

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 154  
5305860

BETWEEN PAUL EDWARD BAYNES  
Applicant  
AND SILVER FERN FARMS  
LIMITED  
Respondent

Member of Authority: M B Loftus  
Representatives: Paul Baynes on his own behalf  
Diccon Sim and Ella Tait, Counsel for Respondent  
Investigation meeting: 23 November 2010 at Dunedin  
Submissions Received At the investigation  
Date of Determination: 27 July 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Mr Paul Baynes, claims that he was unjustifiably dismissed by the respondent, Silver Fern Farms Limited (Silver Fern), on 24 February 2010.

[2] Silver Fern accepts that it dismissed Mr Baynes but claims that it was justified in doing so given his incapacity and an inability to perform his normal duties.

**Acknowledgement**

[3] Unfortunately a considerable period of time has passed since the investigation meeting. The situation has arisen as a result of the file being inaccessible for a considerable time due to Christchurch's earthquakes. I appreciate the parties' patience and regret any inconvenience suffered.

## **Background**

[4] Silver Fern operates a mutton and lamb processing plant in Dunedin and employs 220 staff at seasons peak. Employment at the plant is under a collective agreement (or an individual employment agreement on similar terms), and staff are engaged on a seniority (last-on/first-off) basis. Employment is offered on a season-by-season basis and terminates at the end of each season with re-employment occurring on a specified date at the start of the new season.

[5] Most of the work is extremely repetitive. To combat this, and reduce the risk of injury, Silver Fern adopted task rotation as an integral part of the role of a seasonal employee some time ago.

[6] Mr Baynes was employed on 1 December 2004 in the lamb processing room as a packer. Whilst he claims to have been a 'left handed' packer Silver Fern is adamant, and I accept, there is no such thing as a left handed or right handed packer. He was a packer.

[7] On 1 April 2008, Mr Baynes initially reported a discomfort that was later to be accepted as the result of a work related injury. After initial treatment he returned to normal duties but problems remained. It would also appear the situation was aggravated by work Mr Baynes subsequently performed for another employer during the off-season. He admits suffering a further injury whilst so employed, which required treatment though Silver Fern was unaware at the time.

[8] Mr Baynes commenced the new season in November 2008 but the injury continued to affect him. That led to surgery on 25 February 2009. Upon return he was put on a rehabilitation plan and performed light duties. For the later part of this period he was engaged on a task known as ticket scanning.

[9] On 26 November 2009, it was established Mr Baynes was not capable of returning to his pre-injury job. He did, however, have vocational independence (ie: an ability to fully perform other tasks) and, as a result, he was given three months notice of the cessation of his ACC. Tasks identified as appropriate included stock clerk, rental salesperson, purchasing officer and security officer.

[10] On 15 December 2009, the parties met to discuss ongoing employment options for Mr Baynes once his rehabilitation programme was completed. At that meeting, Mr Baynes suggested Silver Fern retain him as a ticket scanner.

[11] Silver Fern is of the view ticket scanning was normally part of the rotation performed by some seasonal workers. It was never intended that ticket scanning remain a non-rotational position indefinitely and Silver Fern did not consider that viable. Others were entitled to perform the task as they had prior to Mr Baynes assignment there under his rehabilitation plan and, in any event, there was an additional issue in that Mr Baynes would not normally have rotated there as he had insufficient seniority.

[12] Accordingly, Silver Fern sought to review Mr Baynes' status and ascertain what might be available within the range of positions described in his vocational independence. Silver Fern claims that it tried to organise further meetings on a number of occasions but that Mr Baynes refused to attend or engage in the discussion.

[13] While Mr Baynes accepts he came to ticket scanning as a result of his injury and as part of his rehabilitation plan, he claims the appointment was permanent. He does not therefore consider there was any need to discuss his future employment.

[14] As a result of this impasse, Silver Fern concluded there were no suitable seasonal positions available and issued a notice of termination on 24 February 2010. The termination was effective 3 March 2010.

### **Determination**

[15] Mr Baynes raised a number of irregularities in respect to the management of his claim. For example he complains about a lack of communication, concern or care in respect to his rehabilitation, a failure to address an injury to the right arm and allegations he was being asked to perform tasks not contemplated by his rehabilitation agreement – in particular he is resentful about being asked to perform a task known as bagging.

[16] Silver Fern denies these allegations and contends they had regular return to work meetings at which Mr Baynes' rehabilitation was discussed and planned; they ensured he was given suitable alternate duties and told to immediately report any problems or issues so appropriate amendments could be made if necessary; they gave

advice about how to perform the assigned work so as to avoid aggravating the injury and they arranged medical appointments and reviews. Silver Fern also raises concerns and alleges Mr Baynes chose to ignore his rehabilitation plan and attempted to perform tasks he was precluded from. Given the evidence, and particularly the contemporaneous documents, I accept Silver Fern's position but, in any event, these complaints are not ones I can enquire into. The reason is twofold.

[17] First, Mr Baynes has not previously pursued these issues as a grievance. Second, and whilst these allegations are about the actions of Silver Fern employees, they relate to the management of his claims and rehabilitation. In this respect Silver Fern was, as an accredited employer, acting in the place of the Accident Compensation Corporation. Section 133(5) of the Accident Compensation Act 2001 states:

*If a person has a claim under this Act, and has a right of review or appeal in relation to that claim, no court, Employment Relations Authority, Disputes Tribunal, or other body may consider or grant remedies in relation to that matter if it is covered by this Act, unless this Act otherwise provides.*

[18] I can, however, enquire into Mr Baynes dismissal as it occurred after Silver Fern had ceased managing the injury claim.

[19] As has already been said, Silver Fern accepts that it dismissed Mr Baynes. In doing so, it also accepts that it is required to justify its actions.

[20] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least used to state, that the question of whether a dismissal is 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 ... occurred.*

[21] The above test is used as the cause of action arose prior to the present version coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect.* Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless they specifically provide otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[22] Silver Fern's position is that Mr Baynes was incapable of returning to his pre-injury role and that had been confirmed by an independent vocational assessor. The company did not have a suitable role available and Mr Baynes refusal to meet and discuss the issue had made it insoluble. In essence it is a frustration argument and, as the Court observed in *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585, this is an approach that is often raised in cases of illness and injury.

[23] In *Motor Machinists Ltd v Craig* the Court found:

*(1) frustration of contract can occur where illness prevents the performance of an employment contract. However, an employment contract is not frustrated simply because an employee is ill or has been in the past. The contract is not frustrated where there is no medical evidence that the employee is permanently incapacitated or it cannot be said that the incapacity has been such that it destroyed the root of the contract. Under the doctrine of frustration there is no requirement of fairness as the contract terminates by operation of law, rather than by the decision of one of the parties. (p 591, line 24; p 592, line 1)*

*(2) Where illness or injury occurs which prevents an employee from returning to work the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair. This ensures that the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated.*

[24] There can be little doubt Mr Baynes is no longer capable of performing the job he was employed to perform – the medical evidence both exists and is absolute.

[25] Mr Baynes contention that his position changed to that of ticket scanner is unsustainable. Again it is clear that was not the job for which he was engaged and, again, the documentary evidence makes it clear that was a temporary arrangement designed to assist the rehabilitation.

[26] Furthermore I must conclude, given the principles enunciated above, that Silver Fern is not required to restructure its operation to facilitate Mr Baynes retention. There is no absolute right to a job or having a position left open indefinitely. The substantive rationale exists.

[27] Turning to procedure, the obligation outlined above is to ensure the employee is not dismissed without an opportunity to provide information which might prevent

the termination occurring. The evidence is that Mr Baynes was given such an opportunity – indeed there were multiple attempts by Silver Fern to meet and discuss the situation. It was Mr Baynes who chose not to participate.

[28] In these circumstances I conclude this was a decision a reasonable employer would reach. Mr Baynes claim therefore fails.

### **Costs**

[29] Cost are reserved.

M B Loftus  
Member of the Employment Relations Authority