IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 87/07
5036572

BETWEEN	PHILLIP ARMON Applicant	
AND	BRIDGESTONE ZEALAND LIMITED Respondent	NEW

Member of Authority:	Paul Montgomery
Representatives:	David Beck, Counsel for Applicant Glenn Jones, Counsel for Respondent
Investigation Meeting:	17 April 2007 at Christchurch
Submissions received:	18 May 2007
Determination:	30 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Armon, the applicant, claims to have been unjustifiable dismissed from his employment as a tyre builder with the respondent. He further claims he has been subjected to a series of unjustified actions causing him to be disadvantaged. In the alternative, Mr Armon claims that he has been discriminated against by his employer in that his dismissal may be on the grounds of his disability. He seeks compensation and/or damages and a penalty order for the alleged good faith on the part of the respondent.

[2] The respondent says that in its circumstances, the dismissal was justifiable and that the applicant has not been subjected to unjustifiable disadvantage by the respondent. Furthermore, it says the disadvantage complained is beyond the prescribed term of 90 days and that the respondent does not consent for it be

raised. Finally, the respondent says the applicant was not dismissed due to his disability but because his incapacity prevented him from performing the duties he was required to undertake under the employment agreement. Accordingly, the respondent rejects the applicant's claim for remedies.

How the problem arose

[3] The applicant began employment with the respondent in 1998 as a serviceman and moved to working as a tyre builder in 1999. Under the collective agreement, Mr Armon was employed to work 84 hours per fortnight in 12 hour shifts. His sick leave entitlement was five days per year. He performed his role well until mid-2004. He experienced numbness in his hands each morning when he awoke.

[4] At the relevant time, the company time was an Accredited Employer under the ACC scheme. The respondent contracted Catalyst Risk Management Limited (CRM) to independently manage its employees' work related injury claims.

[5] On 18 August 2004, the applicant lodged an ACC claim for a work-related injury of carpel tunnel syndrome in both left and right forearms. CRM accepted his claim in November 2004 and the applicant underwent surgery in November and December 2004. Mr Armon was unable to work and was absent from 10 November 2004 until 14 January 2005.

[6] On returning to work on 14 January, Mr Armon presented his ACC medical certificate and spoke with Mr Allan Goy, the company's safety and environmental officer. Mr Goy questioned the applicant as to what restrictions there were on his work and that the applicant replied that as long as he took his time and did not build tyres at full speed he would be able to manage. Mr Goy agreed and suggested that Mr Armon be placed on Average Earnings, a scheme provided under the collective agreement to enable him to build lower volumes of tyres as opposed to those numbers required when at full production speed. Mr Goy says this was to assist Mr Armon in recovering from his surgery.

[7] On 21 February 2005, the applicant consulted Bridgestone's Tyre Plant Doctor, Dr Blackmore and he was referred on to Mr Bonkowski, a specialist neurosurgeon, who diagnosed the applicant as suffering from ulnar neuritis at the level of the wrist. As a result of this diagnosis, a new ACC claim was lodged and

Dr Blackmore, in an ACC certificate issued on 11 April 2005, stated that Mr Armon would be unavailable to resume normal duties for 90 days starting from 11 April 2005. The applicant was therefore placed on light duties unrelated to tyre building but was at this time working his full complement of hours.

[8] Some time later, on 15 June 2005, CRM advised the applicant that it accepted his claim for cover as a work-related gradual process injury. However, in a decision issued on 31 August 2005, CRM revoked its original decision. On 5 September 2005, the applicant applied to ACC seeking a review of the CRM decision.

[9] The company's attendance records show that the applicant was absent from work for his full 12 hour shift from 18 June to 9 August 2005. From 12 August to 24 November 2005, he worked only four hours of his 12 hour shifts.

[10] On 5 September 2005, the applicant met with Mr O'Connor, the respondent's Employee Relations Manager, Mr Noel Smith, the Shift Manager, and Mr Kerry Pearce, Secretary of the Union. The purpose of the meeting was to discuss the applicant's continuing inability to perform his duties as a tyre builder. Following the meeting, Mr O'Connor and Mr Smith decided that because of the ongoing and prolonged physical incapacity of the applicant, the company would pay him only for the hours he actually worked, transfer him to the service pool in the meantime, advise him that if he was unable to work a full normal 12 hour shift as a radial serviceman in the short to medium term future, the company would have no alternative but to terminate his employment and that it would continue to review the situation with the applicant over the coming months. These matters were confirmed in Mr O'Connor's letter dated the following day.

[11] On 4 November 2005, Mr O'Connor again wrote to Mr Armon asking that they meet in accordance with the process he had indicated in his September letter. The parties met again on 18 November 2005. Mr O'Connor says following that meeting he and Mr Smith considered the position and that due to the uncertainty as to how long the applicant's incapacity would continue, and when he might be able to return to normal duties, they were unable to keep the tyre builder's position open and had no alternative but to terminate the applicant's employment. This was communicated to Mr Armon in a letter from Mr O'Connor on 21 November 2005.

The issues

[12] The issues which need resolving are:

- Was the dismissal of the applicant unjustified; and
- Was the applicant disadvantaged by the process adopted by the respondent; and
- Was the applicant discriminated against because of a disability; and
- Did the respondent breach its good faith obligations to the applicant in allegedly not adopting a more supportive approach in relation to his injury; and
- If so, what if any remedies are due to the applicant?

The investigation meeting

[13] At the investigation meeting the Authority heard from Mr Armon himself, Mr Pearce and from Ms Rachel Pennell, the applicant's partner. Evidence on behalf of the respondent was presented by Mr O'Connor and by Mr Allan Goy. The Authority records its thanks to those who gave evidence at the investigation meeting and for the clarity with which all gave their evidence.

The test

[14] The test to be applied in this matter is that set out in s.103A of the Employment Relations Act 2000. It reads:

> *For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

Analysis and discussion

[15] There is no dispute that at the time the applicant began working as a tyre builder he was fit and able to do the tasks of that role. The difficulties for Mr Armon began in mid 2004 and at issue in this case is how the condition was

managed by the respondent. The claim is that the respondent, and in particular Mr Goy and Mr O'Connor, did not maintain regular contact with the applicant during the period following the initial diagnosis through to the date of dismissal. Further, the applicant says the respondent was not justified in dismissing him before he had the final surgery to improve his condition.

[16] Counsel for the applicant has identified precedent cases in which the circumstances are not dissimilar to the present matter. Mr Beck contended that the test set out in s.103A alters the duty on an employer when considering a dismissal for physical incapacity. He urges the Authority to consider *Innes-Smith v. Wood* [1998] 3 ERNZ 1298 as a precedent which has parallel circumstances to the present matter. I have done so. Goddard CJ held the employer made inadequate efforts to consult with the employee. The Chief Judge's obiter comment provides some guidance in this case:

> *A good reason to dismiss would usually consist of a combination of the length of absence to date and the prospects for the future as to a return to work.*

[17] As already noted above, Mr Armon's situation was being managed by CRM and his case manager was up-to-date with relevant medical information from various specialists.

[18] On the applicant's return from wrist surgery on 14 January 2005, he spoke with Mr Goy whose diary entry reads:

> *P Armon – advised he is feeling good with no pain. He asked if he could go onto full building. Placed on AE for two weeks to help out to increase income.*

[19] From this it is clear that Mr Armon wanted to undertake his full duties and that Mr Goy was not in favour of it. Instead, Mr Goy took a more cautious approach and put the applicant under the Average Earning Scheme for a trial period of a fortnight.

[20] In this context, it is significant that the Individual Rehabilitation Plan prepared for the applicant by CRM and signed off by Mr Armon and Mr Goy on 7 December 2004, it is Mr Armon himself who was responsible for ensuring he abstained from any activity which might re-aggravate the injury. The plan states:

> *You are not to do anything that will put you at risk of re-aggravating the injury either at work or out of work.*

[21] In a report to CRM dated 26 April 2005 from Dr Blackmore, an Occupational Physician, it is stated, after a diagnosis of ulnar nerve entrapment by Dr Bonkowski on 23 March 2005, *it may be that the original diagnosis was wrong and that his current problem of ulnar nerve entrapment was the diagnosis all along*.

