

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 334
3109534

BETWEEN	JASON WELLS Applicant
AND	DOWNER NEW ZEALAND LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Warwick Reid and Rachel Rolston, advocates for the applicant Anthony Russell, counsel for the respondent
Investigation Meeting:	21 April 2021
Submissions (and further information) received:	At the investigation meeting from the applicant At the investigation meeting and 28 April 2021 from the respondent
Date of determination:	29 July 2021

DETERMINATION OF THE AUTHORITY

- A. Jason Wells was subject to an unjustifiable action by Downer New Zealand Limited to his disadvantage.**
- B. Within 21 days of the date of this determination Downer New Zealand Limited is to pay Mr Wells \$8,000 as compensation for his grievance.**
- C. Costs are reserved and a timetable set if the parties cannot reach agreement.**

Employment relationship problem

[1] Jason Wells is an experienced telecommunications technician. He worked extensively overseas on substantial projects. On returning to New Zealand he was involved in scoping the layout of ultra-fast broad band. He then applied for and was offered work based in Antarctica by Downer New Zealand Limited (Downer or the company). Downer is a large company operating in a number of sectors including telecommunications.

[2] Whilst in Antarctica Mr Wells became unwell and had to return to New Zealand. After some time Downer terminated his employment for medical incapacity. Mr Wells challenges that dismissal.

[3] An investigation meeting was held on 21 April 2021 and I heard evidence in person from Mr Wells and from Downer's Grant Wright (Regional Operations Manager South - Mobile/ISP/ES) and Paul Bartlett (HR Business Partner - Telco). Two witnesses, Simon Trotter (CEO Antarctica New Zealand) and Dr Paul Peterson (Medical Assessor for Antarctica New Zealand), gave evidence by audio visual link from Christchurch.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[5] The issues for investigation and determination are:

- (a) Was Mr Wells unjustifiably dismissed by Downer; and
- (b) If so, what remedies (if any) should he receive?

What is the arrangement regarding Antarctica?

[6] Antarctica New Zealand (Antarctica NZ) is the Crown entity that manages Scott Base, New Zealand's research station in Antarctica. Spark provides telecommunications equipment at Scott Base. Downer contracts to Spark to provide a technician to cover maintenance and operations of the Spark equipment, ensuring ongoing communications to and from Antarctica.

[7] Scott Base has very limited health facilities and relies on the nearby American McMurdo Station for medical assistance including with medical evacuations. There are restrictions on who may go the Scott Base, especially for extended periods, based on medical and other conditions.

[8] Downer does not control the medical decision-making about who gets to go to Antarctica. That is Antarctica NZ's decision, which it makes on the basis of the advice of Dr Peterson, its sole medical assessor.

[9] There are New Zealand guidelines for medical examination of candidates for visits to Antarctica. In addition Dr Peterson uses more detailed United States guidelines formulated for the US Antarctic programme. Those guidelines detail a number of medical conditions correlated to whether the condition prevents any visit to Antarctica, would allow only summer visits or both summer and winter trips.

[10] Due to Scott Base's reliance on McMurdo Station's assistance, the US guidelines are followed for the base.

[11] In summer there are around about 80 personnel at Scott Base, reducing to around a dozen in winter. Traditionally the New Zealand air force does not fly to the base in winter.

How did Mr Wells' appointment come about?

[12] Mr Wells had worked on three continents including sub-contracting for jobs for the United Nations and NATO. He had worked in harsh environments and found the idea of work in Antarctica interesting.

[13] Mr Wells had a fulltime permanent role with another New Zealand employer but was interested in Downer's role as it was where he wanted to be on a technical level, was highly paid and a possible bridge to other work for Spark or Downer.

[14] In July 2019 Downer offered Mr Wells a fixed term role. Initially Mr Wells turned it down. Mr Wright encouraged Mr Wells to accept a revised offer at a higher pay rate.

[15] Mr Wells says Mr Wright told him not to worry (about moving from a permanent role into a fixed term role), saying the company always looked to redeploy people once they have been to Antarctica. Mr Wells asked for details and Mr Wright talked about a

cellular contract with his ability to nudge someone up north. That was the division Mr Wells wanted to move into. He had the sense that his employment would continue after the fixed term expired. He describes this as a promise by Mr Wright to find him other work.

[16] I find that there was no promise to provide other work after the agreement expired although Mr Wright did offer to try to find Mr Wells other work at the end of his contract. Mr Wright was not in a position to guarantee that work would be available outside his area and would not have done so.

[17] The medical clearance procedure is complex. Mr Wells was cleared by Dr Peterson on 18 September 2019.

[18] Due to the completion being later than anticipated, it was with hindsight unfortunate that, Mr Wells was not able to fully participate in the usual two week mandatory training with Antarctic NZ. He had some training but he was not, for example, particularly aware before he went of the very limited nature of the health facilities available at Scott Base.

What did the employment agreement provide?

[19] Downer employed Mr Wells in a fixed term role as telecommunication technician Antarctica. There are restrictions on the length of time and pattern of work in Antarctica. The provision of a fixed term agreement was not challenged except to the extent that Mr Wells believed he would or could get other work with Downer after his Antarctic time.

[20] The position was based at Scott Base and ran until 20 October 2020. The agreement explicitly provides that employment will cease on the expiry date with no claim for severance pay or redundancy compensation at that point.¹

What happened in Antarctica?

[21] Mr Wells flew to Antarctica on 8 October 2019. His work progressed well, without concern by Downer. He describes organising good equipment arrangements for

¹ Employment agreement, Schedule Two.

Antarctica NZ. On occasions his work required him to go from the base to the satellite earth station, where he worked alone, albeit in radio contact with the base.

[22] Unfortunately Mr Wells started having acute abdominal pains. Dr Peterson approved Mr Wells' evacuation from Scott Base to McMurdo Station. After medication did not assist, the American medical team advised medical evacuation.

[23] On 25 January 2020 Mr Wells was evacuated from Antarctica to Christchurch on a plane that was flying out for other purposes.

What happened in Christchurch?

[24] Mr Wells was taken to Christchurch Hospital where a diagnosis of acute idiopathic pancreatitis was made.² He was there for almost a week. His recall of events during that time is unsurprisingly not perfect.

[25] Having assessed the medical notes, consulted the McMurdo medical staff and the Antarctica NZ logistics co-ordinator, Dr Peterson concluded that Mr Wells was not physically fit enough to winter over in Antarctica. This was done without Dr Peterson seeing Mr Wells in hospital. In fact the two have never met in person.

[26] Dr Peterson's approach is that it was better that he not meet those whose assessments he was responsible for in person, in order to maintain appropriate distance and objectivity. Mr Wells was at more of a distance from Dr Peterson than some others going through the process who may at least have worked for Antarctica NZ. Mr Wells did not have an understanding of the objectivity and distance point, leaving him with a sense of having decisions made about him from afar.

[27] The US guidelines prevent those with an acute episode of pancreatitis from visiting Antarctica at all if the episode occurred less than a year previously. Subject to some extra conditions, after a year post-episode summer visits are permitted, with winter visits only greater than two years after an episode.

[28] Dr Peterson phoned Mr Wells in hospital to check how he was. Mr Wells' sense was that the first time he was told he had pancreatitis was by Dr Peterson, which he found odd as Dr Peterson had not been in to visit. It is quite plausible that Mr Wells was

² Idiopathic - without known cause. Pancreatitis - inflammation of the pancreas.

informed of the diagnosis earlier by a hospital doctor but did not take in or retain that information due to his medical state.

[29] Dr Peterson recalls telling Mr Wells that he would not be able to return to winter over in Antarctica due to his medical condition. However, Mr Wells did not take that in. He was told by the hospital doctors that it was likely a one-off incident.

[30] Antarctica NZ's Mr Trotter visited and discussed Dr Peterson's assessment that Mr Wells would not be able to return to the base for winter. Mr Trotter expressed his sympathy and stressed that Mr Wells should focus on his health. At this point Mr Wells understood that he could not imminently return to Antarctica.

[31] Mr Wright also phoned initially then visited. He took with him a rigger who was undertaking a planned maintenance programme in Antarctica but was also going to try to undertake necessary tasks which Mr Wells was not present to do.

[32] On 27 January 2020 Dr Peterson emailed the logistics co-ordinator from Antarctica NZ indicating that Mr Wells was not physically fit enough to winter over and would not return to the continent that season. In the email Dr Peterson recognises that this will be disappointing for Mr Wells but has based his decision on Mr Wells' best interests and the interests of the programme.

[33] Mr Wright was copied into that email the following day. Unfortunately Mr Wells was not sent the email until much later. He did not have a sense of how definitive Dr Peterson's assessment was.

[34] Once Mr Wells' condition improved, Mr Wright drove him to the airport for the return flight to his home base in Tauranga.

What happened after Mr Wells returned home?

[35] Downer left Mr Wells to recuperate, paying him sick leave although he was not entitled to it yet as he had not yet reached six months' service.³

[36] Of his own accord Mr Wells sought a medical certificate. On 12 February his GP declared he was unfit to work but indicated he should be fit to return to work on 26 February 2020. She appears not to have any specialist knowledge regarding Antarctica

³ Employment agreement, cl 9.1.

although was well acquainted with pancreatitis. She indicated that the acute condition is usually one-off so could see no reason why in the near future Mr Wells was not able to return to Antarctica. There was no indication of a chronic condition.

[37] The last scheduled flight to Antarctica that allowed passengers before the winter close out period left on 21 February 2020. The summer flights did not start until around October.

[38] There had been some discussion between Mr Wright and Mr Bartlett about Mr Wells' situation but they describe the more active phase of searching for other work for him as not starting until around 24 February. There are no emails indicating contact with other parts of the business until 2 March.

[39] Mr Wells felt much improved and applied for around three jobs within Downer. Mr Wright and Mr Bartlett were not aware of this. Mr Wells describes himself as having a wide scope of experience and not being picky about what he would do. He initially received no interviews or feedback.

How did Downer start its process with Mr Wells?

[40] On Friday 28 February 2020 shortly after business hours Downer emailed Mr Wells a meeting invitation for Monday afternoon.

[41] Mr Wright wrote advising that it had "become necessary to consider the viability" of Mr Wells' future with Downer. Part of a proposed meeting was to determine whether it was appropriate for the company to terminate Mr Wells' employment due to medical incapacity. Medical information was sought.

[42] On Monday morning, 2 March 2020, Mr Wells provided the earlier medical certificate to Downer which indicated he would be fit to resume work on 26 February.

[43] Mr Wright emailed his northern counterpart about Mr Wells' situation, asking that he be looked on favourably for any vacancies. The manager responded that they could not see a requirement for Mr Wells at that stage.

[44] On the afternoon of 2 March a meeting was held by phone between Mr Wright, Mr Bartlett and Mr Wells. Mr Wright and Mr Bartlett were based in Christchurch. Mr Wells was confused by the suggestion of termination as he had a medical certificate permitting him to work. He felt he should be sent back to Antarctica as he was cleared

by his GP. Downer indicated that was no longer an option for the company as Dr Peterson had ruled out Mr Wells returning to Antarctica that winter. At this point Mr Wells had still seen nothing in writing from Dr Peterson.

[45] Mr Wells expressed an interest in other Downer roles, saying that he had already applied for some. Downer representatives discussed what needed to happen about other roles. Mr Wells was asked to send his CV in so it could be distributed to people in the business who may have roles.

[46] Mr Wells had a sense, due mainly to timing he saw as suspicious and his lack of success with Downer roles, that the Downer representatives he was dealing with may have done something deliberate to prevent him from getting jobs. He describes feeling like he had been blacklisted for reasons unknown to him. However, there was no credible evidence to support that having occurred and having heard the evidence for Downer's witnesses I do not accept that they took any such steps. They made some genuine efforts to find him other work. Whether those steps were sufficient will be discussed later.

What occurred between meetings?

[47] Later on 2 March Mr Bartlett received Mr Wells' CV. He sent it the same day to recruitment advisors in Downer's Facilities & Services HR team, with a view to it being circulated to hiring managers. The email indicated that Mr Wells was looking for work in Tauranga despite it having been indicated in an earlier email that Mr Wells had himself applied for a Downer role in Hamilton.

[48] That afternoon Mr Wells received for the first time Dr Peterson's 27 January email. Mr Wells emailed shortly afterwards saying that he was looking for projects in and around Tauranga, Rotorua and Hamilton. He thanked Mr Bartlett and Mr Wright for all their on-going support.

[49] The timing of the job search was described as very challenging as in February 2020 a recruitment freeze was put in place across most of the company's Telco division.

[50] Later on 2 March Mr Bartlett emailed about another meeting on Thursday 5 March 2020. Mr Wells confirmed that he was available.

[51] On 4 March Mr Wells sent a revised medical certificate and blood tests showing he was currently fit to work. Mr Bartlett confirmed the meeting the following day and indicated that they would be considering whether it was appropriate to terminate Mr Wells' fixed term position on the basis of medical incapacity.

[52] Mr Wells acknowledges that at that time he was still coming to terms with the fact he could be seen as medically incapacitated when his doctor said he could work and believed he was up for Antarctica. He believed his doctor was available for discussion with Dr Peterson but that did not occur.

What occurred at the final meeting?

[53] On 5 March 2020 Mr Wright and Mr Bartlett met again by phone with Mr Wells. Mr Wells emphasised that he was fit to return to Antarctica and work there as his contract provided. He stressed that his GP did not consider him to be medically incapacitated and saw it as outrageous that he was being seen as not fit for Antarctic work.

[54] It is unfortunate that Mr Wells was not to have been told about the New Zealand and United States guidelines for trips to Antarctica. As a result he, and it appears his doctor, were in the dark about the stipulations. I accept however, that the Downer representatives was also not aware of the guidelines.

[55] Downer indicated that its hands were tied by Dr Peterson's assessment of Mr Wells' suitability to work in Antarctica.

[56] Mr Wells insisted that Downer must offer him another job until the end of his fixed term. Downer advised that no suitable redeployment options had been identified in the telecommunications and mobile/ISP areas. Mr Wells indicated that he thought Mr Wright had guaranteed employment at the end of his time in Antarctica and that he had left a permanent job to come to Downer. Mr Wright disputed any guarantee.

[57] Downer told Mr Wells that he was finishing with the company. According to Downer's typed notes of the meeting Mr Bartlett indicated that the company was obliged to give four weeks' notice and that they would pay it in lieu. Mr Wright offered to be Mr Wells' referee.

[58] The termination was confirmed by letter on 6 March 2020. Four weeks' notice and outstanding entitlements were paid out. The letter sets out in detail the situation the company was in and why it concluded that Mr Wells' employment should cease.

Does Mr Wells have a grievance claim?

[59] The parties agree that this is a unique situation. It involves a workplace in another territory to which workers could only travel to and from with the approval of an organisation which in this case was not the employer and where, in some situations, travel was entirely dependent on another country's resources.

[60] Mr Wells' claim initially proceeded on the basis of an argument that he should have been allowed to return to Antarctica to finish his shift. However, closing submissions on his behalf emphasised procedural flaws in Downer's process.

[61] The employment agreement provided that:

In the event you are unable to properly perform your duties by reason of ill-health, medical incapacity, accident or otherwise for a period of time, we may terminate your employment by giving notice in accordance with schedule two of this Agreement.

[62] I accept that control over Mr Wells' continuation in Antarctica was outside Downer's hands. Effectively Dr Peterson was the sole arbiter of whether Mr Wells was allowed to continue.

[63] Although able to undertake work in other conditions, Mr Wells was incapacitated from performing his duties under the fixed term agreement which provided for work in Antarctica. On the basis that Mr Wells had had one episode of pancreatitis he was ruled out from going to Antarctica for the remaining of the term of his agreement.

[64] Downers did go beyond its legal obligations by paying Mr Wells for around six weeks before terminating his employment. He was allowed time to recover.

[65] I conclude that there were some inadequacies in the communications with Mr Wells. The nature of the situation in Antarctica with matters being outside Downer's control were not indicated until the very end:

- (a) the offer letter specified that the offer is conditional on drug and alcohol as well as medical tests but Downer is said to have the sole discretion as to whether those tests are satisfied;

- (b) the employment agreement did not indicate that the employee's continued presence in, or return to, Antarctica was solely Antarctica NZ's decision;
- (c) Mr Wells had a shortened training period to fit with operational requirements. This may have contributed to his lack of understanding of Antarctica NZ's role; and
- (d) Mr Peterson's email of 27 January 2020 was not forwarded to Mr Wells until 2 March after the first meeting.

[66] Ideally Downer would have forwarded Mr Wells' GP's material to Antarctica NZ for consideration. This could have provided Mr Wells with some clarification and comfort. However, I accept that there was no way Dr Peterson was changing his conclusion.

[67] I also conclude that having generously allowed Mr Wells sufficient paid recovery time, Downer's completion of the process was hasty, including in light of the communication difficulties identified above. On Friday 28 February 2020, after 5pm, Mr Wells was invited to a meeting. On Monday 2 March, an afternoon phone meeting was held, followed later that day by an invitation to a second meeting. The second meeting was held on Thursday 5 March where Mr Wells' employment was terminated.

[68] Associated with the concern about the speed is the length of time within which other roles were searched for. I recognise that Downer put some effort into looking for other roles for Mr Wells. However, this was over a relatively short period. Although Mr Wright and Mr Bartlett had discussion about Mr Wells' situation before 28 February 2020 the evidence does not establish that there were active efforts to look for other work for him until at best late February. There was also a lack of clarity regarding the geographical areas where Mr Wells was seeking work and Mr Bartlett did not have Mr Wells' CV until after the 2 March meeting. Essentially only roles at one point of time were sought.

[69] Exacerbating that was the decision by Downer to pay out Mr Wells' notice rather than allow him to remain on the pay roll and continue investigating other opportunities. Although it was suggested that Mr Wells may have been involved in that decision, the company's meeting notes support it being Downer's decision. Even if the possibility of staying on the payroll was mentioned, I am not satisfied that Mr Wells was told that this would give him a longer period for job opportunities to be found. With hindsight

however, opportunities may well have been limited given that the country went into level 4 lockdown on 25 March 2020.

[70] In addition, Mr Wells could have been permitted to take his annual leave, which seems likely to have been around two weeks, thus extending the job search period further.

[71] I cannot accept that these flaws should be seen as minor and without effect of treating Mr Wells unfairly.⁴

[72] Although Mr Wells has brought a dismissal claim I am able to find a different grievance established.⁵ In light of his medical incapacity to return to Antarctica, I consider this best considered as a disadvantage rather than a dismissal grievance. I conclude that Downer was unjustified in the way it acted and that was to Mr Wells' disadvantage in terms of the prospect of other work with Downers.

What remedies should Mr Wells receive?

[73] Mr Wells seeks lost wages. However, given the finding of unjustified action causing disadvantage rather than dismissal, I make no lost wages award.

[74] Compensation under s 123(1)(c)(i) of the Act should be paid. I accept that Mr Wells' life was very effected by the sudden and unexpected cessation of his work in Antarctica. However, I am not considering compensation for his medical situation or for the early end to his time in Antarctica. The compensation award must relate to the flaws identified in Downer's conduct. Mr Wells was clearly upset and confused by what was going on in terms of the refusal to let him return to Antarctica. The cessation of his employment was unexpected and he felt unsupported in his efforts to find other Downer opportunities.

[75] Mr Wells did not contribute in a blameworthy way to the situation giving rise to his grievance. Downer is to pay Mr Wells \$8,000 as compensation for his grievance within 21 days of the date of this determination.

⁴ The Act, s 103A(5).

⁵ The Act, s 122.

Costs

[76] Costs are reserved. The parties are to discuss resolution on costs between themselves. If they are unable to reach agreement, Mr Wells shall have 21 days from the date of this determination to lodge a memorandum on costs, including supporting documents. Downer shall have a further seven days within which to provide a reply.

Nicola Craig

Member of the Employment Relations Authority