

Background facts

[4] The respondent is a small company importing and distributing motorcycle and all terrain vehicle tyres and motorcycle accessories and clothing. It operates two warehouses, one in Auckland the other in Christchurch, from which it supplies stock to some 200 retail outlets throughout New Zealand. Staff at the Christchurch operation comprised a branch manager, two sales representatives and three warehouse staff.

[5] The applicant began his employment under an individual employment agreement on 21 February 2006. He says he had some unavoidable health issues which forced him to have time off work *some of which related to getting my diabetes under control*. The respondent, while accepting the reasons for the applicant's absences were genuine, says his actual absences totalled 68 days during the period of his employment.

[6] It says it drew Mr Alsop's attention to the problems his absences were causing in the operation of the branch when it wrote to him on 7 September 2006. Noting there had been 21 absences in the first five months of employment, Mr Gray wrote:

Jade you are part of a small team of three which work in the warehouse. Your absence puts an additional 50% workload on your other team mates. As an employer I must have regard to the pressure this is causing on other staff. I am aware that you have a special medical condition however I understand that this can be managed with a strict routine.

If I cannot see an improvement in your attendance record I will have to review your employment with the company so that we can get reliable staff levels to deal with the current workload.

If there are any issues you think I can help you with to improve your attendance at work please do not hesitate to contact me.

*Yours sincerely,
Malcolm*

[7] Mr Gray again wrote to the applicant on 25 October 2006 saying:

To date you have been with us eight months and have taken 22.5 days off. This affects the efficiency of the Christchurch warehouse and being short staffed puts extreme pressure on your colleagues. Ultimately it affects our ability to meet our customers' expectations and deadlines.

As I have pointed out we are in a very competitive business and to maintain market share we cannot provide less than first class service to our customers.

At this point our discussions have been informal but this letter serves to inform you that any further absence will result in formal disciplinary procedure being followed. This would put your continued employment in doubt.

This is in no way to threaten you but in good faith to advise you of the seriousness of the situation and to ensure you understand that no further absence can be accepted.

*Yours faithfully,
Malcolm Gray*

[8] The Christchurch branch manager, Trevor Eves, and the applicant went over the letter together and Mr Eves' notes affirm that he assured Mr Alsop that they were not dismissing him but that their customer needs demanded a high level of service and to achieve this the branch required staff to provide that service. In the course of the meeting, the applicant said he wished to speak with his mother and so Mr Eves lent him the company van over lunchtime to allow him to go and speak with her.

[9] Once again, on 22 November 2006, Mr Gray wrote to Mr Alsop and the letter is headed *disciplinary procedure first and final warning*. The letter reads:

Your continued absence from work and your inability to meet the obligations of your employment agreement causes us to take this action. In particular please note clause 11 of your employment agreement.

Since joining us in February 2006 you have had 24.5 sick days which is greatly in excess of the five to which you became entitled after six months employment.

Your excessive absence very seriously impacts on our business operations, our efficiency levels, staff morale and service standards our customers expect. As well your absence today has caused a direct financial loss as Trevor had to leave the course he had paid for, to return to work and cover because you were again absent. There is no refund from the training organisation and reorganising his time causes additional complications for him and the other staff.

I think you will agree that to date we have been extremely reasonable in accommodating your health needs and being understanding, but regretfully this cannot continue. I must put the needs of the business first or we will not survive in this highly competitive industry.

In good faith and after consultation with Trevor your manager, I have made this a first and final warning, given the number of occasions we have brought this problem to your notice. Any further performance

problem or breach of your employment agreement will result in termination without further notice.

Jade, I sincerely hope your health improves. If I can assist in any way please let me know. I just cannot continue to run the business without full, reliable staffing levels.

*Yours faithfully,
Malcolm Gray
Director*

[10] The absence issue appears to have been satisfactorily resolved and the employment proceeded without incident until 31 May 2007 when Mr Alsop was knocked from his motorcycle on his way to work. He duly arrived at work but later complained about feeling unwell so company staff took him for an appointment with his general practitioner. Dr Kennedy completed an ACC form that stated that the applicant had suffered concussion, but cleared him for work on 1 June 2007.

[11] On 3 June 2007, Mr Alsop injured his hand and wrist when he came off his motorcycle while riding in a competitive motocross event. The respondent says on 5 June 2007 it received two ACC claims in the mail. One related to the concussion received on 31 May and the second related to the injury to his right wrist when he fell off while racing. The latter stated Mr Alsop was unable to resume any duties for 14 days. Following the expiry of that first medical certificate, the company received a further extension on 14 June, a further extension on 28 June, a further extension on 12 July and yet another extension on 23 July 2007.

[12] Mr Gray had written to the applicant on 8 July 2007 explaining the difficulty the company was facing and looking for an indication as to when Mr Alsop thought he might be able to return to work. Mr Gray says he asked the applicant to phone him after his next doctor's appointment on 12 July in order to give him an update as to when Mr Alsop could return to work. Mr Gray said he did not hear from Mr Alsop after the appointment on 12 July. However, the company received a copy of the medical certificate which said Mr Alsop would return to work on 23 July 2007. The relevant section of the medical certificate reads:

*The patient will be unable to resume any duties at work for 11 days from 12/7/07.
Based on this medical examination the patient will be able to return to normal work on 23/7/07.*

[13] Mr Gray says he telephoned the applicant on 16 July to see how his arm was and whether a return to work on 23 July was likely. Mr Gray left a message on both

the applicant's home and cellphones asking Mr Alsop to call him. The applicant returned the call at 5.10pm that day. Mr Gray says:

I asked him how the arm was healing and if he was confident that he could return to work on 23 July. He said that it was still sore and that he was not confident that he would be able to return to work on 23 July. I explained to him that if that were the case it would be difficult for us to hold his job open for him as the warehouse had now been short staffed for six weeks and it was becoming very difficult to maintain customer service. ... I asked Jayde if he had any suggestions as to how we could bridge the staff shortfall in the meantime and he said he had none.

I then advised Jayde that unless I could get an assurance from him that he was going to be able to return to full work duties on 23 July 07 we could not hold his job open any longer. Jayde said he could not give that undertaking. I advised him we would have to terminate his employment and would advertise the position. I would send a letter confirming this. I invited him to give me a call once he had received the letter if he had any questions. We said goodbye.

About three minutes later I got a call from his mother Liz stating that "you have really upset Jayde". I explained that that was not my intention but as an employer I have a responsibility to ensure the health and safety of staff is met and the current staffing levels in the Christchurch warehouse are too low etc etc. ... She said that Jayde would be there for work on 23 July 07 because the doctor's note said he would. To that end I need the assurance from Jayde. Please put him on the phone. "No Jayde is too upset to talk to you". I said fine, perhaps you can call me in the morning once he has settled down.

[14] Mr Gray says he did not hear from the applicant on the morning of 17 July so rang him seeking an assurance he was going to return to work on 23 July. The applicant said he was still unsure and the pair agreed that Mr Alsop would advise Mr Gray for sure on Friday, 20 July. Having had no call from the applicant on Friday, 20 July, Mr Gray telephoned him to find out what was happening and how his arm was and whether he could return to work on the Monday. He says that he again got a non-committal response and that the return to work would depend on what the medical certificate said.

[15] Mr Gray says that on 23 July his fears proved to be founded because the applicant did not return to work and the respondent received another medical certificate advising that the applicant would be absent for a further seven days.

[16] For the respondent, Mr Gray sums up the views as follows:

As an employer I could not be sure that Jayde would return to work on 30 July either and we were approaching our heavy ATV season.

The warehouse was understaffed and the staff stressed. We had pulled our sales staff off the road to help in the warehouse and sales were suffering. In the interests of their health and safety we had to find them permanent and reliable help. ... Over Jayde's entire employment period we demonstrated a generous tolerance in regard to extraordinary levels of absenteeism and serious misconduct with the unauthorised use of the company vehicle. Jayde voluntarily signed an employment contract before starting his employment with the company. This was a standard employment agreement which had been vetted by the Employers' and Manufacturers' Association. That employment contract stated in clause 11(b):

"as well, employment may be terminated if the employee is unable to perform their duties for any reason, and has exceeded all current leave entitlements."

[17] Finally Mr Gray says:

Jayde's action in going motocross riding four days after being concussed shows he has given little thought to the consequences of his own actions and arguably contributed to his absenteeism in doing so.

[18] Essentially, the applicant does not disagree with the facts as set out by the respondent. However, his view of the matter is significantly different. He says that on 23 July 2007 when he received the letter from Mr Gray advising him of the termination of his employment:

Malcolm Gray knew that the doctor had extended my return to work by one week as he was sent the medical certificate. There was no way he could advertise, recruit and train someone before I was due to return to work, but this didn't seem to make any difference.

In the letter of termination, Malcolm Gray also relied on clause 11 of the employment agreement to justify my dismissal. I don't believe this clause is legal, as my understanding of employment law is you can't get sacked for being sick and exceeding all current leave entitlements unless an injury or illness means you can no longer work which was not my situation at all. My situation was the opposite – I was sacked one week away from being cleared for a return to full duties.

[19] Mr Alsop also complains that if there had been a proper disciplinary meeting instead of a telephone conversation, he would have brought someone with him to discuss the situation.

He knew that the doctor had initially said I could return to work on 23 July; he knew the doctor had pushed this date back by one week and I was due to return on 30 July, and there was no reason to think I would not return on that date. The fractured bones were healing well, and there was no reason for Malcolm Gray to think this injury would prevent me from returning to work, as it was not any kind of long term injury or illness. I think frustration got the better of

Malcolm Gray, and he thought his company would be better off without me.

[20] The company's counterclaim for the sum of \$1,715 relates to damage done to the company van when, according to the respondent, Mr Alsop took it without permission to assist a friend who had run into difficulties on the outskirts of the city. As Mr Alsop had already paid part of the excess relating to the insurance claim, and gave an undertaking in front of the Authority that he would continue instalment payments until the outstanding balance was paid off, the Authority does not need to address this issue save for recording the formal agreement reached in the course of the investigation meeting.

The investigation meeting

[21] The applicant in person gave evidence on his own behalf while the Authority heard from Mr Gray, Mr Eves and Alan Rogers, one of the sales representatives, the latter two confirming the disruption caused to usual customer service levels experienced in the branch during the applicant's six week absence following the motocross accident.

[22] Despite the tensions evident between the parties, all conducted themselves appropriately and the meeting was able to be conducted and concluded within three hours.

The test

[23] The test for justification of a dismissal is set out in s.103A of the Employment Relations Act 2000 which requires the Authority to consider, on an objective basis, the respondent's actions and how it acted and what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

The issues

[24] In order to resolve this matter, the Authority needs to make findings on the following issues:

- Was the process followed by the employer in accordance with the principles of fairness; and

- Was the employer entitled to rely on the information contained in the various medical certificates; and
- Was the first and final warning fair and reasonable in the circumstances; and
- Was the dismissal unjustified; and
- If so, to what remedies is the applicant entitled.

Analysis and discussion

[25] The key issue in this case is the matter of capacity. Mr Brown has referred the Authority to *Te Moana v. GBC Communications Ltd* WA144A/03 in which the applicant was found to have been unjustifiably dismissed on the ground of incapacity. Having reviewed this case, the distinguishing factor is the failure of the respondent to have sought reliable information on the applicant's state of health before issuing the letter of dismissal. The case is also distinguished by the respondent management being unclear about the actual reasons for the dismissal.

[26] The obligation on the respondent is to act fairly in making the decision to dismiss and to base its decision on accurate and up-to-date information known to it at the time.

[27] The relevant individual employment agreement states at clause 11(b):

As well, employment may be terminated if the employee is unable to perform their duties for any reason, and has exceeded all current leave entitlements.

[28] The respondent relies on this section of the agreement. However, the application of clause 11(b) is not mandatory but discretionary and the respondent must be able to justify invoking it *in all the circumstances*. That is, the clause itself does not provide justification for the decision.

[29] Some of the factors that may be relevant in determining whether an employer is justified in dismissing an employee for capacity are set out in *Marshall v. Harland and Wolff Ltd* [1972] ICR 101; [1992] 1 WLR 899; [1972] 2 All ER 715. The principles enunciated here apply in New Zealand and have been described as *well established*. They include:

- (a) The terms of the contract, including any provision as to sick pay;
- (b) Whether the employee was likely to be employed long term if he or she had not been sick;
- (c) The nature of the employment, for example, whether the worker was in a key position;
- (d) The nature of the illness or injury, how long it had continued, and what prospects there were of recovery; and
- (e) How long the employee had been employed to date, i.e. whether the employee was a longstanding and valued employee.

[30] Appendix 1 of the individual employment agreement outlines the disciplinary process to be applied if required. Three issues of significance arise from this document. The first is the statement *during this process an employee will be offered the opportunity to have a support person present*. The second is the classifying of absenteeism as less serious misconduct. The third is the note:

In circumstances where the employer determines that instant dismissal is not appropriate, but the offence is serious, the employee may be given a first and final warning that any further case of misconduct may result in dismissal without notice.

[31] Addressing the issue of representation, I am not convinced that the lack of representation or support is an essential element of procedural fairness in a case involving capacity. In *Barry v. Wilson Parking New Zealand (1992) Ltd* [1998] 1 ERNZ 545, Chief Judge Goddard, when reviewing the procedural fairness in that matter in which the decision to dismiss had been made by the managing director rather than the person who appeared to be making the decision, held this was not unfair as *there is all the difference in the world between an inquiry into suspected misconduct possibly involving credibility assessments and a more routine consideration of an employee's capacity or lack of it to continue working*. In this case, there was never any suggestion that the applicant's absences were for anything other than genuine reasons. His presence or absence at the workplace on any given day is a matter of factual record. In such circumstances, the presence or otherwise of a support person or representative would add little to the factual matrix.

[32] The document attached to the agreement makes it clear that, of itself, absenteeism is less serious misconduct and therefore not liable to incur the ultimate sanction of dismissal without notice.

[33] The letter from Mr Gray to the applicant on 22 November 2006 and headed *disciplinary procedure first and final warning* follows letters to Mr Alsop on 7 September 2006 and 25 October 2006, both of which relate to the difficulties the company was having maintaining its operations in his absence. In the warning letter, Mr Gray again reiterates the seriousness of the impact his absence was having on the business as well as an actual financial loss which he sets out in that warning. While Mr Gray's statement that any further performance problem or breach of the employment agreement will result in termination without further notice is over zealous, it nonetheless puts Mr Alsop on very clear notice of the seriousness with which the respondent is viewing his absences and a likely outcome in the event that they are to continue. As I understand it, the letter had a salutary effect until the mishap in the motocross event which led to his wrist and hand injury.

[34] In his letter of 8 July 2007, Mr Gray asked the applicant to telephone him after his visit to the doctor on 12 July to give him an update on the situation. Mr Alsop did not call Mr Gray but the respondent received another medical certificate dated 12 July 2007. The relevant information on the form states: *based on this medical examination the patient will be able to return to normal work on 23/7/07.*

[35] As noted above, Mr Gray telephoned Mr Alsop on 16 July to inquire how the injury was and *whether a return to work was likely*. Following that call, Mrs Alsop rang Mr Gray and, among other things, told him her son would be at work on 23 July because the medical certificate said he would. Mr Gray asked Mrs Alsop to ring him the following morning. Having not heard from the applicant, Mr Gray telephoned him to get an assurance that he would be returning on the date specified but was unable to secure this. The pair agreed Mr Alsop would let Mr Gray know on Friday, 20 July.

[36] Mr Gray's evidence was:

On Friday 20 I received no communication from Jayde, so at the end of the day I phoned him to see what was happening and how his arm was feeling and whether he thought he could return to work on Monday. Once again I got a non-committal response that his return to work would be dependent on what the medical certificate said. ...

On 23 July my fears were proved to be well founded because rather than Jayde returning to work we received another medical certificate form advising Jayde would be away for another seven days. We just couldn't keep going on like this ...

As an employer I could not be sure that Jayde would return to work on 30 July either and we were approaching our heavy ATV season. The warehouse was understaffed and the staff stressed. We had pulled our sales staff off the road to help in the warehouse and sales were suffering. In the interests of their health and safety we had to find permanent and reliable help.

[37] The applicant's evidence was:

If there had been a proper disciplinary meeting, instead of the phone conversation, I could have brought someone with me and discussed my sick leave. Malcolm Gray said that there was "no final date for return to work established", but this is not true. Malcolm Gray knew I was off work for a bone fracture, he knew that the doctor had initially said I could return to work on the 23rd, he knew that the doctor had pushed this date back by one week and I was due to return to work on 30 July, and there was no reason to think that I would not return on that date. The fractured bones were healing well, and there was no reason for Malcolm Gray to think this injury would prevent me from returning to work, as it was not any kind of long term injury or illness. I think frustration got the better of Malcolm Gray and he thought his company would be better off without me.

[38] While the convening of a disciplinary meeting may have provided the applicant with an opportunity to discuss his sick leave, such a discussion was unlikely to change the facts relating to the situation. I think it something of an overstatement for the applicant to say that there was no reason to think that he would not return on 30 July. As noted above, the medical certificate issued on 12 July stated that Mr Alsop *will be able to return to normal work on 23 July*. The certificate issued on 23 July makes exactly the same statement. I think it highly probable, in the light of the unreliable information provided in the 12 July certificate that Mr Gray was entitled to be sceptical about the prognosis set out in the certificate of 23 July 2007.

[39] The matter is relatively balanced. I am satisfied the sole reason for the dismissal was the inability of the respondent to operate its business effectively in the absence of the applicant. In a small business it is reasonable to say that every operational employee is a key member of staff. In such a business as the respondent's, there is very limited capacity to cover for an absent staff member without significant disruption to other tasks essential to maintaining the business.

[40] In considering the principles set out above, a term of the contract between the parties included the clause set out at 11(b) in the section headed *Termination of employment*. In this case, the applicant was unable to perform his duties due to the accident he had suffered and had also exceeded all his current sick leave entitlements at that time. It is difficult to be sure whether or not Mr Alsop would have remained long term with the respondent although given his interest in motorcycles it is possible he would have. I accept that, given the injury was a fracture, the prospect of full recovery was particularly good. However, as is clear from the evidence, even the doctor appears to have been unsure as to the length of time that might take.

[41] It also has to be borne in mind that the respondent had been particularly generous in the earlier part of Mr Alsop's employment in respect of leave occasioned for the most part by his diabetic condition. The pattern of those early absences was a day and there which I surmise caused less disruption to the respondent's operations than that occasioned by an absence of six weeks.

[42] As Chief Judge Goddard remarked in *Barry v. Wilson Parking New Zealand (1992) Ltd* (supra), *the Court's function is not to compel employers and employees to be generous and kind to each other but only to see to it that they treat each other justly*.

[43] Standing back and considering the issues at the heart of this case, I do not accept that the respondent has been unjust in calling halt to Mr Alsop's employment.

The determination

[44] Returning to the issues as set out above, I find:

- The employer was entitled to rely on the information contained in the medical certificates and in particular that issued on 12 July 2007; and
- The process followed by the employer in all the circumstances, given that Mr Gray was based in Auckland and the applicant in Christchurch, was in accord with the principles of fairness; and
- That although the respondent did not rely upon it in coming to its decision to terminate the employment relationship, the first and final

warning issued to the applicant in respect of his absences up to 22 November 2006 was fair and reasonable; and

- The dismissal for incapacity was, in all the circumstances of this particular case, justified; and
- There is, in these circumstances, no need to address the remedies sought.

[45] I find that while aggrieved at the loss of his employment with the respondent, the applicant does not have a personal grievance and the Authority is unable to assist him further.

Costs

[46] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority