

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 171
5620270

BETWEEN CANTERBURY TRELLIS
 LIMITED
 Applicant

AND CHRISTOPHER SUTHERLAND
 Respondent

Member of Authority: Christine Hickey

Representatives: Barry Rutter and Anna Chamberlain, advocates for the
 Applicant
 Christopher Sutherland, the Respondent, in person

Date of Investigation 27 July 2016 in Christchurch
meeting:

Date of Submissions: At the Investigation Meeting

Determination: 26 September 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christopher Sutherland is a carpenter/joiner who worked for Canterbury Trellis Limited (CTL). On 1 March 2016, he had an accident at work when he dropped a heavy object he was carrying and twisted to try to prevent it falling. He injured his back, and was diagnosed with a lumbar sprain.

[2] Mr Sutherland was not able to work full time for a number of weeks. He received ACC earnings related compensation.

[3] On 2 May 2016, he tendered his resignation because he had accepted another job.

[4] On 11 April 2016, CTL lodged this claim. CTL makes a number of claims against Mr Sutherland, including of breach of contract, and by way of remedy seeks contractual damages of \$4,869.14 for March 2016 and \$4,067.98 for April 2016; a total of \$8,937.12.

Issues

[5] I need to determine whether Mr Sutherland breached any of his duties to CTL. If he did, I need to determine whether those breaches caused CTL's monetary loss of \$8,937.12.

Claimed breaches of Mr Sutherland's obligations

[6] CTL claims Mr Sutherland's injury would have resolved sooner if he had sought medical assistance and/or physiotherapy treatment earlier. It says he owed it a duty to do so. It believed Mr Sutherland was 'doctor hopping' for a dishonest purpose. CTL disputes the extent of Mr Sutherland's injury and how much time he really needed to be off work.

[7] CTL says Mr Sutherland gave it misleading and untrue information about his medical treatment and condition.

[8] CTL's main argument is that Mr Sutherland's lack of timely communication unreasonably contributed to its inability to plan how to lessen the impact of his absence from work. It argues that his ongoing absence from work, which appeared open-ended, and its inability to plan for the length of that absence caused it financial loss. In particular, it says that the need to train someone in its production methods meant hiring a temporary worker was not viable for it. It says Mr Sutherland's level of skill and output could not be replaced over a short period. Mr Sutherland's absence meant delays in quoting, and in some cases loss of contracts, delays in invoicing and longer hours worked by other employees in the factory.

[9] CTL calculated its losses, based on Mr Sutherland's absence, caused it to lose the amount of income Mr Sutherland's work would have made. It seeks to offset that loss against its fixed costs in the months of March and April.

Sequence of events

[10] Mr Sutherland's back injury happened on Tuesday, 1 March 2016. CTL took him to see a chiropractor that day. Mr Sutherland's individual employment agreement (IEA) provided that CTL would pay for three chiropractic sessions, by a chiropractor of CTL's choosing, if an employee suffered a back injury at work.

[11] The chiropractor reported Mr Sutherland's injury to ACC and applied for ACC cover for the injury.

[12] Mr Sutherland was off work on 2 and 3 March. He attended a second chiropractic appointment on 3 March. He had another session booked but was unable to get there through lack of transport. He says he was going to make another appointment but when his back did not improve as he hoped it would be went to his GP instead on 17 March 2016.

[13] CTL texted Mr Sutherland a number of times reminding him to get a medical certificate. On 3 March, Ms Chamberlain texted Mr Sutherland to get "an acc medical certificate so you will need to get one from chiropractor when you next go." He agreed that he would get that. The same day, Mr Rutter texted him asking him to come in and perform "mostly paperwork" the following day.

[14] The parties agree that Mr Sutherland attempted to return to work a number of times before 17 March 2016. He went to work on 4 March and undertook some administrative duties. On 7 March, Ms Chamberlain again texted Mr Sutherland and said unless he had a medical certificate saying he could not work he should come in and do light duties. He attempted to do the lighter tasks than his usual duties on 8 and 9 March 2016.

