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Beales v Ovation New Zealand Limited (Wellington) [2018] NZERA 2009; [2018] NZERA Wellington 9 (31 January 2018)

New Zealand Employment Relations Authority

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Beales v Ovation New Zealand Limited (Wellington) [2018] NZERA 2009 (31 January 2018); [2018] NZERA Wellington 9

Last Updated: 13 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 9
5525427

BETWEEN CHASE DEXTER BEALES Applicant

AND OVATION NEW ZEALAND LIMITED

Respondent

Member of Authority: M B Loftus

Representatives: David Balfour, Advocate for Applicant

Libby Brown, Counsel for Respondent

Investigation Meeting: 22 and 23 February 2017 at Palmerston North

Submissions Received: 8 March and 17 April 2017 from Applicant

4 April 2017 from Respondent

Determination: 31 January 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Chase Beales, has raised a multiplicity of claims. His primary claim is he was unjustifiably dismissed by the respondent, Ovation New Zealand Limited (Ovation), after it had, in his view, failed to address a multiplicity of disadvantage claims Mr Beales had raised.

[2] Ovation denies any of the claims have validity.

Background

[3] Ovation operates a meat processing plant. Mr Beales was employed as a process worker, commencing on 23 September 2013.

[4] On Friday 17 January 2014 Mr Beales felt a sharp pain while lifting a carcass which was followed by mild discomfort overnight. He returned to work on 21

January after a long weekend (Wellington anniversary). He says the pain and discomfort remained and that led him to see a doctor the following day at which point he was given three weeks absence on ACC.

[5] The medical certificate was not provided to the employer till 28 January though Mr Beales had, in the interim, advised his supervisor he had a sore back. Ovation notes Mr Beales did not file an incident report at the time in accordance with his health and safety obligations. It also questions how the event occurred as it says lifting is not a task required of Mr Beales.

[6] Having become aware of the incident and the ACC claim, Ovation referred the issue to WorkAon, its injury case manager. That commenced a process under which various forms were filled out, rehabilitation plans implemented and medical treatments undertaken. This included a referral to physiotherapy and consultations with an occupational specialist.

[7] On 11 February an alternate duties plan was completed and signed off by both Mr Beales and the medical administrator. Mr Beales then went to work with the aim of performing alternate duties on the day shift but by 9:30 had visited the medical administrator and reported he was not coping with the duties he had been assigned. Other alternate duties were found. At approximately 12:20 Mr Beales reported increased back pain and took a rest break. That, however, was not sufficient and at 2:45pm he went home as he was no longer capable of working.

[8] Mr Beales was on annual leave on 13 and 14 February. On 18 February Mr Beales' case was reviewed by the medical administrator. Also present was Mr Beales and his supervisor. Mr Beales, having reported elevated pain levels following various treatments, requested a 50-50 sitting/standing job. That was agreed.

[9] The situation continued without improvement through February and took an

unfortunate turn on 1 March when Mr Beales required a night's hospitalisation.

[10] That was followed by the medical administrator contacting Mr Beales. She provided information about on-site support services and the availability of counselling. She also asked if he wished to attend the next scheduled physiotherapy appointment. He did.

[11] A similar conversation occurred the following day when the medical administrator asked if Mr Beales wished to postpone an appointment with an occupational therapist. He advised he did not want to but, as events transpired, did not attend the appointment.

[12] On 7 March 2014 a workplace assessment was completed.

[13] Mr Beales did not return to work on 10 March following expiry of his latest medical certificate. Contact was made two days later at which time Mr Beales advised he had another doctor's appointment and would bring a medical certificate that day. It was produced the following day but that was the last day of its validity.

[14] On 17 March Mr Beales was reminded he was required to participate in his rehabilitation programme and that meant attending assessments in order to avoid compensation payments being suspended. Mr Beales characterises this as bullying. Ovation says it is nothing more than a dissemination of factual information.

[15] Throughout March similar issues arose with Mr Beales suffering ongoing pain and difficulty with adhering to the requirements of his return to work programme. That saw alterations to the programme after consultation with a specialist occupational physician.

[16] On 21 March Mr Beales attended work but, according to Ovation, declined to perform tasks specified in his work programme. Ovation says he advised he had seen an employment advocate before leaving the workplace.

[17] There then developed what was essentially a stand-off. Mr Beales was no longer participating in his return to work programme. As a result he was told on 27

March that:

Your entitlement to weekly compensation will therefore cease until such time as you resume participation in your rehabilitation and continue with the graduated return to work plan, that Dr Kerr has approved.

[18] Following that there were further medical consultations and investigations with various practitioners and these included a muscular skeletal physician and a rehabilitation specialist.

[19] By this time Mr Beales' advocate was raising numerous complaints which included ones relating to comments made on Mr Beales' file by WorkAon's case managers. This appears to have exacerbated tensions.

[20] Attempts to address the issues and see Mr Beales return to work continued for some months, though Ovation expressed disquiet at what it saw as Mr Beales' failure to participate fully and attend scheduled meetings etc. One initiative that was pursued was placing Mr Beales on a forklift course which saw him cleared for light duties with effect 10 September 2014. He did not, however, report for work.

[21] Throughout this time Mr Balfour was also lodging complaints with the ACC's Customer Complaints division. He was also participating in various meetings with the medical administrator and representatives of Ovation and WorkAon.

[22] None of this resulted in the issues being resolved and on 12 September 2014

Mr Beales raised a personal grievance. It is characterised by Ovation as containing *A large number of vague, unsubstantiated and inflammatory statements that are unsupported by evidence, citations, proper legislative references and any particularity.*

[23] The tensions continued to escalate though eventually Mr Beales was assessed as vocationally independent. This occurred in July 2015 and meant he was considered capable of returning to normal full-time employment though restrictions remained. He was invited to attend a meeting to discuss a return which occurred on 10 July

2015. At the meeting he was told attainment of vocational independence meant weekly compensation could be paid for a further three months but would then stop. There were, however, issues with the tasks Ovation had available and there was nothing available that would not breach the remaining restrictions on Mr Beales ability to work. Ovation says he was advised the situation would be regularly assessed during the three months and if any suitable tasks arose he could, as a current employee, be directed to undertake them.

[24] Unfortunately Mr Beales appears to have interpreted this as advice of dismissal and he raised an unjustified dismissal claim on 28 July. Ovation responded, via counsel, on 31 July. Amidst other things it advised Mr Beales had not been dismissed.

[25] Notwithstanding that Mr Beales did not work during the three months over which his weekly compensation payments continued. Toward the start of October

2015 Ovation reviewed his status and invited Mr Beales to a meeting to be held on 7

October to discuss that. As events transpired the meeting occurred on 14 October. A further meeting occurred the following day. No further medical information was presented and Mr Balfour, on Mr Beales' behalf, took the position Mr Beales' was incapable of working and that Ovation accepted that to be the situation. That acceptance meant, in Mr Balfour's view, Ovation was under an obligation to offer a medical retirement programme which involved some form of buy-out.

[26] Suffice to say that approach was unsuccessful. In the absence of any further input from Mr Beales or on his behalf Ovation chose to dismiss him on the grounds of medical incapacity on 20 October 2015.

Determination

[27] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[28] The original grievances numbered eight. That said there was a significant degree of repetitiveness about the claims. For example the first complaint was that Mr Beales' had been unjustifiably disadvantaged by virtue of Ovations' bullying; breaching his privacy in respect to medical information regarding his injury and its failure to inform him about decisions relating to his employment and ACC entitlements. Poor communication and a lack of information was then repeated as a ground of grievance in the fourth accusation while the bullying was the fifth ground.

[29] Three more of the alleged grounds relate to an alleged failure to provide a safe workplace by failing to provide training

and supervision appropriate to the tasks Mr Beales was being asked to perform and then failing to attend to hazards once these became apparent.

[30] The second tranche of claims included further iterations of those referred to above along with the unjustified dismissal claim.

[31] Finally there was a growing antipathy between Mr Balfour and Ms Brown with an allegation Ms Brown's involvement and her responses to Mr Balfour constituted another disadvantage as *...in advancing the company's refusal to process an ACC review application and that the matter was none of her concern as it was in the work AON/ACC arena, not in the employment arena*. Indeed Mr Balfour went so far at one stage to demand she be disbarred from representing Ovation.

[32] Things were not assisted by a lack of clarity which was never adequately addressed and the use of words that seemed inconsistent with what was being claimed. For example the original disadvantage claims related to matters Mr Balfour labelled *inchoate*. That means undeveloped, rudimentary and immature. That is label whose use continued and was, in some ways correct in that there remained a lack of specificity about the claims which was never really addressed until Mr Beales' gave evidence. Even then there was difficulty as it became clear words were being put in Mr Beales' mouth with his acknowledgment it contained words he did know the meaning of and he had been assisted in the preparation of his brief.

[33] Having reviewed the claims, the evidence and the accompanying documentation I choose to deal with the issues under five heads. They are:

- a. The disadvantage claims of bullying, breaches of privacy and a lack of communication which I shall consider as one;
- b. The claim surrounding the offering of a written employment agreement;
- c. The alleged failure to offer a safe workplace via inadequate training and supervision;
- d. The claims Ms Brown's involvement constituted another disadvantage;

and

- e. The dismissal.

[34] The reason the bulk of the disadvantage claims shall be dealt with as one is because of a conclusion the Authority does not have jurisdiction to deal with them.

[35] Mr Beales evidence, and particularly his answers when questioned, must lead to a conclusion his complaints, other than those being dealt with separately such as

those concerning the employment agreement and safe workplace, related to the response to his injury and the management of his ACC claim.

[36] Key to this conclusion was one answer in which Mr Beales expressly acknowledged all his bullying claims and those concerning both privacy and communication related to the management of his injury.

[37] Further confirmation perhaps comes from one of the remedies he sought. It was for:

An order that the employer as an accredited employer be instructed to uphold and deliver all entitlements appropriate to ACC legislation and ACC Claimant's Code of Rights over the Applicants injury claim which are shown to remain unfulfilled as a result of this investigation.¹

[38] The fact the matters he complained of related to the management of his claim is further confirmed by both the evidence of Ovations witnesses and the documentary evidence.

[39] Ovation is an accredited employer. As such it acts in the place of the Accident Compensation Corporation when managing an injury claim. It takes on the persona of the ACC and not that of the employer.²

[40] [Section 133\(5\)](#) of the [Accident Compensation Act 2001](#) then 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.

[41] The Authority simply does not jurisdiction to consider these claims. That is expressly stated in the [Accident Compensation Act](#) and these complaints should have been raised under [part 5](#) of that Act. Here I note that was ultimately done with the Complaints Investigator issuing her report in March 2016. It found three minor breaches and ordered these be rectified by a written apology. That was provided.

[42] Turning to the claim Ovation failed to provide Mr Beales with a written employment agreement. Ovations response comes in two parts. The first is that the

¹ First amended Statement of Problem dated 11 June 2015

² [Section 39\(a\)](#) of the [Accident Compensation Act 2001](#)

claim has no factual validity. The second is that if it has validity it was raised well out of time as the employment commenced in 2013 but the matter was not aired as a formal claim until February 2016.

[43] Both positions have validity. When Mr Beales was engaged Ovation was party to a valid collective employment agreement. At that same time Ovation was required to employ a new start who was not a union member on the same terms and conditions for the first 30 days.³ Those terms are then retained until alternates are agreed.

[44] In other words and as at the point of commencement Mr Beales had an employment agreement and there was a written version. There is no evidence he sought to amend those terms. Indeed his evidence was that during induction he was given lots of pieces of paper about his terms. He also accepts he was the only person who chose not to join the union but he never told anyone and did nothing to pursue a variation to his terms. Nor can he say he sought a written agreement or if he did when.

[45] I also note the issue was not formally raised for some time and definitely beyond the 90 days for it to be considered as a personal grievance or a year if there was a penalty action. While a belated application to have the matter raised as a personal grievance under [s 114](#) was filed on 9 December 2016 it relied only on the grounds of ignorance and even that was not pursued in Mr Beales evidence. Finally I note no remedy was specifically pleaded.

[46] For these reasons the claims relating to the provision of an employment agreement fail.

[47] Mr Beales evidence regarding his claims about a safe workplace were, with one exception, poorly articulated. He could provide no specifics about what it was that concerned him and accepts he never raised any issues or sought specific training thereby allowing the employer to address his concerns.

[48] Against this I note Ovations evidence of training and, in particular, nearly 40 pages of documents which record various training initiatives in which Mr Beales

3 Section 63(2)(a) of the Employment Relations Act 2000 as it then was

participated. Furthermore Mr Beales records participating in some of these events and though he now suggests the training was inadequate he does not specify how or why.

[49] The exception related to the lifting of heavy items which was the cause of the original injury though this again faces some factual impediment. The first, which Mr Beales does not dispute, is he was acting beyond the requirements of his job which he explained by saying he was *at that point trying to impress*. He further undermines his position by acknowledging he received training and particularly documentation about safe lifting which he may have failed to read. Finally he again acknowledges he took no action aimed at addressing these perceived disadvantages or deficiencies notwithstanding a statement he saw various opportunities for improvement. Finally I note there as never anything of sufficient concern to warrant intervention or investigation by Worksafe New Zealand.

[50] For the above reasons these claims also fail.

[51] The claim Ms Brown's involvement constituted another disadvantage must also fail. This is primarily because Mr Beales offered no evidence in support of it or explained how he may have been disadvantaged by her acting for Ovation. The evidence, such as it was, came from Mr Balfour and related to his interactions with Ms Brown and his perception there-of.

[52] Mr Balfour is not in a position to bring a personal grievance against Ovation and Mr Beales name cannot be leant to the pursuit of Mr Balfour's perceived grievances.

[53] That leaves the alleged dismissal. It is alleged Mr Beales was dismissed at two points – July and then again in October 2015.

[54] The claim regarding an alleged dismissal in July must also fail. Mr Beales was far from assertive about whether or not he had then been dismissed instead saying the allegation was based on a perception or feeling. For two reasons I conclude he had no reason to consider his perception was adequate. First Ovation expressly advised Mr Beales he had not been dismissed.

[55] Second it emerged during the investigation meeting that Mr Beales had secretly recorded the meetings of 14 and 15 October 2015. Part of the discussion referred to the July meeting and having listened I conclude confirm Mr Beales was

well aware he had not been dismissed in July – at least that is what his comments in

October confirm was his view at that time.

[56] Turning to October and the claim of a dismissal then. It is clear there was a termination which Ovation attempts to justify on the grounds of medical incapacity and that is confirmed by the letter of termination.

[57] That is a situation that differs from a performance dismissal. In essence it is a frustration argument and, as the Court observed in *Motor Machinists Ltd v Craig* [\[1996\] NZEmpC 225](#); [\[1996\] 2 ERNZ 585](#), this is an approach that is often raised in cases of illness and

injury.

[58] 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.

[59] Here there arose a situation where Mr Beales had been assessed as vocationally independent. That meant he was no longer eligible for ongoing ACC and

Ovation was entitled to expect a return.

[60] Notwithstanding that restrictions remained and the evidence, including notes of the meeting, confirm Mr Balfour accepted on Mr Beales behalf that he was incapable of returning to the jobs Ovation could offer.

[61] Here I make an observation about the claim for a medical retirement package. It was unfortunate as there was no entitlement to one and the evidence would suggest it distracted both Mr Balfour and Mr Beales who, as a result, perhaps failed to

concentrate sufficiently on the key issue which was the possibility of Mr Beales return. They simply concede that was not possible.

[62] Given the time spent on managing Mr Beales injury, and particularly a year and a half of trying to accommodate his rehabilitation, Ovation was, I conclude, entitled to call time especially given the concession Mr Beales could not return and a lack of evidence about when, or even if, this could occur. This is especially so when it is clear he was on notice of the possibility of termination via the letter of 7 October inviting him to the meeting.

[63] The evidence leads me to conclude Ovation has, as it is required to do, justified its decision to terminate Mr Beales employment given the circumstances. Therefore the dismissal claim also fails.

Conclusion and Costs

[64] For the above reasons all of Mr Beales claims are dismissed. [65] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority

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