

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 181/10
5159455

BETWEEN

JONATHAN CRAIG
BENNETT
Applicant

A N D

TYCO FLOW CONTROL
PACIFIC PTY LTD
Respondent

Member of Authority: James Crichton

Representatives: Jenny Guthrie, Counsel for Applicant
Gerry French, Advocate for Respondent

Investigation Meeting: 24 May 2010 at Dunedin

Determination: 16 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Bennett) alleges that he was unjustifiably dismissed from his employment by the respondent (Tyco) and also suffered disadvantage because of their unjustified actions together with breaches of the duty of good faith. Tyco deny wrongdoing and resist all of Mr Bennett's claims.

[2] Mr Bennett was an installer of irrigation systems for customers of Tyco in the Central Otago region. He was employed in that capacity on 23 January 2006 and his position was terminated by reason of redundancy on 28 August 2009.

[3] Mr Bennett suffered a workplace accident on 21 October 2008. He was working on a particular irrigation installation when he suffered a fall in the presence of his Branch Manager who was on site at the time. Mr Bennett continued to work immediately after the accident for the balance of the working week. It is common ground that Mr Bennett played golf on Sunday 26 October the middle day of the Labour Weekend. Mr Bennett's evidence is that on the Monday (27 October 2008)

his back *seized up* and on the following working day (28 October 2008), now exactly a week after the workplace accident, Mr Bennett attended at work first thing in the morning to complete some paperwork and during the course of that attendance he rang his immediate supervisor. Mr Bennett's evidence is that his intention was to convey to his supervisor both that his wife was having surgery that day for which he intended to take the day off to support her, and that as his back had now seized up he would seek treatment for his back as well. Either way he was to be absent from the job that day.

[4] Mr Bennett says the telephone conversation with his supervisor went badly and that the only part of the message which he managed to get out was the business about his wife needing support while she had surgery. It follows that Tyco did not know that he was intending to seek medical advice for his injury. When a medical certificate putting Mr Bennett off for three days was delivered to Tyco later that day, it came as a surprise. This initial medical certificate emanated from a Central Otago Medical Practice, said the injury was not work related and was not signed by the doctor. Tyco tried to contact Mr Bennett on his work cell phone but were unsuccessful.

[5] Then on 30 October 2008 (2 days later) Tyco got a further medical certificate from a Dunedin Medical Practitioner putting him off work for 14 days.

[6] Tyco made numerous attempts to contact Mr Bennett over this period but were not successful. In particular Tyco wanted to get an explanation about the self evident differences between the two medical certificates, including in particular the fact that one came from a doctor in Central Otago and one from a doctor in Dunedin. Further, Tyco's last communication from Mr Bennett had indicated he was taking leave to support his wife in her surgery and there was no suggestion that his back was an issue.

[7] Because Tyco had been unable to get any engagement with Mr Bennett since 28 October 2008, they determined to write to him and raise their concerns, and that letter is dated 7 November 2008. The letter was responded to by Mr Bennett's counsel and the parties endeavoured to establish (unsuccessfully) a date to meet to discuss the situation. Mr Bennett remained away from the employment because of his injury.

[8] By mid February 2009 that continued absence was becoming problematical with the employer's operational requirements. After being passed fit by ACC, Mr Bennett finally returned to duty on 1 April 2009.

[9] In August 2009, a restructuring proposal commenced in Tyco's Central Otago operations which mirrored a similar outcome in a number of other Tyco branches around the country. Eighteen positions across the country were removed, six of them being roles analogous to the one occupied by Mr Bennett.

[10] Both of the installer positions in the Central Otago operation were disestablished.

[11] The matter proceeded to the Authority in the usual way after an unsuccessful mediation attempted to resolve the matter.

Issues

[12] There are two issues for the Authority to determine:

- (a) Was Mr Bennett disadvantaged by unjustifiable actions of Tyco? and
- (b) Was Mr Bennett unjustifiably dismissed by Tyco?

Was Mr Bennett disadvantaged?

[13] Mr Bennett's claim to have suffered disadvantage as a consequence of the unjustifiable actions of Tyco is based exclusively on his contention that Tyco created that disadvantage in the way it dealt with his sick leave prior to the onset of the restructuring proposal which led to his dismissal for redundancy.

[14] Tyco deny wrongdoing in respect to the treatment of Mr Bennett's absence on sick leave and say that the actions that they took were the actions of a fair and reasonable employer. Tyco's Branch Manager, Mr Adrian Knights, gave evidence that after Mr Bennett hurt himself at work, *a number of factors ... when put together* caused him to conclude that *things just didn't add up*. The evidence was clear that the first thing that did not add up was Mr Bennett's failure to tell his immediate supervisor (Mr Muir) that he was seeking medical advice because of the fact that his injury had not settled down. It is common ground that Tyco were not told by Mr Bennett that he was seeking medical advice. Mr Bennett said that he intended to

tell Tyco in the conversation he had with Mr Muir, but that Mr Muir *got excited* and the conversation ended badly. Mr Muir agrees that he got excited and that he got excited because Mr Bennett was proposing to take leave (which had not been arranged) to support his wife's surgery. Mr Muir said that if Mr Bennett had been in pain and was intent upon visiting the doctor as well, then he ought to have made that clear.

[15] Indeed, Mr Muir went further and said that he thought that the responsible thing for an employee to do in that situation would have been to mention the medical position first before making it clear that he was taking leave without arrangement. Whatever the position with that discussion, it is common ground that Mr Bennett did not tell the employer that his back had now become problematical and so the first that his employer knew about the back problem was when they received the first medical certificate on 28 October 2008. As I have already noted, apart from the surprise in receiving this when there was no intimation that Mr Bennett was suffering the ill effects of the fall, there were other problems. The medical certificate was unsigned and it referred to a non-workplace injury. Clearly, this was a workplace injury; the Manager of the Branch had been present when Mr Bennett injured himself on the job. Furthermore, an unsigned medical certificate potentially raises questions about authenticity.

[16] In any event, the things that *didn't add up* continued not to add up because the next event that happened was that two days later on 30 October 2008, Tyco received a further medical certificate, this one signed and referring to a workplace injury but emanating from a practitioner in Dunedin, four hours drive away, and with a different prognosis.

[17] I am satisfied on the evidence that Tyco made numerous attempts to contact Mr Bennett but were unsuccessful. Those calls were directed to Mr Bennett's company cell phone. It appeared plain from the evidence that Mr Bennett did not have the cell phone with him. There is also evidence that Mr Knights spoke with Mrs Bennett in an effort to track Mr Bennett down. He said in his evidence that Mrs Bennett gave him some indication about how to get hold of her husband but for whatever reason, Mr Knights did not pursue the matter further. I am satisfied that Tyco took all reasonable steps to contact the employee during the period after 28 October 2008 and that he took no steps whatever to contact them. It is clear from

the evidence that Mr Knights might have made further efforts to try to contact Mr Bennett by way of the party that his wife suggested he make contact through, but Mr Knights may have formed the view that, by then, more formality was required.

[18] In any event, Tyco wrote to Mr Bennett by letter dated 7 November 2008. That letter reflected Tyco's frustration that they had heard nothing from Mr Bennett relating to his injury since he left job on 28 October 2008. That letter raises some perfectly sensible questions which, in my judgment, Tyco were absolutely entitled to have responses to. First, it asks why there are two separate ACC forms lodged in respect to the same injury, then it questions why those two forms were provided by medical practitioners 200 kms apart. The fact that the distance between the two medical practitioners, amongst other things, necessitated a four hour drive for somebody suffering a back injury was noted. The letter was sent to Mr Bennett at his home in Central Otago but Mr Bennett was not there. His wife got the letter, was upset by it, and arranged to get it to her husband who was in Dunedin. The letter, as I have already noted, was responded to by Mr Bennett's counsel in Dunedin.

[19] Mr Bennett had been instructed to leave Central Otago by Police as a consequence of a domestic incident. His evidence was that the only person he knew was in Dunedin and so when these events happened (contemporaneously with his obtaining the first medical certificate) he drove to Dunedin where he remained for some time. I accept the submission of Tyco that it was available to Mr Bennett to *fess-up* as to why he was in Dunedin but that, for whatever reason, he chose not to and indeed was hardly forthcoming at the investigation meeting until he was pushed.

[20] Quite clearly, good faith obligations are a two way street and Mr Bennett ought to have told his employer what was going on, both in respect to his injury (and the subsequent treatment for it) and in respect to the domestic incident which resulted in him being required to leave his home. He did neither of those things but now complains that Tyco is disadvantaging him by particularly writing its letter of 7 November 2008 seeking explanation for what is going on. In my opinion, Tyco's behaviour was the behaviour of a fair and reasonable employer. An employer is entitled to know what is happening in respect to its employees. Employees who are absent from the workplace still have an obligation to be communicative with their employer and to voluntarily provide information which the employer would reasonably need to have access to. It is unreasonable for an employer to have to go to

the lengths Tyco went to in order to obtain information to which it is absolutely entitled in the first place.

[21] I conclude for the foregoing reasons that Mr Bennett had no cause for complaint about Tyco's behaviour and indeed that if anybody has the right to complain, Tyco have the right to complain about Mr Bennett's behaviour.

Was Mr Bennett unjustifiably dismissed?

[22] Mr Bennett says that he was unjustifiably dismissed from his employment and he relies really on two pieces of evidence to advance that proposition. The first is his claim that when he returned to work after his lengthy absence caused by his back injury, he was put on to light duties in effect, and then within a reasonably short period of time the restructuring process emerged and his job disappeared.

[23] As well as Mr Bennett losing his role, his colleague Mr Dougherty was also dismissed for redundancy but Mr Bennett complains that Mr Dougherty continued to be employed thus suggesting that the redundancy was in fact a sham.

[24] I am not attracted by either of these arguments. First, I am satisfied that Mr Bennett was placed on light duties when he returned to duty because that was Mr Knights experience in dealing with workers who returned to the work place after a lengthy injury break. He said in his evidence (and I accept) that he had learnt from previous experience that it was better to reintroduce people to physical work in the work place gradually rather than to risk destabilising the rehabilitation by suddenly reintroducing heavy work. I am satisfied then that the evidence discloses only that Tyco was concerned to support Mr Bennett's rehabilitation from injury and certainly not that it sought to marginalise him or make him feel unwelcome, as he alleged. Indeed in that latter regard, there no evidence presented on Mr Bennett's behalf (save his bare allegation) that he was not welcomed back to the work place appropriately.

[25] As to the other allegation, it is true that when the redundancies were declared, while both Mr Dougherty and Mr Bennett were made redundant together, Mr Dougherty was re-employed on a fixed term single contract engagement to complete a specific piece of work which lasted around three months. I am satisfied it was available to Tyco to employ either Mr Bennett or Mr Dougherty in that short term role and, for their own reasons, they chose to offer the position to Mr Dougherty. The

fact that there was short term work continuing after the declaration of redundancies, does not make the redundancies themselves unfair or unjust.

[26] On general principles, the genuineness of the redundancy declaration would be hard to challenge. Tyco's evidence was that there was a dramatic decline in the requirements for its services and that they undertook restructuring across the whole group nation-wide. A large number of installers were caught up in the restructure and as I noted earlier, a total of 18 positions were taken out of the organisation, a third of which were installers like Mr Bennett. Both of the installer positions in the Central Otago branch were disestablished.

[27] Mr Bennett's skills (which were undoubted) were as a installer. Given the nature of the restructure, and the fact that there were no installer positions remaining in the Central Otago branch, there was no position to which he could aspire by way of redeployment. There were more senior positions in the Central Otago branch which were not disestablished and Tyco's intention was to service its diminished client base using contract labour on an as and when required basis. These contractors would be supervised by the remaining supervisory staff in the revised structure. On Mr Bennett's own evidence he was considered for one of these supervisory roles but not appointed because Tyco preferred to appoint an existing staff member (Mr Muir) who already had extensive supervisory experience in branch. On the face of it, that seems a reasonable decision and one that is available to fair and just employer to make.

[28] In the end, the Authority's obligation is to consider redundancy dismissals applying the same s.103A test as applies to other dismissals, but to also overlay that consideration with the general principle that it is not for the Authority to put itself the employer's place in responding to actual business needs, but the Authority must consider whether the parties have engaged with each other in good faith and whether the particular requirements in redundancy terms of s.4 of the Act have been met.

[29] Using those principles, I am satisfied that the common law position, which gives the employer the paramount obligation to run its business in accordance with its own understanding of its market, is made out. The Authority ought not to quarrel with what on the face of it appears to be an absolutely genuine response to a serious economic recession. Second, the process described by Mr Bennett's own evidence suggests a measured and reflective consideration of the needs of the business and

some attempt to deal with the needs of the affected staff, including considering them for redeployment into other roles within the organisation.

[30] However, the reality was that Mr Bennett's role and the other like role in the branch both disappeared and while he seems to accept in his evidence that he was considered for the supervisory role, the employer not unnaturally chose to employ somebody in that role who had more experience as a supervisor, including more experience in that branch.

[31] Finally, the obligation to provide information about the redundancy seems not to be in question; Mr Bennett does not protest about the process adopted by Tyco in proceeding towards the eventual decision and there is no suggestion in his evidence that he was not provided with information which he ought to have been provided with as part of the decision making process.

[32] Accordingly, I conclude that this was a genuine redundancy, which was undertaken by a fair and reasonable employer using an appropriate process which adequately considered the skills Mr Bennett could offer the business in alternative roles but ultimately made the decision that Mr Bennett's role was surplus to Tyco's requirements and that there was nothing further that Tyco could offer Mr Bennett as an alternative to the disestablished position.

Determination

[33] Mr Bennett has failed to satisfy me that he has a personal grievance either for unjustified dismissal or for disadvantage caused by unjustified actions of his employer.

[34] I am also not satisfied that Mr Bennett has demonstrated that there has been any breach of good faith by Tyco; as I noted earlier, if anything, it seems to me that Tyco could have legitimately complained about the absence of good faith from Mr Bennett.

Costs

[35] Costs are reserved.

James Crichton
Member of the Employment Relations Authority