IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 328
3148384

	BETWEEN	ROBERT ELLER Applicant
	AND	COASTAL CABINS LIMITED First Respondent

Member of Authority:	Pam Nuttall
Representatives:	Kirby Kleingeld, counsel for the Applicant Jeremy Ansell, counsel for the Respondent
Investigation Meeting:	20 May 2022 at Auckland
Submissions received:	26 May 2022 from Applicant 2 June 2022 from Respondent
Determination:	18 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Robert Eller was dismissed from his employment as a carpenter with Coastal Cabins Limited (CCL) on 22 February 2021 on the grounds of medical incapacity. Mr Eller claims he was unjustifiably dismissed from his employment and unjustifiably disadvantaged because the employer failed to provide reasonable time off work to recover from his injury.

[2] Mr Eller also claims that CCL has breached its employment agreement with him and breached its statutory duty of good faith. He claims penalties under the Employment Relations Act 2000 (the Act) for both these breaches.

[3] CCL denies that Mr Eller was unjustifiably dismissed or disadvantaged and rejects claims that it has breached its contractual or statutory duties.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Mr Eller and his partner Ms Chantel Smith and from Mr David Grant, CEO of CCL at the time Mr Eller was dismissed and Mr Scott McCauley, foreman and immediate manager of Mr Eller's work. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

(a) Was Mr Eller unjustifiably dismissed – that is was the decision of CCL to dismiss him on the grounds of medical incapacity and how that decision was reached what a fair and reasonable employer could have done in all the circumstances at the time?

(b) Was Mr Eller unjustifiably disadvantaged by CCL failing to allow him sufficient time off work to recover from his injury?

(c) Was there a breach of clauses 16.15 and 16.16 of the individual employment agreement?

(d) Was there a breach of the statutory good faith duty under s4(1A)(c) of the Act? That is, did CCL fail to provide Mr Eller with access to all relevant information about the decision to terminate his employment and

fail to allow him an opportunity to comment on that information before a decision was made?

(e) If CCL's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:

- lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and
- compensation under s123(1)(c)(i) of the Act

(f) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Eller that contributed to the situation giving rise to these grievances?

(g) If there were breaches of the employment agreement or the statutory duty of good faith should penalties be awarded?

(h) Should either party contribute to the costs of representation of the other party.

Background

[7] Mr Eller was employed by CCL as a permanent employee from 27 April 2020 until he was dismissed on 22 February 2021. He was engaged as a carpenter in CCL's business of building portable cabins and was paid an hourly wage of $33.00.

[8] On 16 January 2021, Mr Eller was injured in a non-work-related accident and sustained a lumbar sprain. On 20 January 2021, Mr Eller visited his general practitioner and was signed off work for 7 days and referred to a number of specialists including a physiotherapist and radiologist. On 20 January 2021, he emailed Mr Grant and Mr McAulay as follows:

> Hi Dave and Scott,
>
> So, I have been to the osteo yesterday and the doctor today. Had some xrays (showing some shrinkage in lower back discs and signs of arthritis in RH hip) and trying to get an appointment with specialist regarding the pain in my hip and right leg.
> Got some tramadol at last hope they take the edge off, can't even walk more than 20 or 30m without having to rest with the pain.
>
> I have attached the medical certificate.

This medical certificate stated that Mr Eller was unfit to work for an initial period of seven days.

[9] At 8:32am on 27 January 2021, Mr Grant phoned Mr Eller. The medical certificate issued on 20 January 20221 had now lapsed. Mr Eller's phone records, provided to the Authority subsequent to the investigation meeting, apparently indicate that the duration of the call was 3 minutes. This was the only phone conversation between Mr Grant and Mr Eller referred to in the written witness statements lodged with the Authority or mentioned during the investigation meeting. Mr Eller's phone records do appear to show another phone call with Mr Grant on 3 February 2021. Neither Mr Grant nor Mr Eller referred to any phone call on this date in their evidence and Mr Eller's statement, supplied with the phone records after the investigation meeting, is that he has no recollection of this call taking place. He states that he cannot rule out that it was an inadvertent call that went to answer phone. I asked Mr Grant during the investigation meeting if the phone call on the 27 January 2021 was the only phone call with Mr Eller about his injury and he confirmed that this was the case. I find, in the absence of any other supporting evidence and statements to the contrary, that I cannot rely on the phone record to show that there was any phone conversation between Mr Grant and Mr Eller on 3 February 2021.

[10] During the phone call on 27 January 2021, Mr Eller's account is that he informed Mr Grant that he had been to see his doctor and was potentially going to be off work for a further 6 weeks. However, he was unsure of the exact timeframe for his recovery as he had only just sustained the injury and would have to attend further appointments with his specialist to see how the injury healed and responded to treatment. He reports Mr Grant as stating that he was concerned about the length of this absence and that Mr Eller was needed at work.

[11] Mr Grant's account of the phone call in his witness statement was that they talked about the injury and about what would happen next.

> I stated that we would need to find out how serious the injury was before we could make a decision. I stated that, in the worst-case scenario, if the injury was permanent or took a long time to heal, then there was a possibility that Mr Eller could lose his job. Mr Eller understood this and acknowledged it.

[12] It is clear from his responses to questions during the investigation meeting that Mr Grant believed this was a longer phone call than the 3 minutes noted in Mr Eller's phone records. Mr Grant relies on this short phone conversation as notification to Mr Eller that termination of his employment was a possibility of which he had been advised.

[13] Following the phone call on 27 January 2021, Mr Eller sent an email to Mr Grant attaching an ACC Medical Certificate from his doctor advising that he would not be fit to resume any work duties for a period of 60 days (from 26 January 2021 to 26 March 2021).

[14] At 12.56pm Mr Grant replied to Mr Eller via email asking for further information regarding his injury and proposed return to work:

> I'm concerned that your back injury may mean you can't work for 60 days as it says in the medical certificate.
> Can you give me an indication as soon as possible about the likely timeframe for getting information on the injury as we discussed, and once you get the information, the likely timeframe that the injury means you wont be able to work?

[15] At 13:13pm Mr Eller responded:

> I understand that is a long time frame and I was a bit put back when they said that. After the physio session yesterday it was their opinion that it was the femoral nerve that is causing the issue. Until I manage to get hold of the specialist and obtain an appointment I do not know how long it will take. The physio said it could be up to 6 weeks before I am back to full work duties, but that is just an opinion…

[16] In a further email to Mr Grant at 1:26pm, Mr Eller wrote:

> Managed to get through to another branch and the earliest I can get is the 16th of Feb! I am going to call my GP to see if there is anyone else I can try so I can be seen sooner.

[17] On 14 February 2021, Auckland moved to Covid Alert Level 3 and Mr Eller was advised that the appointment he was scheduled to attend with the specialist on 16 February 2021 would be conducted via video conference. Because Mr Eller attended this appointment remotely the specialist was unable to physically examine his injury and provide a prognosis on when he would be fit to return to work.

[18] On 17 February 2021, Mr Grant emailed Mr Eller:

> Hi Rob
> Can you give me a current update on your situation?

> Thanks
> Dave

[19] Mr Eller replied:

> Hi Dave
> I had a virtual specialist appointment yesterday due to lockdown. Basically he said keep doing what I'm doing which is zip and physio. They have made another appointment for a months time. So at this stage I am no further ahead…

[20] Following this communication, to which there was no response, Mr Grant's evidence was that "we took some time to review the matter before making a decision." Mr Grant identified those involved in the review as himself, Mr John Brown, Director CCL and the administration officer. Mr Grant's statement goes on to say that:

> [w]e decided that, if Mr Eller was unable to give Coastal Cabins a date, or at least some indication of a date for his return to work, and if this was not within a reasonable timeframe, that we were left with no alternative but to terminate his employment…We decided that termination, while not a decision to be taken lightly, was the only viable option in the circumstances as, for the foreseeable future, Mr Eller was unable to preform his key duties and could not even perform light duties."

[21] In the interim, Mr Eller had attended a more positive session with his physiotherapist on 19 February 2021. His evidence was that:

> She told me that my injury was improving, and we discussed my potential return to work on light duties. We agreed that she would start preparing her recommendation regarding this transition and I would be able to provide this to the Company to discuss the options moving forward. I expected that she would provide this to me in the next few working days.

[22] The decision to terminate his employment was communicated to Mr Eller by email on 22 February 2021

> Hi Rob
>
> I've gathered the information about some of the issues we've been discussing and also the timeframes around your back injury.
>
> Thanks for getting back to me about your back injury, we are sad to hear that you are still out of action for the foreseeable future and have our sympathy for what you must be living with, knowing how painful back injuries can be. We are sorry to inform you that as there is no definite date that you are able to return to work and you have been off work for a lengthy time already, the decision has been made to terminate the employment contract as we will need to find a replacement. We give you four weeks notice. Under the employment agreement, we are able to terminate the agreement if you're not able to resume your job in a reasonable time. This is covered under clause 16.15…

[23] Clause 16.15 & 16.16 of the individual employment agreement between Mr Eller and CCL is as follows:

> 16.15 If the employer believes on reasonable grounds that the employee is not able to do their job because of a condition, illness or injury, and will not be able to resume their job within a reasonable timeframe, the employer may end the employee's employer by giving at least four weeks' notice.
>
> 16.16 Before doing so, the employer will:
>
> - request medical details from the employee about their condition
> - consider any information provided within a reasonable timeframe together with any results from medical examinations they have asked the employee to take
> - meet with the employee to discuss their condition and timeframes for recovery.

[24] On 22 February 2021, Mr Eller contacted his physiotherapist to obtain further information which they had discussed during his previous appointment regarding his injury and his projected return to the workplace. On 24 February 2021 he received a letter which states:

> …We discussed in his last Physiotherapy session that we will begin taking him into the gym to begin his core stability work next week, if all going well, and continued to progress this over the next 4-6 weeks. He is signed off from work for another 4 weeks from what I understand which will give us time to begin and progress his strengthening as well as continue with his Physiotherapy. As Rob's job is quite physical, we discussed potentially starting on light duties, and slowly progressing back into normal duties, whether this is on reduced hours or not, but something he will need to discuss with his employer.

[25] This information was not communicated to CCL. By this time Mr Eller had received the email terminating his employment but Mr Grant's evidence clearly conveys his assumption that "Mr Eller was obliged to provide us with this information at the time he received it."

Was Mr Eller unjustifiably dismissed?

[26] Where a personal grievance has been raised, once the employee has established the fact that a dismissal has occurred, it falls to the employer to discharge the onus that the dismissal was justified. The statutory test set out in s103A of the Act requires the employer to establish objectively that the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[27] It is well established that an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work.[1] In *Barnett*, the Chief Judge said that:

> The law is that after a fair investigation, an employer may dismiss an employee justifiably where its reasonable needs cannot be met by an employee who is not fit and able to perform the work required and is not in a position to be able to do so within a reasonable time in all the circumstances.[2]

[28] However in order to meet the statutory test of justifiable dismissal the process followed by CCL in reaching its conclusion to dismiss Mr Eller must be what a fair and reasonable employer could have done in all the circumstances. The requirements of procedural fairness are not some process separate from determining the reasons for which an employer may dismiss. In relation to dismissal for misconduct the Court has stated that:

> An employer who has failed to give its employee an adequate opportunity of being heard prior to a dismissal…cannot be said to have any valid reason to reach a conclusion adverse to the employee and therefore is treated as if it had not reached it.[3]

[29] A fair and reasonable employer is expected to comply with its contractual and statutory obligations. These include the process set out in the individual employment agreement and the s 4(1A) good faith obligations. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law."[4]

Did CCL follow a fair process?

The employment agreement

[30] The individual employment agreement between Mr Eller and CCL requires at clause 16.15 that in order to end the employee's employment, the employer must have a belief on reasonable grounds that the employee is not able to do their job because of a condition, illness or injury, and will not be able to resume their job within a reasonable time frame. A reasonable belief is one based on objective grounds; this means it must be a belief that could be held by the ordinary reasonable employer.

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[1] *Canterbury Clerical Union v Andrew & Bevan* (1983) ACJ 875 (AC) at 877.
[2] *Barnett v Northern Regional Trust Board of the Order of St John* (2003) 2 ERNZ 730 (EmpC) at (35).
[3] *Madden v New Zealand Railways Corp* (1991) 2 ERNZ 690 (EmpC).
[4] *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (Empc) at 842 [65].

[31] Clause 16.16 specifies some specific behaviour which may assist in determining if this objective standard is met and includes a requirement to meet with the employee to discuss their condition and timeframes for recovery.

[32] CCL clearly considered such a meeting was either not feasible because of the covid lockdown conditions or was not necessary. However a virtual meeting by zoom or even phone call was a potential alternative to an in person meeting and would have facilitated discussion and consideration of timeframes. Mr Grant's evidence sets out that CCL did not consider the contractual obligation to meet with Mr Eller to be necessary:

> Although we did not meet in person with Mr Eller, we discussed at length his condition and timeframes for return, as outlined in my witness statement. There was no need to schedule a meeting to discuss matters that had already been discussed multiple times at length. Mr Eller was not unfairly prejudiced in any way by our failure to hold a meeting with him.

[33] The discussion "at length" referred to here however amounts to one (possibly fairly short) phone call and the email messages set out above. These exchanges could not fairly be characterised as discussions at length held multiple times nor do they provide any basis for determining if Mr Eller was or was not unfairly prejudiced. Mr Eller was entitled to have the situation of his imminent dismissal put to him and to have his response to this situation heard and considered. Even the scheduling of a meeting for this purpose would have been sufficient to alert him to the fact that his dismissal was under active and immediate consideration rather than being an eventual potential outcome of his situation.

[34] Mr Eller's witness statements and his responses to questions in the investigation meeting clearly demonstrated that he was not aware that dismissal was imminent and the communications between him and CCL do not provide any indication that this was the situation. Not complying with the requirements of the employment agreement to hold a meeting deprived CCL of further information from the physiotherapist but also deprived Mr Eller of the right to be heard before a decision to dismiss was made.

[35] Accordingly, I find that CCL breached clause 16.16 of the employment agreement and that this breach impacted a fair investigation of whether there were grounds to dismiss Mr Eller.

Statutory good faith duties

[36] The statutory good faith duty to consult prior to reaching a decision to dismiss is set out in s4(1A)(c) of the Act. Good faith required CCL to provide Mr Eller with access to all relevant information about the decision to terminate his employment and to allow him an opportunity to comment on that information before a decision was made. The crucial information which was not supplied to Mr Eller was that CCL had moved from enquiries as to his treatment and prognosis to an immediate consideration of his dismissal. As with the contractual breach, the failure to meet this good faith requirement meant that Mr Eller was unaware that his dismissal was "under review" by his employer and deprived him of the opportunity to comment and be heard before a decision was made.

Statutory test for justification

[37] Could the fair and reasonable employer have dismissed Mr Eller on the grounds of medical incapacity? The breaches of good faith and the employment agreement are deficiencies in the requirements for a procedurally fair process which mean that the decision to dismiss was premature and based on inadequate information. The employer had not heard, let alone fairly considered what the employee had to say before terminating his employment. This meant that the employer was unable to fairly gauge if there was any real prospect of Mr Eller being able to return to work at the date it decided to terminate his employment. The feasibility of options such as a graduated return to work had not been explored. CCL apparently believed that the pressure of the covid situation meant that the urgency of replacing Mr Eller's position in the work team precluded the need to observe the requirements of procedural fairness: "The short point is, however, that the pandemic, and the Government's response, did not act to suspend employee rights or employer obligations."[5] A substantively fair and justified result cannot be achieved without adherence to a fair process. Mr Eller was unjustifiably dismissed.

Was Mr Eller disadvantaged by CCL failing to allow him sufficient time off work to recover from his injury?

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[5] *Gate Gourmet New Zealand Limited v Sandhu* [2020] NZEmpC 237 at

[38] The Authority in investigating any matter "is not bound to treat a matter as being a matter of the type described by the parties and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described."[6] Mr Eller has raised a separate personal grievance for disadvantage in relation to the way in which CCL addressed the issues arising from his injury and consequent incapacity to attend work. Specifically, what is advanced is a failure to allow Mr Eller sufficient time off work to recover from his injury.

[39] I find that this matter has been addressed in considering Mr Eller's personal grievance claim for unjustified dismissal and make no finding that the unjustified actions of the employer also constituted the grounds for a separate claim of unjustified disadvantage.

Remedies

Lost wages

[40] The Act under s123(1)(b) permits reimbursement to an employee of a sum equal to the whole or any part of the wages or other money lost by the employee because of the grievance. Mr Eller has claimed an award of $2,786.76 which was calculated as the difference between what he would have earned from 24 March 2021 and 1 July 2021 in his position at CCL and the ACC contribution with which he was provided.

[41] However Mr Eller was not entitled to any payment from the employer while he was in receipt of ACC weekly payments. There was no contractual entitlement in Mr Eller's employment agreement to have the 80% of weekly payments from ACC "topped up" to 100% of his usual weekly earnings. This means that Mr Eller did not lose a part of his wages because of his unjustified dismissal.

[42] Accordingly I am unable to make any orders for reimbursement of wages.

Compensation

[43] Mr Eller seeks global compensation for humiliation, loss of dignity and injury to feelings in the sum of $30,000. I have found that Mr Eller was unjustifiably dismissed

[6] S160(3) Employment Relations Act 2000.

not that he was unjustifiably disadvantaged, but the written submissions for the applicant in any event appear to focus on compensation for the unjustified dismissal.

[44] Mr Eller describes the effect of the dismissal on him in terms of shock and disappointment at not being provided with an opportunity to discuss this with the company and being advised by email. He says:

> I felt blindsided by the decision as it had been made prematurely and without my input. It was very unsettling and I felt overwhelmed at that point in time….The unfairness of the situation really got to me. I was shocked by the sudden nature of my dismissal. I don't understand why the Company could not take the time to wait for the reports and further information from my medical professionals

[45] Both Mr Eller and his partner, Ms Chantel Smith, gave evidence as to the emotional and physical consequences of the dismissal on Mr Eller. Although these effects appear to have been considerable in terms of stress, emotional withdrawal and sleep deprivation, the predominant impact would seem to be in terms of hurt and loss of dignity. Ms Smith's evidence is that:

> Rob was clearly shocked and hurt by the decision. He was particularly shocked and upset at how he had been treated because he believed that he had a very good relationship with Dave. He told me that he felt betrayed and blindsided by the speed of the decision and the fact that they hadn't followed a fair process or had the opportunity to explore his return to work on light duties.

[46] Compensation for loss of dignity is perhaps more difficult to consider and quantify than the emotional stress of humiliation and injury to feelings. The corrosive effects of injustice on dignity and a sense of self-worth are less readily accessed than the physical manifestations of emotional stress but are nevertheless significant and real.

[47] In this situation an award is made under all three heads of compensation in the amount of $20,000.

Contribution

[48] In considering the question of contribution in a dismissal for medical incapacity account must be taken of the fact that, in contrast to misconduct for example, there is no fault by the employee. CCL's submissions have argued that "the applicant must shoulder some of the blame for the situation that developed and the dismissal".

[49] The blameworthy conduct alleged is that Mr Eller did not immediately notify CCL of his appointment with his physiotherapist on 19 February 2021, of discussions

with his partner about raising the possibility of a return to work programme or that he was awaiting advice from the physiotherapist as to the possibility of a return to work programme which had been discussed in appointment on 19 February 2021.

[50] These allegations are premised on two assumptions: that Mr Eller was aware of the on-going impact of that his absence was having and that there had been an agreement that he would provide timely updates on his prognosis and the outcomes of his medical appointments. While the Authority did not find any unwillingness on Mr Eller's part to share such medical information as he had available, no conclusive evidence to support these two assumptions was established.

[51] The physiotherapist appointment on 19 February 2021 was part of the on-going physiotherapy programme which Mr Eller had mentioned in his emails. The only reason why urgent notification as to this appointment and a possible back to work programme is at issue is because Mr Eller's dismissal was under consideration by CCL at this time – a fact of which Mr Eller was completely unaware and which CCL had not brought to his attention. A general indication one month prior that termination of employment was a potential outcome of Mr Eller being unable to return to work is not adequate notification that a decision to dismiss was being actively considered. It was perfectly reasonable for Mr Eller to wait for the physiotherapist report before providing information about the potential for discussing a return to work programme with CCL. The onus to conduct a fair investigation into Mr Eller's potential to return to work falls on CCL. Given that the CCL decision making process has been found deficient in this respect, it is unfortunate to suggest that Mr Eller was insufficiently timely or forthcoming in supplying information which CCL did not properly set out to obtain.

[52] These submissions also state that had CCL been aware of the physiotherapist's report and possible return to work arrangements "they may not have dismissed the applicant." This is contradicted by Mr Grant's affirmed written evidence that:

> It is unlikely that the receipt of this report would have changed our thinking about the feasibility of Mr Eller's ongoing employment with CCL given no precise timeframe for his return to work was communicated.

It would appear that the suggestion is being made that in not immediately providing information about the discussion with his physiotherapist Mr Eller in some way contributed to his own dismissal. This is compounded by CCL's apparent implication

that Mr Eller was blameworthy in not immediately contesting his dismissal to achieve its reversal.

[53] I find that there was no blameworthy conduct on Mr Eller's part which contributed to the situation giving rise to these grievances.

Penalties

[54] The applicant seeks penalties against CCL for breach of the employment agreement and breach of good faith. I have found that both these contractual and statutory duties have been breached. However, both breaches contribute significantly to a finding that CCL failed to act justifiably in dismissing Mr Eller. These breaches of procedural fairness meant that CCL's actions and how CCL acted where not what a fair and reasonable employer could have done in all the circumstances and remedies have been awarded accordingly. Given the nature and extent of the breaches, in my view a penalty in addition to these remedies view would be disproportionate in all the circumstances.

Summary:

[55] Mr Eller was unjustifiably dismissed.

[56] There is no separate finding of unjustified disadvantage.

[57] There was a breach of clause 16.16 of the individual employment agreement.

[58] There was a breach of the statutory good faith duty under s4(1A)(c) of the Act.

[59] Mr Eller is to be paid compensation under s123(1)(c)(i) in the sum of $20,000.

[60] No penalties are awarded for the contractual and statutory breaches.

Costs

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[62] If they are not able to do so and an Authority determination on costs is needed Mr Eller may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum CCL would then have 14 days to lodge any reply memorandum.

Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[63] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[64] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[7]

Pam Nuttall

Member of the Employment Relations Authority

[7] <https://www.era.govt.nz/determinations/awarding-costs-remedies>