

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 425/08
5110891

BETWEEN BRENT KERRY
 Applicant

AND TAURANGA FOOD
 WAREHOUSE 2002 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Mark Nutsford, Advocate for Applicant
 Stephen Clews, Counsel for Respondent

Investigation Meeting: 25 September 2008 at Tauranga

Submissions Received: 20 October 2008

Determination: 15 December 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Brent Kerry, says that he was unjustifiably dismissed from his position as a shelf stacker at Tauranga Food Warehouse 2002 Limited. Mr Glenn Cotterill, the sole director and owner of the respondent, accepts that there was a dismissal but denies that it was unjustified.

[2] On 6 February 2004, Mr Kerry suffered an injury at work. From 2004 until the middle of 2007 the company tried to manage Mr Kerry's return to work. The company had no light duties role within the stores operation for which Mr Kerry was qualified. In order to give him every opportunity to regain his health and return to full time employment, the light duties component of other workers' jobs were passed to Mr Kerry. That meant that his co-workers were denied the opportunity to do the lighter work themselves. Mr Cotterill said there were health and safety implications for those workers and that was something that could not be ignored forever.

[3] The problem was compounded by the fact that Mr Kerry was only able to work part time and was resistant to working longer hours and during times that best suited the operation of the business, that is, early in the morning. Mr Cotterill said it was only when it became clear that there was no realistic prospect of Mr Kerry returning to his position, even in the medium term, that his employment was terminated.

[4] In October 2004, Mr Cotterill wrote to Mr Kerry pointing out that he needed information regarding his return to work otherwise he would have to consider terminating his employment. In order to allow a progressive return to his position, a graduated return to work programme was commenced on 8 November 2004. The programme was managed by Ms Raewyn Stott who is an occupational therapist. Ms Stott produced regular reports. In summary, the reports show that Mr Kerry's condition improved to a point but despite surgical interventions was not resolved. A recommendation made in May 2007 was that Mr Kerry either try and renegotiate the terms of his employment to allow him to continue working reduced hours doing light duties, or that ACC assist him to find a more suitable position elsewhere.

[5] On 6 June 2007 a meeting was held with Mr Kerry to discuss the recommendation. Concern was expressed to Mr Kerry that there did not seem to be a plan or any surety regarding his return to his former role on a full time basis without restriction. Mr Kerry's response was that he had a further meeting with his specialist scheduled and that he would then provide an update.

[6] On 3 July 2007, a meeting was held with Ms Kirsty Connell, a health advocate who had been asked by ACC to review the applicant's status. Ms Connell agreed to complete a full review on 5 July and to make a report. The report was dated 31 July 2007.

The termination meeting

[7] On 7 August 2007, Mr Cotterill met with Mr Kerry, Ms Connell and Ms Norris who was Mr Kerry's ACC case manager. It appears that the meeting of 7 August came about as the result of a recommendation by Ms Connell in her report dated 31 July 2007. Ms Connell said:

It is also recommended that a meeting will be held with the employer ACC case manager claimant and myself to discuss the current

situation options and that such is scheduled for Tuesday 8 August at 11.30am.

[8] Mr Kerry was told about this meeting by Ms Norris, not by his employer. He understood it was to talk about extending his hours and did not understand that it could entail termination of his employment.

[9] Mr Cotterill's notes of the meeting state that the purpose of the meeting was "To discuss the current situation regarding Brent's shoulder injury, and to decide "where to from here".'

[10] A copy of the 31 July 2007 report was provided to Mr Kerry at the meeting. Under the heading *Summary and Recommendations*, Ms Connell said:

Given Brent's current functional limitations, he has significant difficulty fully performing all aspects of his current work tasks, specifically those requiring heavy lifting and overhead reaching. Employer has noted in previous discussions that there are no alternative or light duties available elsewhere in the supermarket.

From an economic perspective there are no options for significant modification of work duties or adapted equipment that would enable Brent to adequately perform these tasks. It is also not recommended that he increase his current hours due to significant difficulty with current regime, let alone increasing the duration of activities.

As such, it is recommended that at present Brent continue to limit his current work tasks to those that fall within the current functional limitations, i.e. those that do not require using left arm above chest height, heavy lifting, with sustained, or forceful repetitive activity of his left upper extremity.

[11] Mr Cotterill said that at the meeting he indicated that the matter had gone on long enough and that 3½ years on light duties was far too long. He said the company had worked closely with Mr Kerry and ACC to get him back to full duties and full time employment and that to his knowledge there was no light duty work that would suit Mr Kerry or that they could retrain him to do. Mr Cotterill also said that he did not think it was fair to the other staff members for Mr Kerry to have all the light duty work when light duties was intended to allow all fill staff to have some rest periods during their heavy work.

[12] Mr Kerry said he felt that he was getting better slowly, he did not know what he wanted to do, and he would prefer to stay on light duties and was happy to continue doing that. However he would not be able to do any heavy lifting. He did

not see any possible improvement in the medium term that would enable him to return to full duties.

[13] Mr Cotterill concluded by saying he would review the situation and during the course of the next week would put in writing a letter to Mr Kerry and inform ACC and Ms Connell exactly what the company intended to do.

[14] Mr Cotterill said he reached a conclusion that Mr Kerry's position could not be left open indefinitely. In reaching that decision, he took into account Mr Kerry's own view, which was supported by the occupational therapist, that he could not see any prospect of returning to full time work even in the medium term. He therefore decided to terminate Mr Kerry's employment. He prepared a letter dated 13 August confirming that decision.

[15] As Mr Cotterill was not available to meet with Mr Kerry at the next meeting, the meeting was conducted by the store manager and personal assistant, Mr Jimmy Heal, who handed the termination letter to Mr Kerry. Mr Kerry was not permitted to work out his notice period. Mr Cotterill said he thought that had been his decision based on a desire to avoid any possible arguments.

Complaint issue

[16] Mr Kerry feels very strongly that his employment was terminated because he made a complaint about a manager, Mr Justin Nichols. While I accept the strength of that feeling, I do not accept that the termination of Mr Kerry's employment had anything to do with the complaint he made about Mr Nichols. Mr Cotterill was handling that matter separately.

[17] The documents and the oral evidence clearly established that the two processes were quite separate. Furthermore, the concerns regarding the continuation of Mr Kerry's employment had arisen prior to his making a complaint and organising a petition about Mr Nicols.

Decision

[18] Although this meeting resulted in the termination of Mr Kerry's employment, Mr Kerry was not given any opportunity to have a representative present at the meeting. It was clear to me from hearing Mr Kerry that he would have benefited from

a representative during the course of the meeting on 7 August. The 7 August meeting was not convened by the employer to discuss a possible termination of employment. If Mr Cotterill intended a meeting for such a purpose he should have notified Mr Kerry about the meeting and ensured that Mr Kerry was aware that termination was a possibility. Instead, Ms Norris from ACC provided the notification of the meeting.

[19] In the circumstances, the company should have convened a separate meeting after the meeting with ACC and the occupational therapist and discussed the possibility of the termination of his employment with Mr Kerry and the representative.

[20] The termination letter refers to “The purpose of our meeting [7 August] was to review your long standing injury and to assess whether there was any realistic prospect of a return to full-time work”. This does not state that termination was a possibility.

[21] Mr Kerry was not given notice that his employment could be terminated and he was not given the opportunity to have a representative. In those circumstances the dismissal was unjustified.

[22] It is the case that an employer may terminate an employee’s employment because of illness. Mr Cotterill had given Mr Kerry a reasonable opportunity to recover and return to full time duties. Mr Cotterill considered whether or not the business could continue to employ Mr Kerry on a part time basis and concluded that it could not. His concern for other employees and their need to have a break from heavy lifting was reasonable. This was a situation where the employer could fairly cry “halt”: *Hoskin v Coastal Fishing Supplies Ltd* [1985] ACJ 124 at 127. Mr Cotterill had medical evidence and made a genuine management decision.

[23] Mr Clews urged me to take the following decisions into account in awarding remedies: *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 and *Ioane v Waitakere City Council* [2004] 2 ERNZ 194. At para 22 of *Ioane* William Young J commented on the approach that should be adopted for the assessment of compensation in cases where a dismissal is held to have been unjustifiable on procedural grounds.

[24] Those cases refer to a loss of remuneration. Mr Kerry was in receipt of ACC payments. There was no evidence that there was any loss of remuneration.

[25] The matter of compensation for humiliation and distress is a different issue. Although Mr Kerry's may still have been terminated had a fair procedure been followed some of the effects of the termination would have been mitigated. Mr Kerry is entitled to compensation pursuant to s 123 (1) (c) (i). I set this at \$3000.

[26] I am required to consider whether there was any contribution by Mr Kerry. This was a situation where Mr Kerry had suffered an accidental injury. He did not contribute to the circumstances giving rise to the personal grievance.

Costs

[27] Costs were reserved. If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority