

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 96
5441841

BETWEEN NEVILLE THOMAS KEYS
 Applicant

A N D NEW ZEALAND STEEL
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: A M McNally, Counsel for Applicant
 P Skelton QC, Counsel for Respondent

Submissions Received: 28 January 2014 from Applicant
 31 January 2014 from Respondent

Date of Determination: 24 February 2014

INTERIM DETERMINATION OF THE AUTHORITY

- A. The Authority declines to grant the application to exercise its discretion to call for further medical evidence under s160(1)(a). The respondent may renew its application at a later stage if the evidence becomes relevant following the briefing of its expert medical witness and the records are not available elsewhere or by consent.**

Employment relationship problem

[1] This is the written record of the reasons for the above determination. The respondent, New Zealand Steel Limited, applies for an order pursuant to s.160(1)(a) of the Employment Relations Act 2000 (the Act), that the applicant is to provide to the respondent by 7 February 2014 copies of any information and documentation within his possession or control as described in Schedule A. The information sought

is the medical evidence pertaining to 13 injuries suffered by the applicant between 23 July 1997 and 12 August 2013 including any consultation notes, specialist referrals, hospital discharge summaries, reports from specialists and email correspondence relating to each of the injuries. The parties have resolved the remaining information sought in the original application.

[2] The respondent denies this is an application for general discovery. It stated that the medical records are relevant to the remedy of reinstatement as it will assist the Authority to assess whether he will suffer future injuries because they will establish a pattern. It states that it is necessary for the disclosure of medical records to properly prepare and brief its own evidence. No expert has been briefed as yet.

[3] It does not know whether all of Mr Key's medical records are held at the New Zealand Steel medical centre. It undertakes to meet the reasonable costs of obtaining and copying the records from his family GP in the event that the medical centre does not hold all relevant records.

[4] The applicant opposes the application because it is a "*thinly-veiled attempt*" to obtain general discovery, an outcome that is beyond the jurisdiction of the Authority to require. Section 160(1)(a) of the Act is not a general power to order one party to make discovery of documents to another and care is required to ensure the Authority stays within its jurisdiction.

[5] The applicant denies the information sought is directly relevant to these proceedings. New Zealand Steel's medical centre records have been disclosed. The information sought are Mr Keys' family doctor's records about 13 separate events spanning a period of 16 years. It is costly and time consuming to obtain. The crux of this case is whether the respondent had an adequate basis to terminate the applicant's employment due to continuing suffering of further back injury. The applicant can disclose the information on which it relied when presenting its evidence. An evaluation of the likelihood of the applicant suffering further injuries in the workplace requires expert medical evidence. It is not open for the Authority to substitute its non-specialist opinion for that evidence.

Issues

[6] There is a sole issue for determination, namely whether the Authority should call for the evidence or information of the Applicant's medical records set out in this application.

Determination

[7] The Authority may, in investigating any matter, call for evidence and information from the parties or any other person (s160(1)(a)). At this stage of the proceeding, both parties have only filed a statement of problem and a statement in reply. No other evidence or other material is before the Authority.

[8] The touchstone for the Authority exercising its power to call for evidence and information from parties is relevance.

[9] None of the medical records that are described in Schedule A appear to have been before the Respondent at the time it made its decision to dismiss except by way of specialist report. Accordingly, the information is not relevant to the substantive determination of unjustifiable dismissal.

[10] Its relevance to the issue of remedies is equivocal. The Authority would be better assisted by an expert medical opinion on this applicant's current ability to undertake work. The parties may be able to agree on a joint expert or the exchange of expert reports well in advance of hearing to enable the experts to confer and identify areas of agreement and disagreement for determination by the Authority. Until an expert has been briefed and the information required for them to complete their report known, there is little point at this juncture to consider calling for the medical evidence sought.

[11] This evidence may already be available to the respondent through the New Zealand Steel medical centre. The first port of call ought to be for the medical expert to be briefed and to consider the records available to them.

[12] In the circumstances, the Authority declines to grant the application to exercise its discretion to call for further medical evidence under s160(1)(a). The respondent may renew its application at a later stage if the evidence becomes relevant

following the briefing of its expert medical witness and the records are not available elsewhere or by consent.

[13] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority