

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Kevin Blair (Applicant)
AND Lane Walker Rudkin Manufacturing Limited (Respondent)
REPRESENTATIVES David Flemming, Counsel for Applicant
Neil McPhail, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 7 September 2004
DATE OF DETERMINATION 1 October 2004

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kevin Blair was employed by Lane Walker Rudkin Manufacturing Limited (LWR) full-time in various positions from about 1989 until his dismissal on 5 May 2003. He says his dismissal is unjustifiable but LWR says that the dismissal is justifiable on the grounds of Mr Blair's long standing absence from work and that it carried out the dismissal in a procedurally fair manner.

[2] Despite mediation the parties were not able to resolve the problem.

Background

[3] There are very few factual disputes and I was assisted in resolving those by the careful and forthright manner in which all of the witnesses gave evidence at the investigation meeting.

[4] A substantial part of Mr Blair's job before the dismissal involved operating a machine called the Beirebei Cutter. It is highly skilled work which Mr Blair obviously performed well. He was well regarded by LWR. Mr Blair reported to a supervisor and then to Sharon Dawson, LWR's apparel manager.

[5] Mr Blair fell ill with cancer and his last day of full-time work was 17 November 2002. It is common ground that Mr Blair was never asked for nor did he ever provide any medical certificates regarding his illness. None of his managers ever doubted anything he said about the circumstances of his illness and the exchanges between them were founded on the sort of trust that develops over a long standing employment relationship. At the time that Mr Blair ceased full-time work LWR knew that the treatment for his cancer would involve an operation, recuperation, a course of radiotherapy and then further recuperation. It was therefore apparent that he was going to be off work for some time. Mr Blair used up all his sick leave then took paid leave and was finally on unpaid leave from about February 2003.

[6] During Mr Blair's absence LWR covered his work on the Beirebei Cutter initially by getting Nick Wyse, the cutting supervisor, to operate the machine. That imposed an extra burden on Mr Wyse so LWR made arrangements to get two other workers to share the Beirebei Cutter duties. They needed to be trained so Mr Blair was approached to ask whether he could come in to train them. That occurred around March 2003.

[7] Richard Reeves is LWR's Human Resources and Services Manager. He made the arrangements with Mr Blair in March. Mr Blair worked a total of 31 hours over a two week period in March 2003. There is a memo signed by Ms Dawson and Mr Reeves dated 17 March 2003 requesting payment for Mr Blair for the time worked so I take it that Mr Blair had actually finished the two weeks work as at the date of that memo. By this time in March Mr Blair had had his surgery, recuperated, undergone the course of radiotherapy and was in the process of recuperating from that. It is common ground that Mr Blair was at that time unable to extend his arm above shoulder height so he could not perform his usual duties. He had not fully recuperated from the radiotherapy and was not able to spend a full day at work. At the time, the medical advice to Mr Blair concerning his arm was that he would regain the full use of it in due course.

[8] By the time he did this work in March, Mr Blair had also had another minor operation to remove a skin cancer.

[9] While he was at work in March and when he occasionally visited the site to see work-mates, Mr Blair made some comments that made LWR think that he might never return to work but would retire. For example, Mr Wyse asked Mr Blair when he was coming back and Mr Blair said he was not. In fact, Mr Blair was joking because he knew that Mr Wyse was keen for him to return so he (Mr Wyse) would not need to work the Beirebei Cutter. That it was a joke was not apparent to Mr Wyse or the General Manager who was present on one occasion.

[10] Towards the end of March, Ms Dawson spoke to Mr Reeves about Mr Blair's lengthy absence, by then over 4 months. Mr Reeves drafted a letter which Ms Dawson signed and sent. It reads:

Dear Kevin,

It is now approximately 5 months since you had to leave and go in for treatment. Understandably at that time you did not know whether you would be able to return or not. We are pleased that it now appears your health has improved and we need to know what your plans are for the future.

Can you please ring me to discuss this after you have given the matter some thought and/or had discussions with your Doctor.

We need to know if you are able to return soon to run the Beirebei and binding cutters again.

Yours sincerely,

*Signed
Sharon Dawson
Apparel Manager*

[11] There is a dispute about whether Mr Blair responded to the letter. Ms Dawson says that he did not and that the only contact she can recall after she sent the letter was a phone call from Mr Blair

about a bonus payment for the March work. On the other hand, Mr Blair says that he rang and spoke to Ms Dawson about both the letter and the bonus payment within a couple of days of receiving the letter. Common ground is that there was a phone call from Mr Blair to Ms Dawson after the letter, that they discussed the bonus issue and that Ms Dawson referred Mr Blair to Mr Reeves about the bonus. It is improbable that Ms Dawson would not have raised her concerns about the absence during the phone call if Mr Blair had not. It is also more likely than not that Mr Blair made his call in response to the letter because he rang Ms Dawson not Mr Reeves with whom he had made the March work arrangements. In addition, both Ms Dawson and Mr Blair impressed as reliable witnesses and her evidence was that she had no recollection of a discussion about the letter while his was that there had been a discussion about both matters. Accordingly, I find that Mr Blair told Ms Dawson that he was still off on a medical certificate and then they discussed the bonus issue.

[12] Mr Blair went in to see Mr Reeves a week or so later when they talked about the bonus issue. This was a brief discussion and did not extend to the issues raised in Ms Dawson's letter.

[13] On or about 29 April 2003, having still not received the bonus payment, Mr Blair again called in to see Mr Reeves. As Mr Reeves acknowledged, Mr Blair wanted to talk about the bonus issue. However, Mr Reeves also raised the issue of Mr Blair's absence. There is some disagreement about the content of the discussion about the absence.

[14] There are notes dated 29 April 2003 made by Mr Reeves. Mr Reeves acknowledged in evidence that those notes were not written by him until some time after a later meeting on 6 May. By that time, Mr Blair had been dismissed and had been in to see Mr Reeves with the union site delegate (Jack Taylor) so Mr Reeves knew that there was a dispute. In those circumstances, I cannot treat the notes as a contemporaneous record.

[15] I accept Mr Blair's evidence that he told Mr Reeves that the advice from both the physiotherapist and surgeon was that his shoulder/arm would come right in time. He also said that at that stage, his doctor had said he was unable to work. I accept that Mr Reeves did not tell him that it was unlikely that the company could hold the job open; nor did Mr Blair say that it was up to LWR to decide his future. Mr Blair was not told that something would be put in writing.

[16] After this discussion, Mr Reeves spoke to Ms Dawson. Ms Dawson's evidence is that she decided they could no longer keep Mr Blair's job open. At that point she knew through Mr Reeves that Mr Blair would be away for a further 13 weeks (the period covered by the medical certificate). Ms Dawson also relied on her own observations during the 2 weeks in March. As a result of her discussion with Mr Reeves and her observations from a month or more earlier, Ms Dawson decided to dismiss Mr Blair.

[17] A letter dated 5 May 2003 under Ms Dawson's signature was sent to Mr Blair. It reads:

5 May 2003

*Kevin Blair
18a Peer Street
Christchurch 4*

Dear Kevin

Last month we wrote to you regarding your return to work, but did not receive your reply.

However when you came in on 29 April you indicated that your doctor had signed forms for a continuation of your sickness benefit for another 13 weeks. You also have the continuing physical limitations with your arm, and that there are still some questions regarding your health.

We trust that your health improves but regrettably given the above, we cannot continue to hold a position for you and we therefore need to give notice that we will terminate your services as at 14th May 2003.

If you would like to discuss this please do not hesitate to ring.

Yours faithfully,

Sharon Dawson
Apparel Manager

[18] Mr Blair was *completely shocked and stunned* when he received the letter. He went into work to see Mr Taylor, the union delegate. The two of them then went to see Mr Reeves. There was first some discussion about the unpaid bonus and Mr Reeves said it would be paid into Mr Blair's account together with any final wages owing. They talked about the length of time Mr Blair had had off. Mr Blair explained that the 13 week medical certificate related to Work and Income New Zealand's requirements and that if he felt sufficiently well during the period of the certificate, he could return to his general practitioner to get an earlier work clearance. That was news to Mr Reeves. Mr Blair left and there was some further discussion between Mr Reeves and Mr Taylor about whether LWR had any other work options for Mr Blair. Mr Taylor later advised Mr Blair to contact his union office.

[19] After Mr Blair's dismissal, LWR appointed one of the two women who had been working the Beirebei Cutter temporarily to that work on a permanent basis. She did not assume all the duties previously performed by Mr Blair.

The law

[20] LWR dismissed Mr Blair. It is therefore necessary to consider whether that dismissal is justifiable. That involves a consideration of whether LWR had substantive justification for its decision and followed a fair procedure.

[21] In *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124 the Arbitration Court held: *There can come a point at which an employer (particularly in a small shop) can fairly cry halt.* To similar effect in *Canterbury Clerical Workers Union v Andrew Beaven Ltd* [1983] ACJ 875, the Arbitration Court found justified the dismissal of a worker who had been incapacitated and unable to perform his duties for about 5 months stating *...it is well established law that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period.*

[22] The cases also establish the importance of the employer following a fair procedure before making the decision not to keep the job open any longer. In *Barry v Wilson Parking NZ (1992) Ltd* [1998] ERNZ 545 the Employment Court held that an employer *...has to inquire in a fair and open-minded way whether the employee has any realistic prospects of returning to work within a further reasonable time. This necessarily has to include seeking information from the injured employee, making it known at the time that the information may be used for the purposes of a*

decision to discontinue the employment relationship. Cases such as *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585 and *Paykel v Morton* [1994] 1 ERNZ 875, stress the importance of communication and information as part of a fair process.

Analysis

[23] There was no reason for the dismissal other than LWR's view that Mr Blair was unable to do the job for which he was employed and would remain incapacitated for at least a further 13 weeks. As indicated above, Mr Blair was considered to be a highly skilled, loyal employee. Through counsel, Mr Blair accepted that the circumstances of his absence were such that he could have been unjustifiably dismissed at some point.

[24] Mr Blair's criticisms are about the fairness of LWR's decision-making process. The dismissal letter records Ms Dawson's view that Mr Blair had not replied to the first letter. Mr Blair's evidence, which I have accepted, is that he did precisely what had been requested in the 1 April 2003 letter, which was to ring Ms Dawson.

[25] Ms Dawson had heard rumours that Mr Blair had purchased a house on the West Coast with a view to living there rather than returning to LWR. She never raised that at any time with Mr Blair although her uncertainty about whether Mr Blair would actually return to work, even if his health allowed it, contributed to the decision not to hold his job open any longer.

[26] The cases indicate that it should be made clear to the employee that the employer seeks information in order to decide whether or not to terminate the relationship. As the Court said in *Barry v Wilson Parking NZ (1992) Ltd: This is to ensure that the employee understands the seriousness of the issue and will have a motive for ensuring that the information is a full and accurate as he or she can make it be.* I find that the 1 April 2003 letter did not sufficiently convey the seriousness of the issue as far as LWR was concerned at the time. It asked only whether Mr Blair would be able to return soon. It did not say that LWR wanted that information in order to decide whether to discontinue the employment relationship. Given that, it was not surprising that Mr Blair responded in the low key manner that he did by his call to Ms Dawson.

[27] In my view, the exchange between Mr Blair and Mr Reeves on or about 29 April did not take the matter much further. The meeting was unplanned and initiated by Mr Blair who was pursuing the bonus payment. Mr Reeves took the opportunity to talk to him about his health situation. Again, LWR did not convey that it wanted details of Mr Blair's medical situation and prognosis in order to decide whether or not to discontinue his employment. Mr Reeves was also aware of the speculation that Mr Blair did not intend to return to work based on the house purchase and the comments to Mr Wyse and others, but never conveyed all that to Mr Blair to give him the opportunity to confirm or deny his actual intentions.

[28] Given that Mr Blair was not told by LWR that it was intending to make a decision whether or not to terminate his employment, it is not surprising that he was *completely shocked and stunned* to receive the letter of dismissal about a week or so after his 29 April meeting with Mr Reeves. That effect could have been avoided by explicit communication by LWR of the reason for 1 April letter and Mr Reeves's questions on 29 April.

[29] For the foregoing reasons, LWR cannot justify its decision to dismiss Mr Blair so I find that he has a personal grievance.

[30] Since the dismissal, Mr Blair has remained on a sickness benefit because he has not been sufficiently well to seek employment. By reference to *McKechnie Pacific (NZ) Ltd v Clemow*

[1998] 3 ERNZ 245, LWR submitted that I should have regard to that fact in order to find that its decision to dismiss is justifiable. I disagree. If it had been said that the dismissal is unjustifiable because the employer made its decision to dismiss too quickly, then consideration of whether the employee later could have returned to work could be relevant. Here, the complaint is about the manner in which LWR reached its decision which caused avoidable distress to a long serving employee. I fully accept that LWR could have made a justifiable decision to dismiss, but they did not.

Remedies

[31] As originally lodged, the claim extended to compensation for lost remuneration. During the directions conference, Mr Blair was required through counsel then acting either to advise when he became medically fit for work or withdraw the claim. The claim was formally withdrawn on 3 September 2004 so nothing more need be said on the point.

[32] Formally, the claim for distress compensation stands at \$30,000.00. Counsel now acting for Mr Blair submitted that an award at the *upper end of the range is warranted*. There is evidence from Mr Blair and Mr Taylor of the distress caused by the dismissal. What they said is hardly surprising given Mr Blair's history as a long serving and loyal employee. The distress was exacerbated because the events occurred while Mr Blair was still unwell. In my assessment those effects are remedied by an award of \$12,000.00 compensation. I have ignored the evidence about Mr Blair being banned from the worksite after the dismissal. While Mr Blair genuinely thought that he had been banned, that came from a misunderstanding that should not be attributed to LWR.

[33] I do not see that Mr Blair contributed to the situation giving rise to the grievance in any blameworthy manner. He did not provide a full prognosis or answer the concern that he might choose not to return to work regardless of his health because he was never made sufficiently aware that LWR was thinking about the termination of his employment.

Summary

[34] Mr Blair has a personal grievance because he was unjustifiably dismissed by LWR.

[35] LWR is to pay Mr Blair compensation of \$12,000.00 pursuant to section 123 (c) (i) of the Act.

[36] Costs are reserved. If there is no agreement, Mr Blair may lodge and serve a memorandum within 21 days and LWR may lodge and serve a memorandum in reply within a further 14 days.

Philip Cheyne
Member of Employment Relations Authority