

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 175
5313516

BETWEEN BRIAN CASSIE
 Applicant

A N D FONTERRA BRANDS (NEW
 ZEALAND) LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Andrew McKenzie, Counsel for Applicant
 Samantha Turner, Counsel for Respondent

Investigation Meeting 17 June 2011 and 28 July 2011 at Christchurch

Date of Determination: 14 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Cassie) was dismissed from his employment by the respondent (Fonterra) on 21 July 2010 and he claims that that dismissal was unjustified. Fonterra resists that claim.

[2] Mr Cassie was a storeperson at Fonterra's Christchurch depot. On 4 November 2009, Mr Cassie suffered a non work injury accident when he was hit by a skateboarder.

[3] There was initially a misdiagnosis of that injury which impacted on the recovery time but the short point is that the injury put Mr Cassie off work and in fact, from the point of that injury accident onwards, Mr Cassie never returned to employment with Fonterra. At the time of his dismissal for medical incapacity, he had been absent from work for about 39 weeks, equivalent to something over nine months.

[4] In the initial period after the accident, a succession of medical certificates was provided by Mr Cassie to Fonterra from various medical advisers. There was dispute between the parties about the quality of these medical certificates and indeed about whether they were provided willingly by Mr Cassie or were sought by Fonterra, but in any event, it is common ground that Mr Cassie remained away from the workplace, initially on earnings-related compensation paid by ACC. That ACC cover was withdrawn on 7 March 2010 and thereafter, Fonterra continued to pay Mr Cassie until the termination of his employment, either as sick leave, annual leave or paid special leave.

[5] A return to work plan was generated in April 2010 but was unable to be completed because of Fonterra's contention that there were no "*light duties*". In the following month, a medical certificate provided on behalf of Mr Cassie pronounced him unfit for work for 30 days from 11 May and a telephone discussion between Mr Cassie and a Fonterra manager (Mr Sharma) confirmed to Fonterra that Mr Cassie found it very difficult to even drive a car. Then, in a development which Fonterra describes as "*out of the blue*", on 27 May 2010, an orthopaedic surgeon, Mr David Walton, certified Mr Cassie fit to return to work on 31 May 2010. Somewhat transfixed by this juxtaposition of medical certificates and other competing items of information, Fonterra then sought its own medical report from an occupational physician, Dr Mark Floyd. Dr Floyd produced a report dated 24 June 2010 which found that, if Mr Cassie did return to work, there was a high likelihood of him aggravating his injuries. On that basis then, Fonterra reached a preliminary conclusion to terminate Mr Cassie's employment on the grounds of medical incapacity and commenced a process of consulting with him on that outcome.

[6] Amongst other things, Mr Cassie took the opportunity of providing further medical assessments of his own and supplied a medical certificate from Dr James Broadbent dated 9 July 2010 and a brief report from a physiotherapist, Aaron Cunliffe, dated 14 July 2010, both of which said that Mr Cassie was fit to return to his employment. Having considered those matters and balanced them against the Floyd report, Fonterra decided to dismiss for medical incapacity and made that decision known to Mr Cassie at a meeting between the parties on 21 July 2010.

[7] A personal grievance for unjustified dismissal was promptly raised. The essence of Mr Cassie's complaint could perhaps be expressed as a conviction that

Fonterra has failed to properly reconcile the competing medical views and instead simply chosen to accept one view over another.

Issues

[8] The only issue for the Authority to determine in the present case was whether Fonterra was justified or not in dismissing Mr Cassie for medical incapacity. By common consent, the test for justification which the Authority must use in assessing this dismissal is the test that applied prior to 1 April 2011.

[9] A subsidiary question, assuming that Mr Cassie is found to have been unjustifiably dismissed from his employment, is whether he ought to be reinstated to that employment, or not.

Was Mr Cassie unjustifiably dismissed?