[22] In the period between 5 September 2005 when the applicant met with the respondent and 18 November 2005 when he was dismissed, the Union commissioned a review from another Occupational Medicine Specialist, Dr Glass. The purpose of the review was to determine whether Mr Armon's ulnar nerve entrapment was caused by or contributed to by his employment as a tyre builder. That review is dated 4 November 2005. Counsel for the applicant submits that the respondent failed to wait for the outcome of the applicant's ACC review *in the knowledge (from Dr Glass' report) that such was likely to be successful*. Mr Beck also submitted that the respondent failed to await the outcome of Mr Armon's surgery.

[23] Those submissions need to be viewed in the light of several facts not attributable to the respondent. Principally, these are the acceptance and later rejection of Mr Armon's ACC claim, the delay in the ACC review hearing and the continuing inability of the applicant to do the work for which he was employed.

[24] I do not believe it can be said that the respondent was hasty in making its decision. After over a year of the applicant being unable to do his job, and with no certainty as to the outcome of the ACC review or of any surgical procedures, it needed to balance its business interests and the ongoing employment of Mr Armon.

[25] Nor do I accept that the respondent was bound to await the outcomes of these various processes. As Mr Jones submitted for the respondent:

> *Bridgestone was faced with a whole lot of ifs, mights and maybes. In the circumstances (long term inability to do job, no firm expectation of return to full duties and no timeframe), Bridgestone was entitled to 'cry halt'.*

[26] While not definitive of the matter, I think it is significant that at the time of the investigation meeting Mr Armon was still not sufficiently fit to work as a tyre builder. He has begun and is in the process of completing an information technology business course and in his letter to CRM dated April 13 2006 regarding retraining for future employment, Mr Armon says:

> *Due to recommendations by the surgeon, physio and GP etc, that as a result of this injury I should not return to my previous type of employment.*
>
> *My employment was terminated with Bridgestone, as a result of my work injuries not being resolved in a timely manner by CRM. I am now seeking to retrain.*

[27] On the face of it, this appears as reflecting the applicant's then view that his dismissal from Bridgestone was due to the performance of CRM.

[28] Turning to the issue of consultation with the applicant by the respondent, Mr Jones submits the respondent provided Mr Armon with alternative work and with time off during the period 10 November 2004 until 21 November 2005 to accommodate the applicant. Counsel points out that prior to the decision to terminate the applicant's employment, it had consulted with him on four occasions during September, October and November 2005. The respondent, through Mr O'Connor's 6 September 2005 letter, put the applicant on notice that if he was unable to return to tyre building within a two month period from that date, his employment was likely to be terminated. In that letter, Mr O'Connor clearly pointed out that the respondent would consult on a continuous basis with the applicant in order to review any information that was available to it. It is also clear from the email traffic between Mr O'Connor and Mr Goy that Mr O'Connor was diligent in ensuring the consultative process proceeded as he had outlined.

[29] Viewing the matter overall, I can see no grounds on which to find that the respondent breached its duty of good faith, nor do I find the dismissal had any element of discrimination against the applicant. While a more indulgent employer may have done more, I find the respondent has met the test set out in s.103A of the Act.

The determination

[30] Returning to the issues set out above in this determination:

- I find the applicant was not unjustifiably dismissed nor was he disadvantaged by any unjustified action on the part of the respondent.

- I find Mr Armon was not discriminated against in his employment.

- I find the respondent did not breach its duty of good faith in respect of the applicant.

- Mr Armon does not have a personal grievance and the Authority is unable to assist him further.

Costs

[31] Costs are reserved. The parties are encouraged to attempt to resolve the matter of costs between themselves. If this is not possible, Mr Jones is to lodge and serve his memorandum on this issue. Mr Beck is to have a further 14 days in which to lodge and file his response.

Paul Montgomery
Member of the Employment Relations Authority