set out in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*⁸ (*Woolworths*) there are three fundamental situations in which a constructive dismissal claim may arise:

- i. An employee is given a choice between resigning and being dismissed;
- ii. There has been a course of conduct followed by the employer with the deliberate and dominant purpose of coercing the employee to resign;
- iii. There had been a breach of duty by the employer which causes an employee to resign.

[115] The starting point for any enquiry into whether or not there has been a constructive dismissal relies upon establishing the terms of the employment agreement and whether there had been a breach of the terms of that contract serious enough to warrant the employee leaving the employment of the employer.⁹

[116] In this case, Ms Tunnicliffe's claim of constructive dismissal appears to fall under the third category in *Woolworths* since she was not given a choice of resigning or being dismissed by PSL, nor was there a course of conduct followed with the intention of coercing her into resigning

[117] Ms Tunnicliffe is thus claiming that a breach of duty by PSL has occurred, specifically a breach of duty on the part of PSL in respect of the duty of good faith as set out in s 4(1) of the Employment Relations Act 2000 (the Act) which states:

The parties to an employment relationship specified in subsection (2) –
(a) Must deal with each other in good faith; and
(b) Without limiting paragraph (a), must not, whether directly or indirectly, do anything-

⁸ (1985) ERNZ Sel Cas 136; [19785] 2 NZLR 372

⁹ *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59, as referred to in *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 [1983] ACJ 965 (at pp 112-113: p 985)+

i) *to mislead or deceive each other, or*

ii) *that is likely to mislead or deceive each other*

[118] Ms Tunnicliffe claims that PSL breached its duty of good faith by not disclosing Dr Whiteside's report to her so that she could respond in circumstances which affected her employment with PSL.

[119] The leading case in this type of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW*¹⁰. The Court of Appeal in examining the question of constructive dismissal observed:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[120] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[121] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*¹¹ observed in describing this type of constructive dismissal:¹²

¹⁰ [1994] 2 NZLR 415; [1994] 1 ERNZ 168 (CA)

¹¹ [1983] ACJ 965

¹² at [975]

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[122] To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employee, made in circumstances where he or she had no other option.

Breach of duty

[123] Ms Bray's evidence, as supported by that of Ms Rapaea, is that the meeting on 13 September 2013 was not intended to be a disciplinary meeting; it was merely intended as an informal meeting to update Ms Tunnicliffe on her situation in light of the medical information received from Dr Whiteside.

[124] Ms Bray did not have the medical report available to show to Ms Tunnicliffe at the meeting, and the information which she relayed from the email she had received from Dr Whiteside in respect of Ms Tunnicliffe having to remain on restricted duties: "*for the foreseeable future*".

[125] The information conveyed did not convey the further information that Dr Whiteside considered further medical assessments should be undertaken in order to make a definite prognosis. The information conveyed to Ms Tunnicliffe therefore was incomplete and I consider this to be a breach of the employer's duty towards Ms Tunnicliffe.

[126] I consider that PSL breached its duty to act in good faith when failing to convey all the information from Dr Whiteside to Ms Tunnicliffe at the meeting on 13 September 2013.

Sufficiently serious to cause resignation?

[127] Whilst I consider that there had been a breach of good faith by PSL during the meeting held on 13 September 2013, I take into consideration the informal nature of that meeting and the fact that both Ms Rapaea and Ms Bray had been approachable and sympathetic to Ms Tunnicliffe's concerns and frustration at being kept on restricted duties instead of being transferred to the Mercer Service Station.

[128] I further consider that whilst the information conveyed to Ms Tunnicliffe concerning the medical report was inconsiderate and likely to cause Ms Tunnicliffe some unhappiness given the frustration she had expressed to being kept in restricted duties, it was not dismissive or repudiatory in nature, and consequently it was not reasonably foreseeable by PSL as being sufficiently serious that it would cause Ms Tunnicliffe's resignation.

[129] In *Harrod v DMG World Media (NZ) Ltd*¹³ the then Chief Judge observed that the unsuccessful plaintiff failed in her claim of constructive dismissal in circumstances in which: "... she knew or ought to have known that it could have been discussed further if it was troubling her."¹⁴

[130] I consider that this situation is analogous to that in which Ms Tunnicliffe offered her resignation. Whilst PSL put Ms Tunnicliffe at a disadvantage by not providing her with a copy of Dr Whiteside's report, I find that Ms Tunnicliffe had various alternatives open to her other than resigning, specifically she could have:

- requested a copy of Dr Whiteside's report for consideration;
- asked for a further meeting to discuss the options for her;
- availed herself employee assistance via the Employee Assistance Programme as set out at clause 19 of the Employment Agreement, and in the PSL Standard Operating Procedures Manual; and/or
- followed the procedure for raising a personal grievance set out at clause 17 of the Employment Agreement, including requesting the services of MBIE Mediation Service.

[131] I determine that Ms Tunnicliffe was not unjustifiably constructively dismissed by PSL

Remedies

[132] Ms Tunnicliffe has been unjustifiably disadvantaged and she is entitled to a remedy.

[133] In respect of the unjustifiable disadvantage, PSL is to pay Ms Tunnicliffe the sum of \$3,000.00, pursuant to s 123(1) (c) (i).

¹³ [2002] 2 ERNZ 410

¹⁴ *Harrod* at [54]

Costs

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

Eleanor Robinson
Member of the Employment Relations Authority