[10] I am satisfied on the evidence heard by the Authority that Mr Cassie was not unjustifiably dismissed from his employment. It follows that I do not accept the careful argument advanced by counsel for Mr Cassie that Fonterra failed to properly reconcile the competing conclusions of the various medical practitioners involved. In the Authority's opinion, Fonterra behaved as a fair and reasonable employer would have in reaching the decision to dismiss Mr Cassie, having conducted a proper inquiry into the events giving rise to the circumstances of the dismissal.

[11] There is a particular body of case law around termination on medical grounds, although the fundamental responsibility of the Authority considering dismissals for medical incapacity remains the same as the responsibility for determining justification in other cases. A number of principles may be derived from decided cases on medical incapacity. The well known test was expressed in *Hoskin v. Coastal Fish Ships Supplies Ltd* [1985] ACJ 124 at 127 as being whether the point has come "*at which an employer can fairly cry halt*". In essence, this phrase captures a particular facet of dismissal for medical incapacity, namely the question of how long the employer is obligated to keep a job open. In the present case, Fonterra maintained Mr Cassie's vacant role for over nine months. An employer must give an employee a reasonable opportunity to recover from sickness or other medical incapacity, but that does not require an indefinite retention of the role.

[12] Fonterra draws my attention to a number of cases commonly involving either epilepsy or diabetes as ground for dismissal where the employee's own health (or the lack of it) impacts on the health and safety of either themselves or other staff. The particular concern in Mr Cassie's case was the fear that he would re-injure himself and thus create further difficulty personally and potentially for Fonterra. In that wider connection, there are cases which refer to an employer's duty of care, in effect, pursuant to the Health and Safety in Employment Act and the obligation that an employer may have to not only protect its employees from harm but also save itself from potential liability. In the present case, given the suggestion that Mr Cassie might speedily re-injure himself (in effect, a conclusion of Dr Floyd), the submission is made that Fonterra was entitled to act so as to exclude that possibility.

[13] Further, Fonterra says that managerial prerogative must properly emphasise safety in the workplace and it refers in particular to a number of decided cases where the Authority or the Court have emphasised the special place that safety has in the factual matrix. By way of example only, a decision of the present Chief of the Authority, *C v. AL Ltd* (unreported, AA6/10, 13 January 2010), Member Dumbleton stated:

Questions of safety may be given special consideration by the Authority in applying s.103A.

[14] On general principles, Fonterra suggests that there is ample basis for its decision to dismiss Mr Cassie on medical grounds. It cites the length of time Mr Cassie was absent from the workplace (over nine months), the managerial difficulties of keeping the role open, the fact that Mr Cassie had effectively run out of all forms of leave by 26 May 2010 and had to be paid special leave thereafter, and that proper attention was given to any alternative forms of employment that might be available to suit Mr Cassie.

[15] But the real nub of the issue, and the real basis of the challenge to the decision to dismiss, is the question of whether Fonterra put too much weight on Dr Floyd's view and too little weight on the contrary views of others. Fonterra says that, in making the decision to dismiss, it considered all of the medical evidence, including the medical evidence from the experts that Mr Cassie produced. It also makes the point that Mr Cassie was given ample opportunity to provide further and better particulars on his health status and that he could, for instance, have sought his own

detailed medical report to counter the views advanced by Dr Floyd, but he chose not to.

[16] Furthermore, and critically from the Authority's perspective in analysing the decision making of Fonterra, Dr Floyd's conclusion simpliciter was no different from the conclusion of Mr Walton, for instance. Both concluded that Mr Cassie could return to work; the difference was that, in a more extensive and detailed analysis, Dr Floyd also thought that Mr Cassie was in grave danger of exacerbating his existing injury if he did return to work.

[17] Mr Cassie might say in response that his advisers were not asked that subsidiary question and that may be true, but as I have already indicated, it was available to Mr Cassie (and he was given ample opportunity) to go back to one or other of his medical advisers, or contract with a new provider, and in effect obtain a critique of the Floyd report. There is also force to Fonterra's submission that, in a real sense, Dr Floyd's conclusions incorporate the conclusions of others, such as Mr Walton, the orthopaedic surgeon and Mr Cunliffe, the physiotherapist. Dr Floyd talked to both those practitioners and discussed with them their prognosis and conclusions. He records the nature of those discussions in his report and, clearly, his report is informed by those discussions.

