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## Clarke v PPCS Limited (Auckland) [2007] NZERA 102 (30 March 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 98/07 AEA805/05

BETWEEN DONALD WARREN CLARKE

Applicant

AND PPCS LIMITED

Respondent

Member of Authority: Representatives:

Determination:

Leon Robinson

Simon Mitchell for Applicant Tony Waddel for Respondent

30 March 2007

### DETERMINATION OF THE AUTHORITY

#### The problem

[1] The applicant Mr Donald Warren Clarke ("Mr Clarke") is employed at Richmond Limited's ("Richmond") Dargaville meat processing plant ("the plant").

[2] Mr Clarke says he has suffered disadvantage because of unjustifiable action by Richmond. He asks the Authority to investigate and resolve the problem in his favour by finding he has a personal grievance and awarding him compensation.

[3] The parties were unable to resolve the problem between them by the use of mediation.

#### The facts

[4] Mr Clarke commenced employment at the plant on 25 June 1993. At that time the plant was owned by another company Lowe Walker. Mr Clarke was employed under the terms of the Richmond Dargaville Collective Agreement.

[5] In August/September 2003 the plant closed for six weeks while new automated machinery was installed. Mr Clarke returned to work in October 2003 when the plant reopened.

[6] The new automated system required a change to the way Mr Clarke had previously performed his work. With the new system, he found he had to use a hook to stabilise the carcass he worked on while he removed meat. This new method of working caused him discomfort.

[7] In December 2003 Mr Clarke began to experience pain in his left wrist. He felt pins and needles in his hands and as a because of the severity of the pain he experienced, he began working nights. He was later diagnosed with Carpal Tunnel Syndrome.

[8] On 20 April 2004 Mr Clarke had surgery on his left hand. Mr Clarke returned to work in July 2004 on a light duties programme.

[9] Prior to Mr Clarke's return to work, Richmond's human resources manager Mr Gary Williams ("Mr Williams") was advised of Mr Clarke's imminent return to work. Ms Doreen Carter ("Ms Carter"), the person responsible for occupational safety and health issues at the plant, had contacted Mr Williams to express her concern about Mr Clarke's return to boning duties on a full-time basis. She told Mr Williams of Mr Clarke's imminent return, of his full medical clearance in respect of his carpal tunnel injury and that he would likely to wish to return to boning work. According to Mr Williams, Mr Clarke's work history indicated he had an average of four injuries per year. Mr Williams says he advised Ms Carter that Mr Clarke was not to return immediately to "A" grade duties because of his previous injuries.

[10] After the plant closed down for the usual seasonal closedown in September 2004, Mr Clarke returned to work in October 2004. He began a rehabilitation programme eventually completing two weeks of boning for two, two hour runs per day.

[11] Mr Davies tells the Authority that prior to Mr Clarke's return to work in October 2004, concerns were expressed by management about Mr Clarke's ability to perform his boning work. He says that because of those concerns he decided to meet with Mr Clarke to discuss the matter.

[12] Ms Carter prepared a history of Mr Clarke's injuries as follows:-

Date of injury	Description of injury	Body
12/12/03	Carpel tunnel	Left wrist
03/11/03	Foreign body	Eye
28/05/03	Epicondylitis	Left elbow
08/12/02	Strain sprain (non-work)	Back

14/03/02	Epicondylitis	Right elbow
04/12/01	Strain sprain	Back
07/11/01	Ganglion	Left wrist
01/05/01	Strain sprain	Neck
31/01/01	Laceration	Left 3rd finger
03/01/01	Strain sprain	Lower back
21/07/00	Strain sprain	Left arm
10/02/00	Strain sprain	Left arm
26/06/00	Strain sprain	Right wrist/thumb
19/06/98	Strain sprain	Neck
26/07/97	Strain sprain	Back

[13] Mr Clarke responds to that history. He says injury 3 was a tennis elbow. He had four days off work after which he had a cortisone injection. He has not suffered again from this injury. He says his doctor advised him not to worry about injury 7 and he did not have any time off work. Injury 9 was a small cut to his finger frequently suffered by meat employees using knives. He says injury 13 was an aggravation of an old joint injury. A specialist told him it was fine and he only required one or two days off work. Injury 14 was a sprain which occurred after he dragged beef along a chain which had not been oiled. Generally, he says that the injuries have in large part resulted from the speed of the work chain which is very difficult to keep up with. He does not accept his injury history indicates he has a greater risk of injury.

[14] At 6.10 am on 2 November 2004, Mr Clarke handed to his supervisor Mr Brian Hinton ("Mr Hinton") a medical certificate advising Mr Clarke was fit to return to normal boning duties.

[15] Mr Hinton advised Mr Clarke that he was not permitted to return to normal boning duties before he met with the Plant's beef processing manager Mr Laurie Davies ("Mr Davies"). In the meantime, Mr Hinton told Mr Clarke he was to work on a "C" Grade job bulk packing.

[16] Mr Davies met with Mr Clarke at 8.00 am on 2 November 2004 and Mr Hinton was also present. Mr Davies told Mr Clarke that because of his past injuries, the company was concerned about him reinjuring himself and could not guarantee his health and safety as an "A" grade boner. As a result, Mr Clarke was not permitted to return to boning work. However, Mr Clarke was informed he would be permitted to carry on in a lower grade position.

[17] Mr Davies says he made this decision after reviewing Mr Clarke's previous history of injuries.

[18] Mr Clarke protested and reminded Mr Davies he had been successfully boning on rehabilitation. Mr Davies responded that two hours over two days was very different from a full eight hour work day. According to Mr Clarke, Mr Davies further said that while his (Mr Clarke's) doctor might think Mr Clark was safe, the company did not. At that point Mr Clarke declared he would seek his union's assistance.

[19] Mr Clarke's union pursued matters on his behalf with Richmond. Ms Mavis Watson ("Ms Watson") expressed concern that Mr Clarke's rights under the Injury Prevention, Rehabilitation and Compensation Act were being breached. Mr Williams disputed that view and expressed his view that an occupational therapist should be engaged to provide an assessment of the situation and in particular, Mr Clarke's ability to sustain his health and fitness in "A" grade boning work. Mr Williams tells the Authority Ms Watson agreed with that approach.

[20] On 17 November 2004, Mr Clarke was advised that the company had arranged for an occupational therapist to review his boning job.

[21] On 9 December 2004 Mr Clarke was interviewed by the occupational therapist. The therapist reviewed Mr Clarke's pain and medical history with him. After the interview she informed Mr Clarke she was not comfortable supporting his return to boning work given the physical demands of the work tasks and his previous injury claims of epicondylitis and carpal tunnel syndrome. Mr Clarke informed the therapist he wished to discuss the matter with his union.

[22] The therapist Ms Fiona Vaughan produced a report which concluded Mr Clark should not perform "A" grade boning work and suggesting that a second opinion from an occupational specialist be obtained. The therapist wrote:-

*/ am concerned however that given Warren's history of claims involving both upper limbs and the highly upper limb demands associated with his job tasks that Warren is placing himself at risk of further upper limb problems should he resume boning work. I do not believe it is an ideal job position for him and query whether it is advisable that Warren be supported in returning to boning work.*

[23] The therapist did not provide a copy of the report and written opinion to Mr Clarke on the basis it had been requested by the employer. Mr Clarke did not give his consent for a further specialist review.

[24] Ms Watson later advised Richmond it could not prevent Mr Clarke from performing "A" grade boning work. Mr Williams repeated his concern about Mr Clarke reinjuring himself and says that he then suggested an independent specialist be retained to review the therapist's report. He also says he informed Ms Watson he was not particularly concerned about carpal tunnel abut rather, reinjury in the form of sprains/strains that Mr Clarke had suffered previously.

[25] Since November 2004 Mr Clarke has largely worked on "C" grade work. From March 2005 he has occasionally preformed "B" Grade work. His boning work was "A" grade work remunerated at \$24.14 per hour. "C" grade work is remunerated at \$17.31 per hour. Mr Clarke calculates that he has lost about \$273.24 per week because of the lower graded work he has been directed to perform instead of his "A" grade boning work. He says he cannot support his family on "C" grade pay.

[26] Mr Clark is aggrieved with the therapist's conclusion and Richmond's refusal to permit him to perform "A" grade boning work. He says he has received a medical clearance. He believes he should be free to complete his boning work. He does not accept he is incapacitated and wishes to return to his boning work. He says he feels he has been penalised for early reporting of his injuries.

[27] Mr Williams tells the Authority Mr Clarke has not suffered any injuries while performing "B" and "C" grade roles since January 2005.

[28] He also says Richmond has embarked on a new health and safety strategy since February 2004 known as Project Zero. It aims to achieve a total incident rate of zero by the end of the 2007/2008 season. He informs the Authority the meat industry has and remains one of the worst performing industries for health and safety in New Zealand. He says Richmond is looking to apply safety first in all areas of its business.

[29] Mr Williams defends Richmond's approach with Mr Clarke and says it is entirely consistent with its overall business strategy and conforms with good practice and injury prevention.

### **The merits**

[30] The Collective provides for all employees to be graded A, B or C according to job requirements and their skills. Each grade has an applicable pay rate with A Grade paying the highest rate.

[31] It is submitted for Mr Clarke that while the clause provides that each employee will have a grade, there is nothing in the Collective specifying that having been assessed and started work on a particular grade, that the employer is entitled to

change the grade of an employee. It is submitted that Mr Clarke has a personal grievance for an unjustifiable action by his employer. It is said that Richmond has not discharged its burden to show that the action it took in respect of Mr Clarke's employment as an "A" Grade boner was justifiable.

[32] For Richmond, it is said that the company accepts that it refused to allow Mr Clarke to return to "A" Grade boning work on 2 November 2004. It is submitted the medical clearance came as a surprise but it nonetheless felt it had to act immediately to prevent further injury.

[33] In its defence, Richmond says it contacted Ms Watson to discuss its concerns. It says Ms Fiona Vaughan's involvement thereafter was the consultation with Mr Clarke that was required. It further says that Mr Clarke was not disadvantaged by the timing of this consultation.

[34] In relation to Dr McLeod's report of July 2004, Richmond says the doctor's report relates to carpal tunnel injury and was not an assessment of Mr Clarke's ability to return to work in light of the injury history he had. Richmond further submits Dr McLeod's report was of limited relevance because the boning room underwent a change in set up that Dr McLeod was unaware of since his time as the company doctor.

[35] Richmond says Mr Clarke refused to permit a specialist assess his ability to undertake the "A" Grade boning work. As a result, Richmond says it was reasonable for it to rely on Fiona Vaughan's report in which she could not support Mr Clarke's return to the role. The submission is summarised that it was inappropriate for it to rely on a medical certificate provided by Mr Clarke's doctor, the doctor being unaware of the changed work plant and who was making an assessment of the carpal tunnel injury.

[36] There was no discussion with Mr Clarke about his previous injury history. I have no doubt that if he was asked about it he would have said what he tells the Authority - that the injuries are largely a result of the work chain proceeding too fast.

[37] Richmond concedes it made its decision in November 2004 before consulting with Mr Clarke. It made a decision he would not be performing "A" Grade work. It told him this and never invited

him to discuss the matter. Its decision was made without input from Mr Clarke. Mr Davies was not concerned to have Mr Clarke's input in the matter. Richmond made a decision before suggesting Ms Vaughan's involvement. If her involvement was consultation, the decision had already been taken.

[38] Richmond never told Mr Clarke of its concerns before it made its decision that he would not be performing "A" Grade boning duties. I fail to see any reason why it could not have consulted with him about its concerns before he returned to work. It clearly had its concerns, but I remain unconvinced they were well founded.

[39] Nor do I accept Richmond's criticism of Dr McLeod's report. He was previously the company doctor and he had specific awareness of the operation generally and of Mr Clarke. His report of July 2004 stated:-

*/ would anticipate that he should be able to return to his fulltime boning role in some 6-8 weeks.*

And later:

*Therefore, in my view, it is reasonable to return him to boning and to see how he goes.*

[40] But Richmond decided it would not accept that position. It decided before Mr Clarke returned to work that he was not going to be performing "A" Grade boning work. I agree with Mr Mitchell - Richmond had no medical evidence at all to justify its rejection of Dr McLeod's report.

[41] At no stage was there ever any discussion with Mr Clarke about his previous injuries. Mr Clarke had a medical clearance but Richmond decided it knew better. Mr Clarke was not permitted to return to boning work but was directed to perform other duties at reduced remuneration. That was a disadvantage to Mr Clarke. He has suffered as a result of this decision.

[42] Mr Clarke is designated under the Collective as a "A" Grade worker. There is no scope to alter the classifications. As such, if Richmond deemed Mr Clarke was unable to perform the tasks he was contractually bound and entitled to, he was either incapacitated or surplus to requirements. In either event, there are further enquiries and a consultative process required. Neither consultative process occurred.

[43] The result is that Mr Clarke was entitled to retain his "A" Grade classification. There was no contractual licence reserved to Richmond to reclassify Mr Clarke and subject him to the disadvantage he has suffered. Mr Clarke was entitled to be paid according to his contractual classification.

[44] The manner in which Richmond decided to change Mr Clarke's contractual classification was unfair. It constituted a breach of the duties owed to Mr Clarke. Mr Clarke has suffered loss as a result of the breaches. He is entitled to be reimbursed

the reduced grading he has been paid since November 2004. I order Richmond Limited to pay to Mr Clarke reimbursement of lost wages since November 2004. I direct the parties to consult and attempt to reach an agreement between them as to the quantum. If they cannot agree they have 28 days to request the Authority determine the matter.

[45] I accept that Mr Clarke has suffered hurt and humiliation. Having regard to his evidence and the nature of the grievance I make a modest award. I order Richmond Limited to pay to Donald Clarke the sum of \$5,000.00 as compensation.

[46] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Mitchell is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Waddel is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson

**Member of Employment Relations Authority**

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