

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 78
5547066

**Attention is drawn to the order
prohibiting publication of certain
information in this matter**

BETWEEN

MEENA LAL
Applicant

A N D

THE WAREHOUSE LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: S Greening, Counsel for Applicant
M McGoldrick, Counsel for Respondent
Investigation Meeting: 1-2 December 2015 at Auckland
Submissions Received: 9 December 2015 from both parties
Date of Determination: 10 March 2016

DETERMINATION OF THE AUTHORITY

- A. Meena Lal was justifiably dismissed by The Warehouse Limited.**
- B. The personal grievance application is dismissed.**
- C. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] Meena Lal was employed by The Warehouse Limited (TWL) as a Shop Floor Team Member until her employment was terminated for medical incapacity on 3 October 2014 following an earlier injury. She had not returned to full time work since June 2013. She resumed light duties in July until October 2013 then did not return to work again.

[2] Ms Lal submits her dismissal was unfair because she could return on light duties but not to her current store where she had been harassed by one or more of the employees. TWL's insistence that she return to her current store to undertake light duties or be dismissed was unfair in the circumstances.

Non Publication Order

[3] There is a non-publication order prohibiting publication of the name and any identifying details about the TWL employee alleged to have sexually harassed Ms Lal. All evidence leading to his identification shall be the subject of the non-publication order pursuant to clause 10 Schedule 2 of the Employment Relations Act 2000 (the Act). This employee shall be referred to as 'A' in the determination.

Issues

[4] The issues for the Authority to determine are:

- (a) Was Ms Lal medically incapacitated at the time of dismissal? and
- (b) Were TWL's actions leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

Was the applicant medically incapacitated?

Legal definition of medical incapacity

[5] An employer is not obliged to hold a job open for a sick employee indefinitely¹. If the employer chooses to dismiss the employee, its action must be justified at the time. The employer must have substantive reasons for the dismissal and show that the procedure it followed in carrying out the dismissal was fair. An employer is entitled to some certainty about when an employee would return to work and the circumstances of such a return². This is the point where an employer must be fairly able "cry halt"³ and terminate the employment relationship for incapacity.

¹ *Canterbury Clerical Workers IUOW v Andrews & Beaven Ltd* [1983] ACJ 875.

² *McKean v Board of Trustees of Wakaaranga School* [2007] ERNZ 1 at [85].

³ *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124 at 127.

Ms Lal's health at the time of dismissal

[6] Ms Lal's original injury occurred on 31 August 2012 when she accidentally rolled her left ankle whilst trying to retrieve a trolley for a customer. She experienced ongoing pain from standing, aggravating the injury and increasing the pain in her foot. Her pre-injury role was deemed unsuitable for her to return to. Only two job options were available for her, namely clerical and office support work and alarm security monitoring⁴. By 10 February 2014 she had been assessed by ACC as being able to work 30 hours per week⁵.

[7] However Ms Lal's doctor had provided a medical certifying she was unfit to resume work for a period of 42 days from 3 September 2014⁶. At the time of dismissal Ms Lal was unable to return to work in any capacity. She had not attended work for nearly one year. There is no evidence TWL was responsible for her ongoing incapacity. I find Ms Lal was medically incapacitated at the time of dismissal.

Were the respondent's actions leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

Legal requirements of all employers prior to dismissal

[8] It is accepted Ms Lal's employment was terminated on 3 October 2014. The onus falls upon TWL to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred⁷. In determining whether this dismissal was justified, I must consider whether, having regard to the resources available, TWL sufficiently investigated the concerns about incapacity, raised their concerns with Ms Lal about her incapacity, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal⁸.

Employee harassment

[9] Ms Lal alleged her workplace at TWL Newmarket was unsafe due to harassment and hostility in the workplace. She referred to a complaint she made about an employee A in 2010. He was alleged to have come close behind Ms Lal and

⁴ JBD document 59 individual rehabilitation plan for Meena Lal

⁵ JBD document 58 Notes of meeting between Ms Lal and others

⁶ Joint bundle of documents (JBD) document 78

⁷ Section 103A(2) of the Employment Relations Act 2000 (the Act)

⁸ Section 103A(3) of the Act

rubbed his genitals against her bottom. He was subjected to a preliminary disciplinary investigation. The outcome was the issue of a written warning to A about intimidating behaviour in the workplace.

[10] Ms Lal referred to an agreement with her previous manager for her to continue working at the Newmarket branch but on different shifts from A. During her rehabilitation programme she encountered A during one of her shifts. She believed if this was to become a regular occurrence she could no longer return to the store on light duties. She sought redeployment to another store.

Investigations

[11] The respondent wrote to Ms Lal on 9 June 2014 seeking a meeting to discuss Ms Lal's ongoing absence, refusal to take part in a rehabilitation programme and the effect upon her employment status. These concerns were reiterated in a subsequent letter on 11 July 2014⁹.

[12] The parties met on 21 July 2014 to discuss Ms Lal's return to work. The Minutes¹⁰ show redeployment was discussed but was not considered to be an option. Protective measures were discussed for Ms Lal's return to work at Newmarket. Ms Lal was given Julia Frew as a contact person for safety issues regarding the harassment at work. There were sufficient investigations of Ms Lal's medical capacity to work in the circumstances.

Concerns

[13] On 22 July 2014, Mary Marshall, the respondent's Employment Relations Manager, confirmed that automatic redeployment to another store was not an option due to business constraints. The evidence at hearing confirmed Ms Lal could apply for jobs in the usual way at other stores but they were not obliged to accept her because of the way TWL's business was structured. Either Ms Lal returned to work in the Newmarket store on light duties or TWL would have to consider termination.

[14] Ms Lal alleged during hearing the respondent had not offered her light duties at all. This is not supported by the evidence of the occupational therapists and other medical personnel. They confirm her normal work duties were, "light work

⁹ JBD documents 71 and 73.

¹⁰ JBD document 75.

category”¹¹ and that she was “still on light duties.”¹² An ACC assessment carried out on 23 July 2013 states “Ms Lal was completing light duties of customer services and ticketing for 5 hours per day, 5 days per week.” I do not accept Ms Lal’s submission she was not being given light duties or that they would not be available to her at the Newmarket store.

[15] In my view, the respondent’s concerns were properly raised with Ms Lal.

Opportunity for Ms Lal to be heard

[16] TWL met with Ms Lal on 22 July and continued corresponding about her return to work. In September 2013 Ms Lal sent a further medical certificate stating that she was unfit to return to work.

[17] The respondent wrote to her on 23 September 2014 stating that it could no longer hold her job open for her. Unless she returned to work at the Newmarket store by 30 September 2014, it would have no option but to terminate her employment¹³.

[18] Ms Lal replied on 28 September 2014 by email declining to return to work¹⁴. It also noted that she had only received the letter from TWL on Saturday, 27 September 2014 and “*it doesn’t give us much time to think and make a decision*” but did not request any further time to consider her decision.

Genuine consideration Ms Lal’s responses

[19] The decision maker was Mary Marshall. Ms Marshall no longer works for TWL. She was not available to give evidence at hearing. The only evidence of her decision making process is correspondence between the parties and notes from a meeting held on 21 July 2014.

[20] On 1 October 2014, TWL replied that it was terminating her employment as at 3 October 2014. The basis for this decision was the very considerable period of her absence from the business. TWL believed it could no longer sustain this degree of uncertainty. It confirmed that TWL could no longer hold her position and was terminating her employment.

¹¹ JBD document 44.

¹² JBD document 45.

¹³ JBD document 81.

¹⁴ JBD document 82.

[21] In the circumstances it was reasonable for TWL to dismiss Ms Lal for medical incapacity. It could not redeploy Ms Lal to another store due to business constraints. There were protective measures taken for her return to work addressing issues of safety in the workplace. Despite these efforts Ms Lal continued to be unfit to return to work after having been absent from work for nearly a year. It is reasonable for an employer to require certainty about an employee return to work after this period of time.

[22] In my view, the dismissal was justified. The personal grievance application is dismissed.

Costs

[23] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority