

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 51
5560488

BETWEEN PIRIHI KAMIZONA
 Applicant

A N D NORSKE SKOG TASMAN
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Tim Oldfield, Counsel for the Applicant
 Kylie Dunn, Counsel for the Respondent

Investigation Meeting: 22 February 2017 at Rotorua

Submissions Received: 5 December 2016 and 22 February 2017 from the Applicant
 22 December 2016 and 22 February 2017 from the
 Respondent

Date of Oral Determination: 23 February 2017

Date of Written
Determination: 24 February 2017

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

[1] I previously determined that the Applicant, Mr Pirihi Kamizona, had been unjustifiably dismissed by the Respondent, Norske Skog.¹ In that determination I reserved remedies to a later stage, following further medical information and driving tests being obtained.

[2] Mr Kamizona is seeking reinstatement, lost wages, lost benefits and compensation in relation to hurt, humiliation and injury to feelings pursuant to s.123(1)(c) of the Employment Relations Act 2000 (the Act).

¹ [2016] NZERA Auckland 26

Remedies

Reinstatement

[3] In determination [2016] NZERA Auckland 26 I set out at paragraph [139] that reinstatement was subject to two conditions being satisfactorily completed:

1. *Mr Kamizona is to undertake a practical driving test conducted to strict requirements and in his normal working environment with Dr Gourlay's input to the tester prior to the test to ensure that strict requirements are followed. I consider that the NZTA may be able to either conduct such a test, or make a recommendation as to an appropriate organisation with the expertise to carry out such a test. The written results of the practical driving test must also include the NZTA requirements of any licence conditions imposed relating to any vehicle Mr Kamizona is allowed to drive.*

In the event that Mr Kamizona's Class 4 and/or Forklift OSH licences are not validated, Mr Kamizona cannot meet the required competencies of an MSO pursuant to the Collective Agreement and cannot therefore be reinstated.

2. *A second medical opinion on Mr Kamizona's fitness to carry out his duties as an MSO at his current place of work is to be obtained from an independent medical specialist with expertise in the particular circumstances of Mr Kamizona's medical problems. The medical specialist is to be provided with full details of Mr Kamizona's normal working environment, and afforded a site visit if he or she considers this to be necessary prior to formulating an opinion. The opinion should also include any comment relating to the results of the practical driving test.*

[4] There is no dispute between the parties that Mr Kamizona has satisfactorily completed the first condition. He has undertaken a practical driving test, and the NZTA, with full knowledge of his medical issues, has confirmed that Mr Kamizona may continue to hold his heavy vehicle driving licences.

[5] With regard to the second condition, Dr Black, Specialist in Occupational Medicine, was the agreed: *independent medical specialist with expertise in the particular circumstances of Mr Kamizona's medical problems*” appointed.

[6] In a report dated 12 July 2016 Dr Black advised that he would not certify Mr Kamizona as medically suitable for a commercial vehicle licence.

[7] Whilst the Applicant accepts that Dr Gourlay, Company Medical Officer for Norske Skog, and Dr Black would not clear Mr Kamizona as fit to work as an MSO, it submits that such a position is inconsistent with the provisions of the collective agreement between Norske Skog Tasman Limited and the PPWU (the Collective Agreement).

[8] The Collective Agreement specifies at Appendix C only that an MSO must hold a class 4 vehicle licence and OSH forklift licence, conditions that Mr Kamizona fulfils.

[9] In setting the two conditions for reinstatement in my determination I was mindful of the particular environment presented by Norske Skog and the safety-sensitive services provided by MSOs which are frequently carried out in confined areas with people and equipment in the vicinity, and the need to ensure that if reinstated as an MSO, Mr Kamizona could carry out those duties safely.

[10] Although in setting the two conditions in my determination I had not envisaged the development of the further condition, the second medical opinion from Dr Black has identified the CKD5 which has major significance in respect of Mr Kamizona's ability to safely carry out the duties of an MSO.

[11] I find that Mr Kamizona has not fulfilled both conditions which were required to be fulfilled in the determination.

[12] I determine that Mr Kamizona is not to be reinstated by Norske Skog.

Compensation for Injury to Feelings, Hurt and Humiliation under s 123 (1) (c) (i).

[13] Mr Kamizona was employed at Norske Skog for 38 years. It is submitted that the issue for Mr Kamizona is not humiliation as such, but more particularly injury to feelings and loss of dignity.

[14] In Determination [2016] NZERA Auckland 26 I found that the decision to dismiss Mr Kamizona was substantively justifiable, but unjustifiable on procedural grounds.

[15] Mr Kamizona's evidence is that Ms Turpie's communication in a public area that his continued employment was in jeopardy had a profound impact on him, leading to concern about his future and to his having to take stress leave.

[16] Mr Kamizona has a large whanau but said that the impact upon him was such that he felt unable to discuss the situation regarding his dismissal with them, and withdrew from contact with them.

[17] Additionally Mr Kamizona has felt a need to occupy himself away from Kawarau, which has led to a separation from his wife Cecilia for the first time in 35 years.

[18] Mr Kamizona said that he has suffered a loss of dignity and mana resulting from an inability to provide for his whanau to the same extent as he was able to do prior to his dismissal; and he has been affected by the loss of dignity inherent in his driving vocation and the loss of social connections at work.

[19] I do not underestimate the impact that losing his long-standing employment in such a close community and family environment has had upon Mr Kamizona, nor the effect on his confidence and mana.

[20] I also accept that Norske Skog was at fault in regards to Ms Turpie's communication, in not obtaining a second medical opinion on Mr Kamizona's fitness to drive prior to making the dismissal decision when advised by Dr Gourlay that he considered an external second opinion necessary, and in not offering Mr Kamizona a practical driving test.

[21] However these were procedural defects, and in my I found that the decision to dismiss had substantive justification. That substantive justification arose from medical issues which were not the fault of Mr Kamizona, but nor were they the fault of Norske Skog which had a responsibility to ensure the safety of all its employees at work.

[22] In all the circumstances I determine that Norske Skog is to pay Mr Kamizona the sum of \$15,000.00, pursuant to s 123(1) (c) (i) of the Act.

Reimbursement of Lost Wages

[23] I found Mr Kamizona's employment to have been unjustifiably terminated by Norske Skog with effect from 12 June 2015. Mr Kamizona said that he tried to mitigate the effects of the loss of his employment by undertaking alternative employment at Norske Skog and by looking for one alternative job.

[24] The lack of procedural justification arose in part from Norske Skog's failure to obtain a second medical opinion.

[25] It was Dr Gourlay's opinion that Mr Kamizona was unfit to drive as an MSO. That opinion took into consideration Mr Kamizona's eye condition and his diabetes. In Dr Black's report he notes that Mr Kamizona's optometrical examination: "*finds vision that meets the required standards (if monocular vision is accepted) for private and professional driving.*". He also finds that: "*With regard to the diabetes mellitus, this appears to be well controlled*". These two issues are not considered to disqualify Mr Kamizona being cleared as fit for work as an MSO.

[26] It is a further condition, CKD5, which Dr Black states in his opinion means Mr Kamizona: "*should not be certified as fit to drive a heavy commercial vehicle*". Dr Black reached that opinion after consideration of: "*ongoing reviews by renal physicians*".

[27] Whilst Dr Gourlay was cognizant of a significant deterioration in Mr Kamizona's renal function and that he had been referred to a renal physician, the extent of that deterioration had not been identified to the extent available to Dr Black almost a year later.

[28] Moreover the decision made by Norske Skog to dismiss as identified in the letter of termination dated 3 June 2015 was based solely upon a vision problem, and it has now been ascertained that Mr Kamizona's vision problems are not a bar to his undertaking MSO duties.

[29] I determine that Mr Kamizona is to be awarded lost wages at the gross rate of pay he would have earned as an MSO for the period from his dismissal on 12 June 2015 until the second medical report was obtained from Dr Black on 12 July 2016 pursuant to s 128(3) of the Act.

[30] From that amount is to be deducted the sum of the gross monies earned by Mr Kamizona when he was employed by Norske Skog during that period.

Holiday Pay

[31] I determine that Mr Kamizona is to be awarded holiday pay entitlement for the period from his dismissal on 12 June 2015 until the second medical report was obtained from Dr Black on 12 July 2016 pursuant to s 25 of the Holidays Act 2003.

[32] From that amount is to be deducted an amount equivalent to the holiday pay paid to Mr Kamizona on a 'pay-as-you-earn' basis during the period he was employed by Norske Skog.

Lost Benefits

[33] Mr Kamizona was entitled to benefits including:

- superannuation contributions under clause 26 of the applicable Collective Agreement and the Tasman Kaingaroa Employees Retirement Trust Deed;
- Death and disability cover and medical insurance under clause 27 of the applicable Collective Agreement and the TKERS Deed;
- Transport Allowances under clause 24 of the applicable Collective Agreement ; and
- On-Call Allowance under clause 24 of the applicable Collective Agreement.

[34] I determine that Mr Kamizona is to be awarded lost benefits for the period from his dismissal on 12 June 2015 until the second medical report was obtained from Dr Black on 12 July 2016.

[35] From that amount is to be deducted an amount equivalent to the benefits received by Mr Kamizona during the period he was employed by Norske Skog.

[36] The parties have agreed, and I would anticipate, that they can resolve the amounts to be paid. If not, leave is reserved to return to the Authority

Contribution

[37] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[38] Mr Kamizona was not at fault in the situation which arose solely from the development of medical issues and which resulted in the termination of his employment.

[39] I note that Mr Kamizona did not assist the job seeking process by requesting a reference from Norske Skog or providing a full explanation for the reason for his dismissal via the provision of my determination on that matter; however I also take into consideration

the fact that Norske Skog is the largest employer within Kowarau and alternative employment is not easily obtainable in that limited area, especially for a man of Mr Kamizona's age.

[40] There is to be no deduction from the remedies awarded on the basis of contribution.

Costs

[41] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority