

**IN THE EMPLOYMENT COURT  
AUCKLAND REGISTRY**

**[2014] NZEmpC 98  
ARC 32/13**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority

BETWEEN                      MADHUKAR SHYAM NARAYAN  
   Plaintiff

AND                                TELECOM NEW ZEALAND LIMITED  
   Defendant

Hearing:                      19-20 February and 15 May 2014

Appearances:                M Narayan, plaintiff in person  
   E Butcher, counsel for defendant

Judgment:                    18 June 2014

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**JUDGMENT OF JUDGE M E PERKINS**

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**Introduction**

[1] Mr Narayan was an employee of Telecom New Zealand Limited (Telecom) from 19 May 2010 until his employment was terminated on 14 March 2012. He worked as a specialist on Telecom's Broadband Help Desk. He usually worked Tuesday to Saturday inclusive. Mr Narayan took annual leave over the Christmas period 2011/2012. He was required to return to work on 27 December 2011. He did not return to work until 3 January 2012. Mr Narayan was in Fiji, became ill and had to defer his return until he was well. He produced a medical certificate, which became the subject of dispute between himself and his superiors. His employment was terminated on 14 March 2012 following a lengthy disciplinary procedure. The ground for the dismissal was serious misconduct.

[2] Following termination of his employment Mr Narayan submitted a grievance for unjustifiable dismissal, disadvantage and other unlawful actions by Telecom against him. The grievance was not settled and proceeded as an employment relationship problem before the Employment Relations Authority (the Authority). An investigation meeting was held on 9 January 2013. A determination of the Authority was issued on 1 May 2013. Mr Narayan's claims were dismissed.<sup>1</sup> Costs were reserved and in a subsequent determination dated 24 September 2013, the Authority ordered Mr Narayan to make a contribution towards Telecom's costs amounting to \$4,000.<sup>2</sup>

[3] Mr Narayan has filed a challenge to both determinations. His challenge is against the whole of the determinations. He has sought a hearing de novo.

[4] Mr Narayan failed to attend the investigation conducted by the Authority. In the period leading up to the investigation, Mr Narayan had become uncooperative with the Authority in its attempt to conduct a pre-hearing telephone conference on a date mutually suitable to the parties. Both Mr Narayan and his then advocate, Ashika Bali, also engaged in correspondence with the Authority, which directed abusive language and unjustified allegations of bias at the Authority Member. In view of Mr Narayan's unwillingness to engage with the Authority to obtain a hearing date, the Authority set the investigation for 9 January 2013. It then proceeded in his absence.<sup>3</sup>

[5] As a result of Mr Narayan's failure to appear and the nature of the correspondence, the Chief Judge of the Employment Court, when the challenge was filed, called for a good faith report from the Authority pursuant to s 181 of the Employment Relations Act 2000 (the Act). Such a report was received and responded to by Mr Narayan. He filed two responses, one to the Authority and one to the Court. It would be true to say that Mr Narayan was somewhat unrepentant for his behaviour. It was clear, however, that he was under some pressure having taken up employment in Wellington and was reluctant to take time off from his new

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<sup>1</sup> *Narayan v Telecom New Zealand Ltd* [2013] NZERA Auckland 149 [Substantive Authority determination].

<sup>2</sup> *Narayan v Telecom New Zealand Ltd* [2013] NZERA Auckland 431.

<sup>3</sup> See Substantive Authority determination, above n 1, at [7]-[16].

employment to participate in the Authority's processes. He failed to respond, however, in any way to the criticism of the language that he and his advocate had used. This was clearly unacceptable. In all the circumstances, however, and in the interests of finally disposing of the challenges, I decided to take no further action on the good faith issues at that time. Unfortunately, Mr Narayan did not moderate his intransigent attitude as the matter proceeded to a hearing. I was forced to comment on this in an interlocutory judgment dated 27 November 2013, dealing with a minor procedural error on the part of Telecom's counsel, which Mr Narayan had unjustifiably and unreasonably escalated.<sup>4</sup> These are all matters which will need to be considered later when the issue of costs comes to be dealt with.

### **The pleadings**

[6] Mr Narayan's amended statement of claim contains 89 paragraphs. Over a third of those paragraphs deal with his failure to attend the Authority's investigation meeting. After a brief summation of the background to the dispute, Mr Narayan claims four causes of unjustified disadvantage, an allegation of discrimination and a claim to have been unjustifiably dismissed.

[7] The alleged bases for the unjustified disadvantage claims are as follows:

- a) "Bad treatment" alleging actions of the defendant of releasing personal information about Mr Narayan to third parties in Fiji;
- b) "Withdrawal of an offer of promotion". This relates to the suspension of an agreed promotion of Mr Narayan by Telecom pending completion of the investigation into his medical certificate;
- c) "Breach of health and safety in the workplace". This relates to an allegation that one of Mr Narayan's superiors had acted in a violent and abusive manner towards him. In addition, this claim relates to Mr Narayan's allegation that Telecom made unreasonable demands on him and his time during the disciplinary process;

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<sup>4</sup> *Narayan v Telecom New Zealand Ltd* [2013] NZEmpC 216.

- d) “Withdrawal of benefits”. This relates to Mr Narayan’s allegation that following termination of his employment, Telecom unjustifiably cancelled his telephone and internet package. This had been provided to him on a concessional basis as an employee. Following dismissal the concession was removed, arrears accrued and in the face of Mr Narayan’s refusal to pay at the non-concessional rate, debt collectors were engaged;

[8] The discrimination claim alleges that Telecom’s attitude to the medical certificate was on the basis of Mr Narayan’s ethnic and national origin. He alleges that Telecom’s approach towards him in respect of the document and his subsequent dismissal was different to that normally adopted in New Zealand or towards other employees of Telecom New Zealand. He also alleges that he was discriminated against by virtue of his employment status because of the disparate way Telecom treated its senior representatives in the disciplinary process from the way it treated him. This allegation is that the company representatives were given adequate time to conduct the disciplinary process against him whereas he had to work full time throughout and was not afforded time to prepare for and conduct his response.

[9] The allegations in respect of the unjustified dismissal cause traverse Mr Narayan’s complaints as to the way Telecom investigated the issue over the medical certificate, the procedures adopted in the disciplinary process and his allegation that Telecom failed to give him information and proper opportunities to respond throughout the process leading to the dismissal. Overall it can be inferred that he pleads there was insufficient justification for the decision to dismiss him.

[10] The remedies Mr Narayan seeks are:

- a) Compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act (all causes);
- b) Compensation for loss of employment (bad treatment, breach of health and safety, discrimination and dismissal causes);

- c) Compensation for loss of benefit (withdrawal of promotion, discrimination, dismissal and withdrawal of benefit causes);
- d) Loss of wages (all causes except the withdrawal of benefits cause);
- e) General and exemplary damages (all causes);
- f) Interest (all causes except the withdrawal of benefits cause);
- g) Costs (all causes);
- h) There are prayers under some of the causes seeking any other remedies the Court deems just.

[11] The challenge to the costs determination alleges errors, failures and improper considerations by the Authority in ordering Mr Narayan to pay a contribution of \$4,000 towards Telecom's costs. The assertions traverse the failure of the Authority to give Mr Narayan the opportunity to present his case. He alleges that the Authority failed to adequately consider his case in dismissing his claims. Mr Narayan, of course, refused to attend the Authority's investigation meeting. It is asserted by him that the application of a notional daily rate means the award was excessive and unreasonable.

[12] The defendant has filed a lengthy statement of defence. That arises out of the necessity to traverse the numerous allegations of the plaintiff. Generally the statement of defence consists of admissions and denials. Where necessary the defendant's contrary assertions on facts are presented. This is particularly so in respect of Mr Narayan's pleadings in relation to his failure to attend the Authority's investigation meeting. It is debatable, of course, whether these pleadings are in any way relevant to the challenge to the Court apart from those factors relating to the good faith issues discussed earlier. In respect of the final cause relating to withdrawal of benefits, a positive defence is pleaded that such a grievance was in any event submitted outside the 90-day period prescribed in the Act. The defendant has not consented to such grievance being raised after the expiration of that period.

## **Factual outline**

[13] Mr Narayan applied for annual leave in November 2011. He requested leave for varying periods between 6 and 31 December 2011. With the public holidays in addition, Mr Narayan was proposing to return to work on 3 January 2012. Telecom indicated it could not afford to have him away for this length of time but approved leave for three weeks from 6 December until 27 December 2011. On this basis Mr Narayan was to return to work on 27 December 2011. Mr Narayan was intending to travel to Fiji for his annual leave.

[14] On 27 December 2011, Mr Narayan sent an email to Telecom indicating that he was unwell and could not return to work on that day or the following day. That email was sent to Mr Ricky Henry, the Customer Care Manager for Telecom. Mr Narayan also sent a copy of the email to Mr James Betton, who was his Team Leader. Mr Betton had been informed by Mr Narayan that Mr Narayan was taking his annual leave in Fiji.

[15] In any event Mr Narayan did not return to work until 3 January 2012. What occurred in Fiji, Mr Narayan alleges, is as follows.

[16] When he first became ill he consulted a general practitioner on 24 December 2011. He claims that the general practitioner was selected by a taxi driver who Mr Narayan had requested to take him to the nearest doctor. He says that the doctor prescribed Panadol and decided his illness was simply caused by a change in environment. Mr Narayan claims to be unable to now identify that general practitioner despite subsequently being requested to do so by Telecom.

[17] When Mr Narayan was still unwell on 27 December 2011, he sent the email to Mr Henry. He says that Mr Henry asked him to deal with another team leader and Mr Narayan did this. When, by 29 December 2011, he had still not recovered, he sent a further email to the team leader advising that he was still ill, but that he was going to seek a second medical opinion. The team leader he was dealing with did not realise that he was in Fiji at that time. Mr Narayan then went to the Colonial War Memorial Hospital in Suva, which is a public hospital. He went there on the night of

29 December 2011. He says that when he was at the accident and emergency ward, the only ward operating at that time of night, he did not wish to wait behind other patients. When he saw a doctor he approached him and insisted that he attend to him urgently. He says that he informed the doctor that he was just visiting Fiji and did not want the hassle of paperwork and the doctor agreed to examine him. He also requested a medical certificate and the doctor issued him with one. He was not given a prescription for any medication as the doctor diagnosed allergies. Mr Narayan says he did take some medicine on the spot for dehydration.

[18] Mr Narayan had not booked his return flight to New Zealand by this stage. He subsequently did so and returned to work on 3 January 2012. There is some evidence, given at the hearing, that Mr Narayan was not in fact rostered for duties for a few days from 3 January 2012. However, he was able to persuade other employees to give up their rostered duties to him so that he could work and earn wages as he was, by then, short of money.

[19] During the period when Mr Narayan was sending emails to the team leaders advising of his illness they, not being aware that he was not in New Zealand, asked him to drop in his medical certificate. Alternatively if he was unable to do so they would send a courier to collect it. This was apparently standard Telecom practice in a situation such as this. Mr Narayan did not respond to this request. In any event, when he returned to work, Mr Narayan was asked to produce the medical certificate. It transpired that he had left it in his hotel room in Fiji. His partner, Ms Bali, who had remained in Fiji, was able to recover the certificate and it was forwarded to Mr Narayan. He was then able to give the original of the certificate to Telecom on 17 January 2012. Mr Henry had also been away on leave over this period. When he returned to work he requested Mr Narayan's medical certificate, which by that stage was in the hands of his team leader or the human resources department. Mr Narayan alleges that the fact of Mr Henry requesting the certificate at that late stage indicated that, for an ulterior motive, Mr Henry wanted to commence a disciplinary process against him.

[20] The evidence from the Telecom witnesses is that once they received the medical certificate they had some suspicions about the matter. This might be

understandable in view of the fact that Mr Narayan had originally sought extended annual leave until 3 January 2012. This had been refused, but in fact that was the very day on which he returned. The evidence from Telecom is that the supervising employees were suspicious of the medical certificate because it was only partly printed and partly handwritten and there was no hospital letterhead printed or endorsed on it. They decided, without informing Mr Narayan, to carry out enquiries of other hospitals in Fiji as to whether medical certificates would customarily be on a letterhead or simply in this handwritten form. Apparently one hospital indicated that its certificates were on a letterhead form, and another hospital indicated that theirs were not.

[21] Mr Narayan, as part of his claim against Telecom, alleges that in this process of enquiring of other hospitals, Telecom employees released personal and confidential information about him. The Telecom witnesses stated that this was not so and that the enquiries were made without releasing any information about Mr Narayan. There is insufficient evidence to make any finding on Mr Narayan's claims in this respect. Another point about this part of the matter is that Mr Henry alleged during the disciplinary process that none of the hospitals, to which enquiries had been made, indicated that their medical certificates were in the partly handwritten form Mr Narayan had submitted. This assertion was not true. The question arises of course as to why Mr Henry and the other Telecom employee chose to carry out this enquiry behind Mr Narayan's back instead of simply speaking to him to ascertain the name of the hospital endorsed on the medical certificate as "CWM" and to identify the name of the doctor who had completed the certificate following Mr Narayan's consultation with him at the hospital.

[22] In any event, Mr Narayan was eventually asked for this information, which he supplied. His problems did not end there, however, because Mr Henry and another officer from Telecom then made enquiries of the Colonial War Memorial Hospital in Suva. The purpose of these enquiries was to obtain information as to whether the certificate Mr Narayan had supplied was genuine. The enquiry by this stage had been taken over by Ms Tania Breen who was a human resources officer at Telecom. She made contact with a Ms Filomena Browne who was a senior manager at the Colonial War Memorial Hospital and managed all human resources for the



hospital. A copy of the medical certificate was sent to Ms Browne, who, following enquiries indicated that the number on the medical certificate indicated from the hospital record that the patient to whom that particular certificate number related was a patient other than Mr Narayan. She further indicated that it had been issued by another doctor some years earlier. The initial conclusion was that the medical certificate was a fake. In view of this, a disciplinary process was commenced against Mr Narayan. Throughout that disciplinary process, communications continued between Ms Breen and Ms Browne. What can be said from these further communications was that the inquiry in Fiji was proceeding slowly. This was because Ms Browne herself was absent from her work for some time and also the doctor who had been identified as signing the medical certificate was initially away on leave and then subsequently resigned. The evidence, however, disclosed that at a point prior to Mr Narayan's dismissal, Telecom had evidence by way of confirmation from Fiji that the doctor named on the certificate had stated he had seen Mr Narayan on the day in question and issued the certificate to him. Regardless of discrepancies within the hospital records in Fiji and continuing inquiries being made, there was no real basis upon which Telecom could have finally concluded, as it eventually did, that the certificate was a fake and that Mr Narayan was deceiving them.

[23] During the course of the disciplinary process Mr Narayan and his partner were making their own enquiries of Fiji. This was an endeavour to obtain further evidence which might satisfy Telecom employees on the doubts that they had expressed as to the genuineness of Mr Narayan's illness. A quite significant document dated the same day as the day Mr Narayan's employment was terminated, was received by Mr Narayan's partner. This document was from the General Manager of the Colonial War Memorial Hospital/Ministry of Health in Fiji. It stated as follows:

**Subject:** RE: Medical Certificate – Telecom NZ (IN CONFIDENCE)

**From:** Ned P. Taito [...]

**To:** ashikabali [...];

**Cc:** Ituiwawa [...]; shyammnarayan[...];

**Date:** Tuesday, 13 March 2012 1:23PM

Bula Vinaka,

On receipt of the request from Telecom NZ, [an] initial investigation was conducted by CWM Hospital management. The investigation was centred on a scanned CWM Hospital medical certificate.

The medical certificate had Dr Narayan's signature as the medical officer. When questioned Dr Narayan, verbally stated that he had indeed seen the patient Shyam who was visiting from NZ and had issued him with a medical certificate.

Dr Narayan is a registered medical practi[ti]oner and at the time in question was employed at the CWM Hospital A&E Department.

Ned Taito

General Manager / Colonial War Memorial Hospital / Ministry of Health

...

[24] As can be seen, this document confirmed that Mr Narayan had been seen by Dr Narayan (no relation). This document was not available to the employees of Telecom at the time they carried out the dismissal of Mr Narayan. However, the document is confirmation of information Telecom already had. The combination of circumstances and information leading to that email being received by Mr Narayan's partner is significant as to the outcome of Mr Narayan's challenge.

### **The disciplinary process**

[25] Mr Narayan indicated to Mr Henry his displeasure at the fact that Mr Henry and Ms Breen had been contacting hospitals in Fiji behind his back. There followed a meeting between Mr Narayan and Mr Henry in Mr Henry's office. This incident gives rise to the allegation by Mr Narayan that one of his supervisors had acted in a violent and abusive manner towards him. Mr Narayan's and Mr Henry's evidence as to what was said and what transpired is markedly different. Mr Narayan alleges that Mr Henry was aggressive and threatening towards him. He says Mr Henry was angry and waved his hands in Mr Narayan's face as he spoke. Mr Narayan said that Mr Henry ordered him out of the room and after Mr Narayan had returned to his desk Mr Henry approached him again and told him in a threatening manner that at subsequent meetings he had better have his girlfriend or partner present. This was a reference to Ms Bali. Mr Narayan asked Mr Henry if he was threatening him. There

was then a subsequent conversation where another employee was present at Mr Henry's request, and Mr Henry told Mr Narayan not to twist things.

[26] Mr Henry has a different perception as to what transpired in all of this. He says that he was not threatening or angry towards Mr Narayan. He denies telling Mr Narayan to leave his office.

[27] He says that he offered Mr Narayan a meeting to discuss the matters in issue. He says that he approached Mr Narayan at his desk later to clarify two points. He says that he offered to meet Mr Narayan again but that it would be best if he got notice of any such meeting and that Mr Narayan could bring a support person with him. Mr Narayan had asked him if that was a threat. Mr Henry then felt concerned and got another employee present and repeated the offer to meet with Mr Narayan. These circumstances form the basis for Mr Narayan's claim under the head "Breach of Health and Safety in the Workplace".

[28] While these matters were taking place Mr Narayan received a promotion on 26 January 2012, after his return to work. He was to start the new position on 13 February 2012. Mr Narayan was awaiting his agreement for the new position. He found that others similarly promoted had received their agreements and had been briefed on training. When he made enquiries he was informed that following discussions with Mr Henry, the promotion was on hold pending the outcome of the disciplinary investigation on the medical certificate. This came as news to Mr Narayan as he was unaware at this time that there was a disciplinary investigation taking place.

[29] On 10 February 2012 Mr Narayan was invited by Mr Henry to attend a disciplinary meeting regarding the medical certificate. It was recommended that he bring a support person with him. That meeting was conducted on 14 February 2012. Mr Narayan was represented by his partner, Ms Bali, who was legally qualified. There were a number of company representatives present, including Mr Betton, who attended at Mr Narayan's request. Mr Narayan had presented his position in writing prior to the meeting and was given the opportunity to address his submission. The issues between Mr Narayan and Mr Henry, previously traversed, appear to have been

discussed at the meeting. Mr Narayan was asked to provide information about the nature of his illness and other information which might corroborate his explanation for not returning to work. He was not exactly forthcoming on some of those aspects.

[30] As there had been an allegation that Mr Henry had been violent towards Mr Narayan (which Mr Henry of course denied), he was removed from further involvement in the disciplinary process. His role was taken over by Mr Richard Fuli, who had recently joined Telecom as Manager, Customer Service Resolve.

[31] Following the disciplinary meeting Mr Narayan sent a lengthy email to Mr Henry, Ms Breen and other representatives of Telecom including Ms Shannon Kelly who was the Senior Employment and HR Counsel Corporate Human Resource for Telecom. This email took issue with the way which the disciplinary meeting had been conducted. He repeated that he had attended the CWM Hospital in Fiji, had seen Dr Narayan, as he stated, and that the medical certificate was genuine. He raised a personal grievance. He indicated that he had lost trust that Telecom would act in a reasonable and prudent way towards him and that he did not wish to attend any further meetings or mediation with Telecom.

[32] This letter was responded to by Ms Kelly. Her letter dated 21 February 2012, set out the steps that the company had taken to enquire into the matter and also set out the results of the inquiries resulting from the email correspondence with Ms Browne at the CWM Hospital. Ms Kelly's letter responded in a comprehensive way to the matters raised by Mr Narayan in his email. She traversed those matters that had been indicated by Ms Browne from Fiji, which led Telecom to have suspicions about the authenticity of the medical certificate. However, there is one significant piece of information not specifically mentioned in Ms Kelly's letter. On a perusal of subsequent correspondence between Mr Narayan and Mr Fuli, this omission was perpetuated from the time of the disciplinary meeting. What is significant, independently of whether Mr Henry and Ms Breen should, in any event, have been corresponding with other hospitals without first speaking to Mr Narayan, is the fact that Ms Browne confirmed in her correspondence that in enquiries directly of Dr Narayan, who was the doctor Mr Narayan indicated he had seen, Dr Narayan stated that he had seen Mr Narayan on the day that he issued the medical certificate. In

addition to this, in response to Mr Narayan's assertion that he had 'jumped the queue' and simply approached Dr Narayan directly, Ms Browne indicated that this was sometimes a process adopted by patients visiting the hospital. It is true that Ms Browne indicated that this was usually where an earlier arrangement had been made, or where the patients were friends and relatives of the doctor. Ms Browne indicated that even if this practice was adopted, records will be prepared of the patients visit. However, this correspondence emanating from the hospital in Fiji indicated practices that should have alerted Telecom to the fact that Mr Narayan may have been telling the truth about being treated and acquiring the medical certificate. It is clear that Telecom knew that Dr Narayan had advised the CWM Hospital that he had seen Mr Narayan on 29 December 2011 at the hospital and issued him with a medical certificate. This was confirmed in Ms Breen's emails to Ms Browne (and the responses) on 14 and 27 February 2012. In the later e-mail when asked whether the hospital accepted Dr Narayan's response, Ms Browne indicated that "...we neither [accept] nor deny his response until all finer details surrounding the sick sheet, sick sheet number and visitation to the hospital of Shyam Narayan on the said date is confirmed."

[33] While this might not have been a particularly satisfactory response to Telecom and inconvenient in view of the stand it had taken against Mr Narayan, the fact of the matter was that with that information its basis to continue with a process leading to Mr Narayan's dismissal was seriously undermined until further enquiries had been made.

[34] By this stage it was clear that Mr Narayan and Ms Bali were becoming frustrated. Mr Fuli, having taken over the matter following the disciplinary meeting, set out his preliminary views on all of the information available to him to that point. However, as Ms Bali correctly pointed out to him, he failed to give adequate consideration to the responses which Mr Narayan had made. It was clear that Telecom did not believe Mr Narayan's assertions that he had seen Dr Narayan in Fiji and obtained the medical certificate from him. In the same way that it is significant that Ms Kelly omitted a vital piece of information from her letter, Mr Fuli did the same. He simply set out the company's position in his correspondence without indicating the consideration and weight he had given to Mr Narayan's responses. He

failed to mention that Telecom knew Dr Narayan had confirmed seeing Mr Narayan and giving him the medical certificate.

[35] Mr Fuli did invite Mr Narayan to a meeting to discuss the preliminary findings. Mr Narayan did not attend such a meeting. He simply asked Mr Fuli to make his decision and Mr Fuli then communicated with Mr Narayan by telephone to advise him that he was being dismissed. Mr Narayan at the hearing of this matter complained about the fact that he was notified of termination of his employment by telephone. However, in view of the stand he clearly took and confirmed in correspondence, he is not in a position to make that complaint. Nevertheless, when requested to do so, Mr Fuli took an inordinate length of time before confirming the grounds of the dismissal in writing. The letter was not sent until 14 days after the decision to dismiss had been communicated to Mr Narayan. Again, a perusal of that letter indicates that either Mr Fuli was not aware that Telecom had information that Dr Narayan had seen Mr Narayan and issued the medical certificate, or he was choosing to ignore that fact because it was inconvenient to Telecom's view that the medical certificate was false.

[36] In addition to this, both Ms Bali and Mr Narayan had indicated to Mr Fuli that they were carrying out investigations of their own of the hospital to try and get confirmation. As indicated earlier, Mr Taito, the General Manager at the hospital, wrote to Ms Bali on the very day that Mr Narayan was dismissed confirming that Dr Narayan had verbally stated that he had seen Mr Narayan at the hospital and issued the medical certificate. This letter was of course was not available to Mr Fuli prior to his decision to dismiss. That did not matter because the same information had already been confirmed to Telecom and they knew of it. However, the fact that this letter was received the very day of the dismissal and confirmed information which Telecom already had in its possession, indicates that Telecom should have allowed Ms Bali and Mr Narayan further time.

[37] There is no doubt in all of this that the circumstances surrounding Mr Narayan's return to work in the context of his earlier request for leave, the information received in a spasmodic fashion from the CWM Hospital employee, Mr Narayan's belligerence and his refusal to provide information in an open way, would

have created initial suspicions. However, Mr Henry and Ms Breen's contacting of other hospitals in Fiji, instead of carrying out a logical process of simply speaking to Mr Narayan about the certificate, was clearly an inappropriate way of dealing with the matter. Mr Narayan up to this point had proved to be a valuable employee of Telecom. There was no basis upon which they could assume from any previous behaviour that he was not being honest with them. Indeed, he was sufficiently valued to be given a promotion upon his return to work.

[38] Assessing the information available in an even and fair fashion, the way in which Telecom conducted this entire matter were not actions that a fair and reasonable employer could have taken in all the circumstances.

## **Conclusions**

[39] The decision by Telecom to dismiss Mr Narayan was not justifiable. Telecom adopted an inappropriately suspicious stance in the matter right from the outset. While it is clear that there was tension between Mr Narayan and Mr Henry, I am nevertheless not prepared to accept that Mr Henry's motives for carrying out the investigation were as Mr Narayan suggested. Mr Narayan had an obligation himself to act in good faith towards his employer. It is true that he would have been upset by the way matters turned, but nevertheless, he did have an obligation to assist Telecom by giving as much information as he could. Even at the hearing, he alleged that he was not able to give very much information about the general practitioner he visited on the first occasion. I am bound to say that I was very sceptical about his evidence in that regard. Initially, he would not give information to Telecom about his airline bookings. It is difficult to know why he refused to do that, because the confirmation of the bookings is now available in the bundle of agreed documents produced at the hearing and would not seem to provide any information upon which Telecom could have taken objection. Mr Narayan and his advocate Ms Bali took what I regard to be an unreasonably aggressive stance in the process. Having said that, it is understandable that following the disciplinary process they would have been frustrated by the fact that Telecom did not give sufficient credence to Mr Narayan's assertions. Telecom also ignored the indication from the hospital that the doctor himself stated that Mr Narayan had consulted him and the certificate had been

issued. A lot of this could have been avoided in my view if Mr Henry had simply approached Mr Narayan at the outset when he had concerns about the form of the medical certificate.

[40] So far as the disciplinary process itself was concerned, a fair process was adopted by Telecom. Mr Narayan was given adequate notice of the disciplinary meeting. He was given the opportunity to respond to the assertions being made by Telecom in advance. He was given the opportunity of having a representative present, and she was legally qualified. He was given the opportunity to present all of his submissions at the meeting. That process should not be called into question. However, it was the stand taken by Telecom where it clearly indicated it was not prepared to accept Mr Narayan's explanations that led to the somewhat aggressive exchanges which took place after that. Mr Narayan indicated that he was endeavouring to obtain further information from the hospital and the proper opportunity for him to do that was cut short by his employment being terminated.

[41] The process which Mr Fuli adopted following the disciplinary meeting was also clearly appropriate as far as it went. He did a full review of the matter. He then wrote a letter setting out his preliminary views to Mr Narayan and gave him the opportunity of responding which Mr Narayan took up. He then endeavoured to have a face to face meeting with Mr Narayan when he clearly wanted to communicate the decision to dismiss him which Mr Narayan frustrated by his refusal to meet. Mr Narayan chose not to continue in the process from that time. That being the position, Mr Narayan could hardly then complain when Mr Fuli notified the dismissal by telephone. However, again it needs to be said that while the process itself was fine, Telecom had an insufficient basis for the termination in the face of clear evidence it had that Mr Narayan was telling the truth. Regardless of the information which Telecom had received from Ms Browne, those were administrative matters showing the hospital's records were far from perfect. From Telecom's perspective dealing with a disciplinary issue, it could not have reasonably taken that information at face value in view of the other conflicting evidence. It was under an obligation to treat Mr Narayan fairly and reasonably. If it still had doubts, and clearly it did, the proper steps to take would have been further careful enquiry of the hospital. If it had



delayed matters in that way, then prior to any dismissal decision being made, Telecom would have received Mr Taito's confirmation letter.

[42] Dealing in turn with Mr Narayan's various claims, first is the allegation of bad treatment. This relates to the allegation that Mr Henry and Ms Breen released confidential information about Mr Narayan to third parties in Fiji. Putting aside Telecom's contact with the CWM Hospital, there was contact with two other hospitals. One of these was a private hospital and the other a public hospital. I have already found that this was not an appropriate step to take. The proper course was for the officers in Telecom to contact Mr Narayan personally about the certificate. This would have cleared the issue up immediately and then led to further enquiries being made, which at that point Telecom was perhaps entitled to do. Nevertheless Mr Henry and Ms Breen assert when contacting those hospitals they did not identify Mr Narayan or state specifically what the enquiry was about. Mr Narayan asserts the contrary. There is insufficient evidence and certainly no contemporary documents or other evidence from those hospitals, which would confirm Mr Narayan's assertion. Accordingly, I am not prepared to accept that in this respect Mr Narayan was unjustifiably disadvantaged.

[43] So far as the withdrawal of the offer of promotion is concerned, Mr Narayan's assertions here are again incorrect. The promotion was not withdrawn but simply suspended. In view of the way that matters stood at the point where Mr Narayan needed to be inducted into the new position, I do not consider Telecom's steps to suspend the promotion were inappropriate. The entire circumstances surrounding Mr Narayan providing the medical certificate to Telecom were curious. The fact that he alleged that he left the medical certificate in his hotel room in Suva, seems very surprising indeed. I have already indicated that his asserting not to know the identity of the general practitioner he consulted is also surprising. He should have known that, by returning to work as late as he did, the company would have been entitled to have evidence from him as to his illness.

[44] Insofar as the assertions against Mr Henry as to violence and abuse are concerned, again there is conflicting evidence. There is no corroboration apart from an exchange of emails between Mr Narayan and Mr Betton. While this confirms that

the meeting was acrimonious it does not warrant the description of “violent and abusive” as pleaded. The undisputed fact that Mr Henry got another employee to attend the further conversation he had with Mr Narayan following the meeting, leads me to the view that in respect of these assertions, I give more weight to Mr Henry’s version than Mr Narayan’s. Mr Henry was clearly concerned that Mr Narayan was elevating the matter.

[45] Insofar as the withdrawal of benefits claim is concerned, there can be no basis for this. Once Mr Narayan’s employment was terminated he would no longer be entitled to any concessional rates insofar as his telephone and internet package was concerned. He established no contractual basis for such a claim. Mr Narayan refused to make payment of a debt accrued and obviously Telecom was entitled to recover it. Employing debt collectors to do so might be seen as slightly draconian in view of Mr Narayan’s history with the company and in view of the fact that personal grievances were pending. Nevertheless, I am not prepared to make any finding in Mr Narayan’s favour in respect of this claim. Further, this grievance was not raised within the time limits prescribed in the Act if it was raised at all and no application for leave to do so has been brought. Mr Narayan did not respond during the hearing to this positive defence raised in the defendant’s pleadings.

[46] So far as the discrimination claims are concerned, again there is simply insufficient evidence to substantiate this assertion. There would need to have been some further independent corroborating evidence from Mr Narayan to substantiate this. So far as the claim of discrimination on the basis of employment status is concerned, this again is totally unsubstantiated. The evidence from company witnesses was that if Mr Narayan had required time to prepare for the disciplinary process then he would have been given it. Indeed there was clear evidence that he was offered time off but declined taking it.

[47] For these reasons all of the claims, except the claim of unjustified dismissal, are dismissed. The dismissal claim by Mr Narayan is upheld. The Court is entitled to retrace the basis upon which the employer makes a decision such as this. The Court cannot simply substitute its own decision for that of the employer. Nevertheless, in a situation where the employer as in this case has completely

ignored a fact which substantially undermines the basis for its decision, the Court is entitled to intervene.<sup>5</sup> In such circumstances the decision reached is that the employer's actions and how the employer acted, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

### **Remedies sought**

[48] I now turn to the remedies which Mr Narayan seeks. There is very little evidence before the Court as to his claim to lost income. Mr Narayan indicates that he was able to obtain alternative employment within four weeks. He gives no evidence as to the level of wages or salary that he is receiving in the position that he was able to obtain and, accordingly, it is not possible to assess his actual losses. It is clear that he took steps to mitigate his loss and it is unfortunate that he chose not to adduce any further evidence in that regard. However, there is evidence that he was without employment for four weeks. No real contest was made to this during his evidence. Accordingly, I am prepared to accept this claim and award him four weeks loss of wages. That will need to be calculated by Telecom on the salary he was receiving at the time of dismissal and PAYE deducted. Such salary would not include any contemplated increase for the promotion.

[49] Insofar as compensation is concerned, I have, of course, dismissed the claims apart from the dismissal claim. It is clear that the dismissal caused Mr Narayan distress in the form of humiliation, loss of dignity and injury to his feelings. He did not call any evidence from another witness who could have corroborated the position by giving evidence as to their observations of Mr Narayan following the dismissal. Nevertheless it is possible from all of the circumstances as presented to the Court to find that Mr Narayan has suffered in this way. An appropriate award under this head pursuant to s 123(1)(c)(i) is \$7,000 and I award this accordingly.

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<sup>5</sup> *C v Air Nelson Ltd* [2011] NZEmpC 27, [2011] ERNZ 207 at [48]-[51]; aff'd *Air Nelson Ltd v C* [2011] NZCA 488, (2011) 8 NZELR 453 at [19].

[50] Insofar as interest is concerned, I award Mr Narayan interest on his loss of wages from the date of termination until the date of this judgment at the rate prescribed by the Act.

[51] I note that there is also a claim for general and exemplary damages on all of the causes. No legal basis has been put forward in this case for such awards. Indeed it is well established that, in these circumstances, exemplary damages are not claimable.<sup>6</sup>

### **Contributing behaviour**

[52] I am required to consider the extent to which the actions of Mr Narayan contributed towards the situation that gave rise to the personal grievance in this case. I have already indicated that Mr Narayan was not as forthcoming with information as he should have been. The Act requires that each party to an employment relationship deal with each other in good faith.<sup>7</sup> In the present case I cannot find that Mr Narayan, while the circumstances may have been troubling for him, behaved in an appropriate way throughout. In the circumstances I consider that there be an appropriate reduction in the remedies that have been awarded by 10 per cent. PAYE deductions and interest will also need to be calculated on that basis.

### **Costs**

[53] Insofar as costs on the challenge are concerned, the parties have not yet addressed me on that matter. Costs are reserved. Mr Narayan has 21 days in which to file his memorandum on costs. The defendant will then have a further 21 days in which to respond. I make the point in a preliminary way that Mr Narayan represented himself and would not have incurred legal costs in conducting the challenge. He may have incurred disbursements and will need to address those.

[54] Apart from dealing with the non-attendance at the Authority's investigation in his pleadings, Mr Narayan has not taken the challenge to the costs determination any

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<sup>6</sup> *Prins v Tirohanga Group Ltd* [2006] ERNZ 321 (EmpC) at [78]-[80].

<sup>7</sup> Employment Relations Act 2000, s 4(1).

further in his evidence and only briefly dealt with it in his submissions. Nevertheless, in view of his success in part in the substantive challenge, the costs determination of the Authority is set aside and costs in respect of the Authority's investigation will be reconsidered. The parties will need to consider that issue in their submissions on costs. I have already indicated that Mr Narayan's behaviour in respect of the proceedings before the Authority may need to be taken into account when determining costs.

M E Perkins  
Judge

Judgment dated at 1pm on 18 June 2014