[18] There is one other factor that weighs with the Authority in reaching the conclusion it does. It is the evidence of Madhukar Sharma, the national supply chain manager for Fonterra and effectively Mr Cassie's senior manager. I was impressed with Mr Sharma's evidence and the manner in which it was given, as I must say I was by all of the witnesses for Fonterra. But Mr Sharma's evidence was particularly important in discussing events around when he received the medical certificate from Mr Walton, the orthopaedic surgeon. That certificate is dated 27 May 2010 and describes Mr Cassie as being fit to return to duty four days later on 31 May 2010. Mr Sharma thought the timing of the certificate "*suspicious*" because it immediately followed two events, namely the withdrawal of ACC cover for Mr Cassie on 7 May 2010 and the letter from Mr Sharma himself to Mr Cassie dated 19 May 2010 in which, amongst other things, Mr Sharma says:

... I do not believe it is possible for you to return to your role and perform the duties required. This is primarily because of your back injury and the fact you have indicated that it is difficult for you to

drive your car and you have also indicated that ACC will not pay for your injuries as this was declined by Work Aon previously.

[19] Mr Sharma's suspicions about Mr Cassie's prognosis were heightened by the apparent failure of Mr Cassie to make any progress at all in his rehabilitation until suddenly it seemed that the stopping of earnings-related compensation and the receipt of the Fonterra letter of 19 May both conspired to activate Mr Cassie.

[20] I thought Mr Sharma's evidence on this point was illuminating and while no doubt it could be criticised as being uncharitable, the Authority's view is that an employer is entitled to make judgments about the motives and motivations of employees in circumstances such as the one that Mr Cassie was in, and whether charitable or not, those assessments that employers may make properly form part of the decision making matrix for the employer in reaching the conclusion it does and for the Authority in, as it were, "*auditing*" the employer's initial conclusion.

[21] This was a case, then, where it could perhaps be stated that Fonterra placed less weight on the medical certificate from Mr Walton than it might otherwise have done, because of the circumstances at the time the certificate became available. Of course, Mr Cassie was not to know about those impressions that Mr Sharma gained, presumably until the investigation meeting convened by the Authority. It might be said that had Mr Cassie known that Mr Sharma had formed those views, Mr Cassie might have been more encouraged to seek further medical advice to negative the influence of the Floyd report in particular. If Mr Sharma's honestly held conclusions were the only factor in the decision of Fonterra to dismiss for medical incapacity, or even the dominant factor, the Authority would be concerned about issues of fairness and the need for those matters to be put to Mr Cassie before they were in any way a factor in the decision making matrix of the employer. But these matters on which I have been commenting are no more than impressions that Mr Sharma had which obviously influenced the way in which he approached the matter. I think that his evidence was honest and truthful and I applaud his willingness to share those conclusions with the Authority in its investigation meeting. I do not think that the conclusions that he reached and which he spoke about so honestly were of sufficient moment to require disclosing to Mr Cassie so that he could deal with them. But having heard the evidence, I think it is available to the Authority to take it into account as one of the factors which encouraged the employer to reach the decision it did.

[22] In essence, then, the Authority is satisfied that Fonterra has met its obligations. There was a proper process. The job was retained for over nine months with a variety of temporary persons filling in. There were a succession of medical reports culminating in the Floyd report. Dr Floyd spoke to the physiotherapist and to Mr Walton and his discussions with those other practitioners, as I have already noted, informed his own conclusions. Mr Sharma thought the timing of the receipt of the Walton certificate, while not impacting on what the certificate itself said, did rather reflect Mr Cassie's sudden enthusiasm to return to the workplace because of the two factors Mr Sharma referred to, the loss of ACC funding on the one hand and the prospect that his job was in jeopardy on the other.

Determination

[23] I am satisfied that Fonterra was justified in dismissing Mr Cassie for medical incapacity. It follows that there can be no question of reinstatement being an issue.

Costs

[24] Costs are reserved.

James Crichton
Member of the Employment Relations Authority