[15] The chiropractor completed a medical certificate on 7 March but unfortunately, that was not sent to CTL until 15 March 2016. It certified that the chiropractor had recently treated Mr Sutherland for:

acute low back pain, which we expect to resolve fully for him, however it is important that he remains on light duties until Friday the 19th. Anything that is too strenuous or demanding for him is going to exacerbate and retard his recovery.

[16] On 10 March, Mr Sutherland let CTL know his back was worse and he would not be in to work. Ms Chamberlain reminded him to get the chiropractor to give him a medical certificate and said that ACC would need it to pay him his earnings related compensation.

[17] On 11 March, Mr Sutherland undertook to get a medical certificate and bring it in or get it emailed to CTL on Monday, 14 March. However, he did not do so although CTL received the chiropractor's letter on 15 March 2016.

[18] Mr Sutherland worked on Tuesday, 15 March 2016. He did not provide CTL with a medical certificate that day.

[19] He was not at work 16 or 17 March. On Thursday, 17 March, he went to his general practice. Mr Sutherland says his back pain had not improved as much as he had expected so he decided to go to the doctor. His usual GP was not available and he saw Dr Weenink.

[20] Dr Weenink appears to have applied for ACC cover for the injury but stated the wrong injury date of 2 March 2016. ACC treated this as a separate claim until it became clear it was a duplicate claim and closed the second claim.

[21] Dr Weenink prescribed some pain relief medication and told Mr Sutherland her plan was for him to go to a physiotherapist. She certified that he was fully unfit for work from 2 March until 10 April 2016. Mr Sutherland's evidence is that he thought a physiotherapist was going to contact him to make an appointment.

[22] On 17 March, Mr Sutherland texted CTL "back to work Monday pending results of physio and X-Ray".

[23] On 18 March, Ms Chamberlain texted to asked him to bring in any medical certificates and asked for an update once he was cleared for full duties. Mr Sutherland told her Monday was unlikely and he would more likely be in on Wednesday.

[24] Later that day, Mr Rutter texted that :

... we can't work with you saying you will be in on Monday now it's been changed to Wednesday, Can you please get a medical certificate outlining when exactly you are off until. I'm sure you understand we need to plan work and production, we can't do so if we have no idea what's happening with you.

[25] Mr Sutherland replied that he was still waiting on "the X-Ray and what the physio thinks tomorrow." CTL took that to mean he had an x-ray and a physiotherapy appointment booked for the following day. However, that was not the case.

[26] On 19 March, Mr Sutherland texted CTL that he would not be in to work on Monday as he needed to go back to the doctor that day.

[27] On Monday, 21 March, Mr Sutherland texted CTL that he had talked to his doctor and he could be off work for another week. He also wrote that ACC wanted more scans of his back.

[28] On 21 March, Ms Chamberlain rang ACC and was told that a case manager had not yet been assigned, but that Mr Sutherland had contacted it about earnings related compensation and that it had no medical certificates on file but that a second claim had been lodged.¹

[29] At this point CTL's frustration with the lack of information from Mr Sutherland became worse. Mr Rutter and Ms Chamberlain suspected that he was not as badly injured as he appeared. They also suspected he was not telling them, and possibly ACC, the truth.

[30] On 21 March, Mr Rutter texted Mr Sutherland that CTL wanted a medical certificate for the entire time he had been off work from 1 March. He also wrote:

Three weeks and you only talked to [ACC] today! ... If your back is so bad that you need scans or X-rays then we have to seriously look at the impact on the business or if we can even hold your job open. Taking this long to get a diagnosis or treatment is quite negligent Chris.

¹ This caused CTL to suspect Mr Sutherland was lying to ACC. I am satisfied it was an administrative mistake by Mr Sutherland's GP who was unaware a claim for cover had already been made by the chiropractor.

[31] In two further texts on the same day he asked Mr Sutherland to get his doctor to ring CTL “as we need information to make a decision.”

[32] On 22 March, Mr Sutherland went back to his GP practice but was sent to the emergency department of the hospital where he had an x-ray and an MRI scan. The medical certificate from the hospital says that he was fit for “restricted/light duties” from 22 April 2016 and for “full duties on 22/5/16.” He was advised to see his GP again if his symptoms worsened. The hospital notes record some lower limb symptoms that were indicative of disc involvement in the injury. However, the scans did not show any disc problem.

[33] As at 23 March Mr Sutherland’s ACC case co-ordinator notified CTL her plan was:

... to discuss Chris’ progress with him and his doctor the week after Easter and if I can refer him to a physio to be reviewed and whether there is a possibility of getting him fully fit before 22/05/16. I realise that his job may not be there for him and I think Chris realises that too due to the length of time.

He has been told he has a slightly slipped disc and that it will pop back and settle of its own accord. With these we need to be careful not to put too much weight through the back until the disc settles or there can be a risk of it completely popping out.

I am catching up with Chris after Easter to see how he is feeling and will touch base with you too. I should hope he makes contact with you today to explain all of this himself.

[34] Ms Chamberlain replied to ACC:

To enable us to make a fully informed decision in relation to either the possibility of rehab back to work for Chris or the future of his employment with us we would request the following information:

A written diagnosis of Chris’s condition and prognosis for the future. This is in relation to both short and longer term implications. Given the inconsistencies in information supplied by Chris to us to date we are unwilling to accept his description of his condition and treatment and therefore request that be supplied by his doctor. The medical certificate supplied by the hospital gives no indication of the nature of his condition at all.

... we are not comfortable with Chris’s communication or the information supplied by him to date and therefore feel it pertinent to rely on factual, professional information as to his condition based on scans (if there have been any).

We believe his attendance at the Emergency department was to avoid the costs of a doctor rather than being the requirement of an emergency.

He advised us that he has spoken to his doctor on Monday, he also advised that he attended physio last Saturday. We question that both even happened as you had to date not received indication of either against his file.

[35] Ms Chamberlain also indicated that CTL wished to meet with Mr Sutherland to discuss the options available and asked if ACC could offer any practical and financial help “if we choose to hold Chris’s position open and look at a return to work program.”

[36] On 30 March, the ACC case co-ordinator emailed Ms Chamberlain and stated that the hospital notes showed symptoms “suggesting some disc interruption”. She said she would contact Mr Sutherland’s GP to see if they could get physiotherapy and a return to work programme started sooner than the hospital suggested.

[37] On 30 March, Mr Rutter texted Chris to come in for a meeting the following week. He also wrote:

We have you [sic] notes from the hospital which say there is nothing structural wrong with your back, so unsure where this slipped disk came from that you told ACC you had. Please advise day and time

[38] On 6 April 2016, Mr Sutherland told his case co-ordinator that he had a new job to go to at the end of the month and that regardless of his back injury he would begin working. His case co-ordinator told him he needed to let CTL know and he said that he would do so.

[39] On 7 April, Mr Sutherland texted CTL:

...will be in tomorrow around 9 I’m assuming it’s a meeting to say that you can’t hold my job open do know [sic] happy to collect my tools and leave it at that

[40] Mr Rutter responded that the meeting was about losses to CTL because Mr Sutherland had not met his obligations under his employment contract. He said he would cover things in more detail at a meeting but could not meet at 9 am the next day. He wrote that CTL’s lawyer would be at the meeting and told Mr Sutherland he may wish to have a support person at the meeting.

[41] Mr Sutherland agreed to meet at any time CTL's lawyer named but wished to pick up his tools the next morning in any event. However, Mr Rutter replied that he was not welcome in at work until:

this is sorted. ... I don't think you realise how serious this is Chris.

[42] Mr Sutherland replied that he had talked to ACC and to his lawyer and knew he had done nothing wrong. Mr Rutter asked who his lawyer was and Mr Sutherland replied he had obtained advice from his uncle. Mr Rutter responded:

So you haven't contacted a lawyer then! This is the issue, you lie so much man, time to face some adult responsibility. I will get our lawyer to advise a time for a meeting next week.

[43] CTL did not arrange a meeting with Mr Sutherland and instead filed these proceedings. On 11 April Mrs Chamberlain emailed ACC that she had received a medical certificate clearing Mr Sutherland for work on 10 April but he had not attended work:

He did not make any indication to us that he had been cleared for work and now leads us to question the extent of his injury and his intention to return to his employment. We suspect now given the request for his tools that Chris has another job set up and may indeed be working from there from today. How had therefore has his injury been?

[44] However, CTL did not put its suspicion to Mr Sutherland.

[45] Mr Sutherland had his first appointment with a physiotherapist organised by ACC on 20 April. That day he told his physiotherapist, who told his ACC case manager he was intending to resign from CTL, or had resigned. The ACC case manager passed that on to CTL.

[46] As a part of Mr Sutherland's treatment plan he was also involved in a gradual return to work programme. He arranged to do the part-time work, as part of that plan, at the same place a friend of his worked and was initially not paid for those hours. After a short time, he was offered ongoing work and resigned from CTL.

[47] Mr Sutherland resigned on 2 May 2016.

Did Mr Sutherland breach any of his duties to CTL?

[48] CTL employed Mr Sutherland under an individual employment agreement (IEA). CTL alleges he breached a number of clauses of his IEA being 4.2 (i), 4.2 (iv), 4.2 (v), 8.4, 12.1, and clause 4 of CTL Employee Handbook.

Supply of medical certificates, delay in seeking treatment, doctor hopping, good faith and misleading and untrue information:

[49] Mr Sutherland does not consider he did anything wrong and believes all the issues could have been resolved through discussion at an earlier stage.

[50] Clause 4.2(i) of the IEA obliged Mr Sutherland to comply with all reasonable and lawful instructions of CTL. This claim relates to what CTL considers was an unreasonable failure to provide medical certificates in a timely manner.

[51] Clause 4.2(iv) of the IEA obliged Mr Sutherland to deal in good faith with CTL. The parties had a mutual obligation to deal with one another in good faith.²

[52] This claim also relates to what CTL says were failures to supply it with medical certificates and the fact that he saw three different GPs so that there was no continuity and no evaluation of progress from one appointment to the next. CTL suspected Mr Sutherland of purposely 'doctor hopping' to extend his time off work.

[53] CTL says it asked Mr Sutherland for medical certificates at least six times by text and three times in person.

[54] CTL also says Mr Sutherland failed to act in good faith when he did not see a GP between the medical certificates dated 4 and 27 April 2016, despite being cleared to return to work on 11 April 2016.

[55] Clause 4.2(v) of the IEA obliged Mr Sutherland to comply with the employer's policies and procedures. Clause 4 of the Employee Handbook provided:

If an employee is unable to attend work due to sickness they are required to advise management by phone call no more than 1 hour after their normal starting time. Notice by text is not considered

² Section 4 of the Employment Relations Act 2000.

sufficient. A medical certificate is required if absent for more than 3 days due to sickness or injury.

[56] Texting was the usual mode of contact between the parties. CTL made no complaint to Mr Sutherland about his method of contacting it to say he could not come into work. Therefore, there was no breach of that aspect of the code of conduct. Mr Sutherland did not breach his duty of good faith by texting CTL, rather than telephoning, when he would not be coming in to work.

[57] I accept that Mr Sutherland delayed seeing a GP until 17 March. CTL says that was negligent of him and says he had a responsibility to seek diagnosis, treatment and advice earlier. I cannot deal with claims of negligence.³ I assume CTL is claiming this is an implied term of its contract with Mr Sutherland. Even if it is, which I do not accept, there is no expert medical evidence supporting CTL's view Mr Sutherland's injury would have resolved earlier if he had attended his GP earlier.

[58] It was CTL that caused Mr Sutherland to consult a chiropractor first, not a GP. Mr Sutherland was aware the chiropractor had certified him as fit for light duties only until 19 March. He attempted to undertake light duties on a number of days and consulted a GP before 19 March. I do not consider he was irresponsible in his approach to his recovery up to that point.

[59] In relation to the supply of a medical certificate, I find that CTL first asked for one for its own purposes on 14 March in Mr Rutter's text. I accept that medical certificates had been mentioned earlier in CTL's texts (3,7,10 and 11 March) but they were in relation to ACC's needs and about whether the medical certificate had certified him as being fully unfit for work or OK for light duties.

[60] CTL did not receive a copy of the 17 March medical certificate until after Mr Sutherland resigned in early May. However, from 15 March CTL had the chiropractor's certificate and as at 23 March had the hospital certificate. It does not matter that these were not supplied directly by Mr Sutherland.

[61] Therefore, as at 23 March CTL was aware Mr Sutherland was off work fully until 21 April and after that fit for light duties. It was aware that he had not yet been referred for physiotherapy.

³ Claims based on tort are outside of the Authority's jurisdiction.

[62] The real issue is CTL's lack of trust in Mr Sutherland that clearly existed from at least 23 March as demonstrated in Ms Chamberlain's email to ACC. That lack of trust became mutual in early April once Mr Sutherland heard from his ACC case co-ordinator and other CTL employees that CTL doubted his honesty about his back injury, and even doubted that he had open-heart surgery the year before.⁴ Mr Sutherland was upset about that. I accept it gave him cause to question whether he wanted to return to work for CTL.

[63] Mr Sutherland denies telling the ACC case co-ordinator in early April that he already had a new job to go to at the end of the month. However, he says he certainly was considering not going back to work for CTL because of its demonstrated lack of trust in him. For example, Mr Rutter's text saying, "you lie so much". Mr Sutherland explained to me that his uncle in Wellington was a lawyer and had advised him at the time. From his perspective, it was not a lie that he had talked to his own lawyer.

[64] By early April it is clear that CTL did not have the requisite trust and confidence in Mr Sutherland to allow him to return to work for it once he was fully fit to do so. Its filing of these proceedings demonstrated that. The lack of timely provision of medical certificates may have contributed to this.

[65] Did he also provide misleading and untrue information to CTL? CTL says that texts received from Mr Sutherland on 17, 18, 21, 22 and 23 March "are unsubstantiated (basically lies)". However, being unsubstantiated in CTL's view does not mean that Mr Sutherland was lying to CTL. For example, on 22 March when Mr Sutherland was referred to the hospital he texted Mr Rutter that he was going to see a specialist. I asked Mr Sutherland about this and he said that what he meant was a specialist was going to review his case and view the scans. That happened and so was not a 'lie'.

[66] Likewise, CTL says that when Mr Sutherland texted on 23 March that he had a "slightly slipped disc", he was lying, because the scan reports it later saw showed no physical abnormalities. However, on the ACC case co-ordinator's interpretation of the hospital notes there was some disc involvement. It is more likely than not Mr

⁴ For the sake of completeness, the hospital records of the x-ray and MRI scans clearly show that Mr Sutherland had major thoracic surgery in 2015.

Sutherland reported honestly to CTL that one or other of the medical staff at the hospital had told him he might have a slipped disc.

[67] Relaying medical advice second-hand via text message is never likely to result in clear communication. In addition, the prognosis for Mr Sutherland's recovery kept changing each time he saw and was assessed by a medical professional. Mr Sutherland was unable to convey a clear picture and a clear date for his return to work to CTL when he did not have one.

[68] I consider Mr Sutherland was not somewhat misleading when he texted that he was waiting on an x-ray and to hear what the physio thought "tomorrow", and that "acc want more scans". However, Mr Sutherland did not deliberately provide misleading and untrue information to CTL on all the times it assumed he did. I consider there was a breach of his duty of good faith to CTL regarding the text about waiting on an x-ray and what the physio thought "tomorrow" when he knew he had no physiotherapy appointment booked for the following day.

[69] However, I note no penalty for breach of good faith has been pleaded and even if it had been; I do not consider the breach would have reached the threshold of being "deliberate, serious and sustained".⁵

[70] However, I also need to consider whether he breached his duty to be responsive and communicative. I do not consider Mr Sutherland had a duty in early April to tell CTL he was considering not returning to work for it. If he had not definitely decided when he was leaving and did not know when he had another job to move to he was not obliged to tell CTL. He did not breach his duty to be responsive and communicative.

[71] By its text on 7 April, CTL initiated a process whereby they and Mr Sutherland could meet face-to-face to discuss what was happening with his injury and with his job. On 7 April, Mr Sutherland indicated to CTL that he would accept its decision if it could not keep him on while waiting for his injury to resolve. However, CTL never set a date for the meeting it had asked him to attend.

[72] In early April, CTL had an opportunity to move on from wondering when or whether Mr Sutherland would return to work for it by having a discussion with him

⁵ Section 4A of the Employment Relations Act 2000.

and coming to an agreed resolution that he would not return to work. It did not carry on down that route. Because of that CTL cannot continue to blame Mr Sutherland that for the rest of April it did not know whether he would come back to work. CTL openly expressed its concerns about that to ACC but not directly to Mr Sutherland.

[73] In addition, on 20 April Mr Sutherland's case co-ordinator told CTL she understood him to have resigned. He had not done so. Mr Sutherland should have communicated his resignation to CTL as soon as he had decided to resign. However, CTL did not contact Mr Sutherland to check whether the information from ACC was accurate.

[74] I consider by then that the requisite trust and confidence that would have been necessary for Mr Sutherland to return to work with CTL had disappeared. Mr Sutherland is not entirely to blame for that.

[75] There is no substance to CTL's claim that Mr Sutherland was deliberately 'doctor hopping' and that process had some dishonest intent. I am satisfied that Mr Sutherland was an enrolled patient at Dr Hanley's general practice but when she was not available he was seen by her colleagues. In addition, Mr Sutherland attended the GP practice and was referred to the emergency department by the "acute GP" at the practice. Even if he had chosen to go directly to the emergency department to avoid paying for a GP consultation, there is nothing sinister about that. Quite simply that was none of CTL's business.

[76] For completeness I note that ACC initiated an investigation, largely based on CTL's concerns about Mr Sutherland's injury. After interviewing Mr Sutherland, ACC's investigator was satisfied that he had been honest with ACC. The investigation was closed.

Was Mr Sutherland's failure to give a week's notice a breach of contract for which damages can be claimed?

[77] Clause 12.1 of the IEA provided that Mr Sutherland had to give one week's notice when he resigned. He did not do so but resigned with immediate effect.

[78] CTL withheld a week's worth of his final pay, as it says clause 12.2 of the IEA provided it could. Mr Sutherland accepts that as a fair result.

[79] There is no evidence of any damage to CTL consequent on Mr Sutherland failing to give notice beyond the damages CTL has already claimed, being one week's wages.

Is CTL entitled to payment of damages?

[80] Communication from both parties after Mr Sutherland's injury and before his resignation was less than ideal but I cannot find that Mr Sutherland breached any of his duties to CTL such that they directly led CTL to suffer financial loss.

[81] CTL told me that ACC had told it that 43 days is the optimum time for a lumbar sprain to resolve sufficiently for a full return to work. If that 43-day period began on 2 March, even under optimum conditions Mr Sutherland would not have been ready to return to full duties until 13 April. There is no way of knowing if Mr Sutherland's recovery could have been optimised if he had attended his GP earlier. However, even under optimum conditions CTL would have lost the economic benefit of his production work for at least that time anyway, even if he had been prompt in responding and communicating with it.

[82] CTL lost income from the loss of Mr Sutherland's labour in March and April. The cause of the loss of Mr Sutherland's production was his injury, not any failure to communicate on his part. Mr Sutherland's ACC earnings related compensation payment ended on 13 May 2016. He would not have been able to return to full-time work before this, even if he had returned to work at CTL.

[83] CTL's claim for damages is dismissed.

Costs

[84] Mr Sutherland represented himself at the investigation meeting. Therefore, I do not have to consider costs.