

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Paul Brian Blake (Applicant)
AND Canpac International Limited (Respondent)
REPRESENTATIVES Samuel Hood - Counsel for the Applicant
Simon Menzies - Counsel for the Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 10 February 2005
FINAL SUBMISSIONS RECEIVED 5 April 2005 and 27 April 2005
DATE OF DETERMINATION 17 June 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] Mr Blake brings three claims to the Authority. Firstly, he claims that effective from 30 January 2004, an unjustified constructive dismissal was visited upon him by his employer, Canpac International Limited ("Canpac"). Secondly, Mr Blake says that prior to the termination of his employment he was subjected to an unjustified disadvantage. Alternatively, Mr Blake says that Canpac breached an implied term of his employment contract by failing to provide a safe work environment. The third claim of Mr Blake is that Canpac breached the Health and Safety in Employment Act 1992, in that the company failed to provide a safe work environment.
- [2] Canpac denies that Mr Blake was dismissed and says that because he had a continuing medical condition, Mr Blake resigned of his own free will. In regard to the unjustified disadvantage claim, Canpac says that this personal grievance was not raised within the 90 day limit provided by s.114(1) of the Employment Relations Act 2000 and the company does not consent to the grievance being raised outside the time allowed. Finally, Canpac deny that any breach of the Health and Safety in Employment Act occurred, or that any contractual duties were breached.

Background to the Problem

- [3] Mr Blake was initially employed on a temporary basis working on the day shift. The hours of work were from 5:30am to 1:30pm. He became a full-time Machine Operator in November 2002, working on the night shift. The hours of work were from 9:30pm to 5:30am, Monday to Friday each week.

- [4] The evidence of Mr Blake is that prior to starting to work on the night shift, he had excellent health, but soon after, he became very tired and rundown. In January 2003, Mr Blake visited a Doctor who diagnosed that Mr Blake probably had a virus and that he should take two or three days off work to allow some recovery.
- [5] The further evidence of Mr Blake is that sometime in February 2003, following further medical testing, it was discovered that he had a very low pulse rate and he was admitted to hospital for two days. Mr Blake says that he continued to feel very rundown and tired and he frequently needed to have time off work on medical grounds. It was not clear at this point, what the actual cause of Mr Blake's condition was.

A Change of Shift

- [6] The evidence of Ms Rita Nabney, the Human Resources Manager for Canpac, is that in mid-June 2003, the Company conducted a review of a number of employees, whom, in the Company's view, had an unacceptably high level of absenteeism. Mr Blake was one of those employees, with 13 days off work with health related issues against an entitlement of 6 days. Mr Blake was invited to attend a meeting on 23 June 2003 to discuss this.
- [7] The outcome of this meeting was that it was agreed that it may be beneficial to Mr Blake's health if he worked on the day shift for a trial period of three months. He started work on the day shift on 30 June. Because of the circumstances related to the work volume at the time, the trial period went on longer than had been envisaged. But by December 2003, due to an increase in the volume of work, the site Union took issue with the Company about Mr Blake continuing on the day shift. Apparently, under the terms of the collective employment agreement ("the CEA"), there were other employees entitled to be transferred to the day shift ahead of Mr Blake.
- [8] I note that the relevant provision of the CEA, clause 4.5, allows for workers to have "Shift Transfers." Essentially, where a vacancy occurs for a permanent position, then the vacancy is advertised internally. If more than one person applies, then the applicant that is doing the same job on another shift, and has the longest continuous service on their shift, shall be offered the job. [Sub-clause 4.5.1]
- [9] An exception to the above application is provided at sub-clause 4.5.3, in that:
- "This clause shall not prevent the Company, by agreement with the Union which shall not be unreasonably withheld, from redeploying a worker into the vacant job either temporarily or permanently for medical or health and safety reasons or for the purposes of rehabilitation following an injury or illness."
- [10] It appears that while Mr Blake had a shift transfer on a temporary basis, the Union would not agree to a permanent transfer as it wished to ensure that the provisions of sub-clause 4.5.1 of the CEA prevailed and it was not agreed that any exception should be made for Mr Blake.
- [11] The evidence of Mr Wayne Reid, Mr Blake's manager, is that due to the Union's insistence, Canpac was required to transfer Mr Blake off the day shift. Mr Reid says that because of the health problems that Mr Blake had experienced on the night shift, it was not an option to transfer him back there. Mr Blake had also earlier provided a letter, dated 26 August 2003, from his cardiologist. This letter conveyed that Mr Blake was, at that time, undergoing cardiac investigations and that: "[it would be preferable for him to remain on day shift work until the nature of his problem and remedial treatment is established.]"

- [12] However, it was the view of Mr Reid that a transfer to the afternoon shift would be an acceptable option for Mr Blake, as the hours of work, 2:00pm to 10:00pm, would still enable Mr Blake to have a regular sleep pattern that would meet his medical requirements. Mr Reid acknowledges that Mr Blake objected to being transferred to the afternoon shift and he advised Mr Blake of his right to challenge this decision via the Union but Mr Blake did not do so. That is hardly surprising, given the Union's objection to Mr Blake continuing to work on the day shift.
- [13] Mr Blake transferred to the afternoon shift on 15 December 2003. In the meantime, because he was still feeling tired, on the advice of his doctor (GP), Mr Blake underwent an evaluation at the Waikato Hospital Sleep Clinic and was diagnosed as having a circadian rhythm disorder. In a letter dated 22 December 2003, the Respiratory and Sleep Physician conveyed that the management of the disorder: "[will require a fixed shift rather than rotating shifts, and it would be preferable for his fixed shift to be a daytime shift, enabling a normal bedtime to provide sufficient sleep. I would be grateful if you could help in this matter." Mr Blake was to undergo a review in the New Year. Mr Blake provided this letter to his employer.

Medical Problems

- [14] The evidence of Mr Blake is that while working on the afternoon shift, he became "*more rundown*" and was "*desperate to get off the afternoon shift.*" Mr Blake says that he continued to discuss this with Mr Reid but was told that that a change was not possible. The further evidence of Mr Blake is that on or about 9 January 2004, about an hour after starting work, he began to feel very tired and dizzy. A check of the heart monitor he was wearing showed that his heartbeat was just above 40 per minute. Within five minutes, his heartbeat had reduced to below 35 per minute. Soon after, Mr Blake was driven home. He attempted to contact the cardiology department at the hospital but he says that it was closed at that time. It appears that Mr Blake continued to have some concerns about his overall well being, as on the evening of 20 January 2004, he phoned Mr Reid.
- [15] The evidence of Mr Reid is that Mr Blake told him that he was: "*[having serious health issues (dizzy spells)]*" and that he had to be transferred to a day shift. Mr Blake acknowledges that he did say to Mr Reid that he was having dizzy spells but did not state that it was "serious." The evidence of Mr Reid is that Mr Blake used the words "serious health issues" and I accept this is so. The outcome of the conversation was that the two men agreed they would meet the next day to discuss Mr Blake's health. Mr Reid was under the impression that Mr Blake had attended the hospital the day before but it seems that he was mistaken about that.

Discussion about Mr Blake's Health Issues

- [16] At the meeting the next morning, there was some discussion about the health problems that Mr Blake was having related to his lack of sleep and slow heartbeat. Mr Reid says that Mr Blake told him that there had been two or three "near misses" in the workplace in the last few weeks. Because Mr Reid was concerned about the health and safety implications of what Mr Blake said he had been experiencing, a meeting was immediately arranged with Ms Nabney.
- [17] Mr Blake has attempted to portray that there was something untoward about the meeting with Ms Nabney occurring on a spontaneous basis, without a representative for him being present. However, I have no doubts that he was a willing participant. Furthermore, I conclude that the meeting was not of a disciplinary nature, but simply - and sensibly, took place due to a concern for Mr Blake's health and safety in the workplace, and also those employees working with him.

- [18] The evidence of Ms Nabney is that what Mr Blake had to say at the meeting was “*quite alarming.*” She says that Mr Blake said that he was suffering from ongoing sleep problems and that he was finding all shifts difficult. The evidence of Ms Nabney and Mr Reid is that Mr Blake told them that he was tired on both the day and the afternoon shifts and that he had suffered “*spells*” and “*turns*” while working on the afternoon shift.
- [19] Of more concern to Ms Nabney and Mr Reid was that Mr Blake told them he had been having dizzy spells at work and had experienced some “*near misses.*” The evidence of the two managers is that Mr Blake went on to describe an incident where he had what appeared to be a brief blackout and “*came to*” in a area of the work place that could have resulted in a serious injury or death, if he had fallen.
- [20] Having listened to what Mr Blake had to say, Ms Nabney came to the conclusion that it was not safe for Mr Blake to continue working with machinery. The further evidence of Ms Nabney is that health and safety is a major issue for Canpac, as the company had been prosecuted on two earlier occasions regarding accidents that involved serious injury and a death and could not possibly have any exposure to another incident that could be prevented.
- [21] Mr Blake was informed that Canpac could not take the responsibility for him being in the work place without a medical clearance and that he would have to “*stand down*” on medical grounds in the meantime.
- [22] The further evidence of Ms Nabney and Mr Reid is that Mr Blake informed them that he had been looking at other job opportunities and that he had a job interview later that week. It was then suggested to Mr Blake that he should take some time off work to rest and prepare for the job interview and to think about his future. The evidence of Ms Nabney is that Mr Blake did not look at all well. There was also some discussion about it being a better option for Mr Blake to resign rather than have his employment terminated on medical grounds, in the event that he was not able to obtain a medical clearance.
- [23] The option of other employment on the site was also discussed but it was the view of Ms Nabney that there was nothing suitable for Mr Blake at the time. Mr Blake has testified that he felt that he could have taken up a cleaning position but there is no evidence of any such position being available at the time in question. The meeting concluded on the understanding that Mr Blake was to take the rest of the week (approx 2.5 days) off work on pay to think about the issues that had been discussed. Mr Blake was also told that if his decision was to resign he would be paid an extra weeks’ pay. Ms Nabney says that the discussion about the possibility of Mr Blake resigning was also in the context of Mr Blake indicating that he wanted to get away from all shift work and possibly get a job with a friend fruit picking.

The Resignation

- [24] Rather than taking the rest of the week off work, Mr Blake returned the next day. He met with Mr Reid and informed him that he had discussed the situation with his wife and had decided to resign, with immediate effect. Mr Blake also sought and obtained, confirmation from Mr Reid, that he would be paid for the further week as discussed the day before.
- [25] The evidence of Mr Reid is that Mr Blake signed the company resignation form and that he appeared to be content with the decision he had made. Conversely, Mr Blake says that he felt that he had been put under pressure by his employer to such an extent that he had no option but to resign.

Analysis and Conclusions

(a) Was There a Constructive Dismissal?

- [26] Mr Blake says that his resignation was in fact, a constructive dismissal. The law relating to constructive dismissal is well established. The onus of showing that a constructive dismissal has occurred rests on the employee. In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd (1985) ERNZ Sel Cas 136*, the Court of Appeal held that a constructive dismissal could include cases where a breach of duty by the employer causes an employee to resign.
- [27] The matter of a breach of duty on the part of the employer was expounded upon further by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW [1994] 1 ERNZ 168*. The Court held that:
- “In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.”
- [28] Applying the above findings of the Court of Appeal to the circumstances surrounding Mr Blake, the first question to ask is: Was his resignation caused by a breach of duty on the part of his employer?
- [29] The submission for Mr Blake is that Canpac’s conduct amounted to a breach of duty in that the company: “[embarked on a series of conduct, including transferring Mr Blake from the day shift to the afternoon shift and conducting an unfair disciplinary meeting where he was forced to resign.” Weighing the totality of the evidence I have to say that I do not find this submission persuasive. It is clear from the evidence of Ms Nabney and Mr Reid that they had justified concerns about Mr Blake’s health and his safety, and the possible danger to other employees in the workplace, based on what Mr Blake told them.
- [30] I accept the evidence of Ms Nabney and Mr Reid as to what Mr Blake told them about his “near misses” while working. I also accept that Mr Blake conveyed that he was looking for alternative employment and that he also indicated that he had a job interview forthcoming. The evidence of Ms Nabney is that Mr Blake did not look well and she assessed that it would be in his best interests to have some rest in order to present himself better at the job interview.
- [31] When Mr Blake left the meeting on 21 January 2004, he had been given some paid time off work to consider his options. Having discussed the situation with his wife and after giving thought to matters overnight, Mr Blake decided to resign. While I accept that Ms Nabney had suggested to Mr Blake that if he was not able to obtain a medical clearance, then his employment may be terminated on medical grounds, that option was not put to Mr Blake as a *fait accompli*. Rather, because of Mr Blake’s candid admission regarding the affects of his health problems, it was prudently decided that Mr Blake, and other employees, should not be further exposed to a possible health and safety risk.

- [32] The evidence is that a variety of options were discussed in an open and frank manner, including the possibility of Mr Blake obtaining employment elsewhere. Mr Blake was given some days to assess his options. That could have included obtaining a medical assessment of his medical condition. Mr Blake decided not to avail himself of the time available off work to assess his options and instead decided to resign and accept one further weeks' pay.¹
- [33] On the surface, that appears to have been a somewhat hasty decision but one that Mr Blake was entitled to take. However, I do not accept that he was pressured in any way by his employer. It seems to me that albeit it there was a distinct possibility, that following an appropriate medical assessment and prognosis, Mr Blake may have been faced with making a decision about his ongoing employment with Canpac, or the company making a decision on medical grounds, that position had not yet been reached.
- [34] Therefore, taking all of the above into account, I find that the resignation of Mr Blake was not a constructive dismissal and that Mr Blake chose to resign of his own free will.

(b) **Was there an Unjustified Disadvantage?**

- [35] While an unjustified disadvantage grievance was not raised with the 90 days required by s.114 of the Employment Relations Act, and the employer has not consented to the grievance being raised after the expiration of that period, given the overall evidence, I do not accept Mr Blake's assertion that his health would have been better had he remained on the day shift and that Canpac should have left him working on that shift. The overall evidence, including his absence report and the limited medical information as provided, tends to show that Mr Blake had an unfortunate medical condition that was going to have a detrimental effect regardless of whether he was on the day shift or the afternoon shift. While the evidence shows that Mr Blake had better health while working on the day shift as compared with the night shift, there is no evidence that conclusively points to Mr Blake suffering any unjustified disadvantage by being transferred onto the afternoon shift.
- [36] Furthermore, apart from the fact that Mr Blake's union did not accept that there was any justification for Mr Blake to be treated as an exception to remain on the day shift under the terms of clause 4.5 of the collective employment agreement, there is evidence that shows that Mr Blake's health problems continued after his departure from Canpac.²
- [37] As an alternative argument, Mr Hood submits that Canpac breached the contractual term of providing a safe working place by transferring Mr Blake from the day shift to the night shift. I refer to my findings as above and I do not find that there are any grounds to support this submission.

(c) **Breaches of the Health and Safety in Employment Act 1992**

- [38] Mr Blake has not been specific as to what, if any, breach of the Act has occurred. The Authority has only limited jurisdiction to be involved in proceedings relating to breaches of the Act. It seems to me that the claim advanced for Mr Blake is simply a rather disingenuous attempt to circumvent the requirements of s114 of the Employment Relations Act pertaining to the alleged unjustified disadvantage. Given the failure to be more specific about the nature of any possible breach, I am unable to reach any tangible conclusions.

¹ The understanding of the Authority is that Mr Blake had exhausted his sick leave entitlement.

² A letter from Dr Heald – Cardiologist, dated 10 February 2004 and a letter from Dr John McLachlan - Sleep/Respiratory Physician, dated 5 February 2004.

Determination

- [39] Mr Blake resigned from his employment with Canpac International Limited on 22 January 2004. The resignation was not an unjustified constructive dismissal. Mr Blake does not have a personal grievance and the remedies he seeks are not available.
- [40] Mr Blake did not raise an unjustified disadvantage personal grievance within the 90 days required by s.114 of the Employment Relations Act and the employer has not consented to the grievance being raised after the expiry of that period. In any event, there is no evidence of an unjustified disadvantage being visited upon Mr Blake by his employer.
- [41] There is no evidence to support Mr Blake's claim that a breach of the implied term to provide a safe workplace has occurred.
- [42] The Authority has only limited jurisdiction to be involved in proceedings relating to breaches of the Health and Safety in Employment Act 1992. Given the lack of specific details, I am unable to reach any tangible conclusions pertaining to this claim.

Costs

- [43] Costs are reserved. I request that the parties attempt to resolve that issue themselves, taking into account the usual awards of costs issued by the Authority in similar circumstances. In the event that a resolution is not possible, the parties may file submissions with the Authority within 21 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority