IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 271
5316044

	BETWEEN	DAVID MARSH Applicant
	A N D	THE NEW ZEALAND FIRE SERVICE COMMISSION Respondent

Member of Authority:	M B Loftus
Representatives:	Janet Copeland, Counsel for Applicant Megan Richards, Counsel for Respondent
Investigation Meeting:	28 and 29 June 2011 at Dunedin
Submissions Received:	11 July and 8 August 2011 from the Applicant 29 July 2011 from the Respondent
Date of Determination:	13 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr David Marsh, claims he was unjustifiably dismissed by the respondent, The New Zealand Fire Service Commission ("the Fire Service") on 22 February 2010.

[2] The Fire Service accepts it terminated Mr Marsh's employ but contends its actions were justified.

Background

[3] Mr Marsh worked as a professional fireman for slightly more than 40 years. As at the time of termination he held the position of senior station officer at the Central Fire Station in Dunedin. As such he was responsible for the day to day running of a number of Fire Stations in the Dunedin district.

[4] On 15 October 2008 Mr Marsh attended an emergency callout. While there he bent down to turn off an isolation switch and, when he rose, he hit his head on an overhanging protrusion. He says notwithstanding the fact he was wearing a helmet he suffered significant pain in his neck. He reported the incident but continued to work in the belief he would recover in due course.

[5] During an overseas holiday he took soon thereafter he noticed the pain was worse. He also suffered pain in his left ear which affected his balance.

[6] Upon his return he went to a doctor who was unable to find anything obviously wrong. He subsequently sought medical assistance for these issues another three times over the ensuing months.

[7] On 28 May 2009, and without warning, he suffered significant problems with his balance and found himself unable to walk. He phoned his partner who took him to Dunedin Hospital Emergency Department. He was declared unfit for work until 4 June 2009. As events transpired Mr Marsh did not return to work until 23 July. He was on an individual rehabilitation plan he and the Fire Service had agreed and under which he only performed non-operational light duties.

[8] Mr Marsh says:

> *The Respondent arranged for me to attend two separate appointments with medical specialists being an ENT specialist, Dr Dawes (25 August 2009) and a Neurologist in Wellington, Mr Mossman (1 September 2009). Both specialists were chosen by the employer and arranged for the purpose of speeding up the process and assisting me in a safe rehabilitation back to work. I willingly consented to these Specialist appointments on this understanding.*

[9] Mr Marsh goes on to say:

> *These specialists provided reports dated 25 August 2009 and 1 September 2009 respectively. Mr Dawes concluded that if a "vestibular ablation" was performed on me I would likely have permanent vestibular dysfunction (permanent balance issues). Mr Dawes recommends though that even so, a balance test would be recommended at a later stage.*

[10] Mr Marsh says he believed the diagnosis was incorrect and declined to undergo the operation given an understanding it would lead to permanent damage. He goes on to say:

> *It appears that the respondent read this diagnosis to mean whether or not I had this procedure, I would suffer from a permanent vestibular dysfunction. This is incorrect and the Respondent never requested a balance test before dismissing me.*

[11] The prognosis itself states:

> *I think that progressive cochlear vestibular failure of uncertain aetiology should be the primary working diagnosis and there may be some residual and unstable labyrinthine function on the right side. I think that vestibular ablation would be appropriate and have discussed Gentamicin application to the middle ear/round window. This can be quite effective in abolishing vestibular function in the affected ear creating a stable lesion on that side. Should this fail then surgical ablation of the labyrinth or division of the vestibular nerve can be considered although these are major procedures.*
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> *The prognosis is good in terms of stabilising vestibular function and removing his tendency to vertigo and vestibular ocular reflex dysfunction. Howeve, there will be permanent non-recoverable reduced function of the right vestibular apparatus. This means that if in the dark, affected by drugs affecting cognition (for example alcohol) or on unstable/uneven surfaces, his balance will be less certain than for someone with a normal bilateral vestibular function.*
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> *I am asked if Mr Marsh could foreseeably return to full duties. I expect that the Fire Service has some underlying criteria which would apply in this situation. Once a stable labyrinthine lesion has been formed central compensation should allow Mr Marsh to function on a day to day basis at a level which would allow him to complete many of the tasks associated with fire fighting. However as stated above there will be some residual vestibular dysfunction and the practical effect of this may be assessed through a repeat School of Physiotherapy Balance Assessment including computerised dynamic posturography and motor control test. Because of the permanent vestibular dysfunction on the right side he may experience difficulty climbing ladders or being at heights without adequate support. There may be either instability or unsteadiness when moving through dark environments in particular those with an uneven floor surface.*
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> *Unfortunately it is difficult to determine Mr Marsh's degree of recovery of balance function after treatment as this is variable from one individual to another …*

[12] It would appear from the document that Mr Marsh is wrong. Dr Dawes is saying there will be ongoing concerns about Mr Marsh's balance which would limit his ability to fulfil the full range of tasks expected of a fireman.

[13] Mr Marsh goes on to say:

> *Mr Mossman concluded that I was currently not suffering from balance issues but may have future episodes caused by migraines.*

> *Mr Mossman recommends that I would not be safe climbing ladders and therefore not safe to return to my job. This diagnosis was not only inconsistent with Dr Dawes' report, but also incorrect regarding an actual diagnosis and prognosis. It is noted however that Mr Mossman confirms no current balance issues existed as at 1 September 2009.*

[14] Mr Marsh says he was dissatisfied with those conclusions which he considered inaccurate and contradictory. He therefore set out to establish a clear and accurate diagnosis of his condition. He says this led to a firm diagnosis of whiplash which was subsequently established as being a treatable and manageable condition. For this conclusion he relies on the diagnosis of Dr Barrie Tait, Consultant Physician in Christchurch, which was written on 30 November 2009.

[15] I cannot say the document necessarily supports Mr Marsh's contention. Whilst it clearly states the dysfunction is consistent with a whiplash type injury, it observes:

> *The literature does not give any clear cut guidance to effective treatments as gauged by appropriate controlled studies … the literature does not give any clear cut guidance as to prognosis, though maintenance of activity, control of pain and ongoing engagement in work is important.*

[16] In the interim and on the strength of the diagnoses of Mr Dawes and Mr Mossman, the Fire Service had concluded Mr Marsh's problems were likely to be permanent and would result in impairment of balance. It was concluded such a condition was incompatible with a return to operational fire fighting. Those conclusions are contained in the report of Dr David Hartshorne, the National Medical Officer.

[17] That led to a further decision to cease the rehabilitation programme. This was on the grounds the programme is designed to assist employees to return to their usual occupation. It was concluded:

> *[Mr Marsh] does not fit the criteria for assistance under the illness rehabilitation programme for the following reasons:*
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> *1. David has made the claim his current symptoms causing incapacity relate to a work accident.*
> *2. A return to operational duties is not likely.*

[18] Also around this time Mr Marsh had advised the Fire Service it was his view he no longer suffered from balance problems and that he should be allowed to return to work in his full capacity. It was at that point, and following Dr Hartshorn's note, the Fire Service decided to commence an investigation into whether or not Mr Marsh should be medically retired under s.72 of the Fire Service Act 1975. That section provides:

> *Any member of the Fire Service who is certified by 2 medical practitioners, nominated by the chief executive, to be substantially medically unfit to perform any specified duties in the Fire Service which the chief executive considers suitable for him may be required by the chief executive, by notice in writing, to retire from the Fire Service within such time, being not less than 1 month, as may be specified in the notice*

[19] The decision would ultimately lie with Dr Peter Robinson, the Fire Services Principal Medical Officer.

[20] Mr Marsh was advised of this in a telephone conversation on 28 September 2009. Mr Marsh says he acknowledges the Fire Service's right to do that but had concerns that they had made up their mind on the basis of medical assessments he was challenging. He wrote to the service (twice) advising he disagreed with Dr Hartshorn's views and sought a delay while he investigated other conditions and sought the opinion of Dr Wright, a Neurologist in Dunedin.

[21] As events transpired Mr Marsh never saw Dr Wright who cancelled the appointment on the grounds he had already been seen by three specialists with an interest in vestibular issues and balance disorders. The third had been a Dunedin based Neurologist, Dr Cutfield, who, along with two others (Drs Gardner and Wright), had been nominated by Mr Marsh as a Doctor from whom Dr Robinson could source information about Mr Marsh and his condition.

[22] Following that Dr Gardener, Mr Marsh's GP, forwarded the reports of Dr Mossman and Mr Dawes to Dr Robinson. Dr Robinson interpreted that as endorsement of their content. Dr Cutfield saw Mr Marsh on 11 December 2009. His report dated 2 February 2010 concludes:

> *In Mr Marsh's case, now 14 months after onset, the probability of an excellent symptomatic recovery is unfortunately low. I believe it is unlikely he will now make a dramatic enough recovery to be able to*

> *perform all of the (demanding) functional duties of a fire fighter that are listed.*

[23] Mr Marsh then wrote attempting to withdraw the previous consent he had given for the Fire Service to access medical information. He also criticises Dr Cutfield on the basis one of his statements was unfair and very questionable. The Fire Service did not accept that.

[24] Dr Robinson then considered the medical reports before him which were numerous, before recommending Mr Marsh be medically retired. The recommendation was accepted and Mr Marsh was advised by letter dated 22 February 2010.

Determination

[25] As has already been said, the Fire Service accepts it dismissed Mr Marsh. In doing so, it also accepts it is required to justify its actions.

[26] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least used to state, that the question of whether a dismissal is justifiable

> *… must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal … occurred.*

[27] The above test is used as the cause of action arose prior to the present version coming into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless they specifically provide otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[28] The Fire Services position is Mr Marsh was incapable of returning to performing the duties required of him as a result of his medical condition. It therefore felt warranted in medically retiring him as it was entitled to do under s.72 of the Fire Service Act. In essence it is a frustration argument and, as the Court observed in *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585, this is an approach that is often raised in cases of illness and injury.

[29] In *Motor Machinists Ltd* the Court found:

> *(1) frustration of contract can occur where illness prevents the performance of an employment contract. However, an employment contract is not frustrated simply because an employee is ill or has been in the past. The contract is not frustrated where there is no medical evidence that the employee is permanently incapacitated or it cannot be said that the incapacity has been such that it destroyed the root of the contract. Under the doctrine of frustration there is no requirement of fairness as the contract terminates by operation of law, rather than by the decision of one of the parties. (p 591, line 24; p 592, line 1)*
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> *(2) Where illness or injury occurs which prevents an employee from returning to work the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair. This ensures that the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated.*

[30] This is not a case of an uninformed opinion - the medical evidence both exists and is absolute. There was a plethora of medical reports and a perusal of them show the specialists who examined Mr Marsh are almost unanimous in concluding he was incapable of performing the duties required of him.

[31] Even the exception and the report Mr Marsh stated he saw as the most preferable – Dr Tait's falls short of stating he was fully fit and capable of returning. As has already been indicated it was inconclusive and observed *the literature does not given any clear cut guidance to effective treatments …* and, more significantly, *The literature does not give any clear cut guidance as to prognosis.*

[32] In such circumstances and applying *Motor Machinists Ltd* – this is a frustration. The employment has therefore come to an end by operation of law rather than a decision of one of the parties.

[33] That however is not the end of the matter. The obligation outlined above is to ensure the employee is not dismissed without an opportunity to provide information which might prevent the termination occurring. The evidence is Mr Marsh was given such an opportunity and nominated medical practitioners to whom he was referred such as Dr Cutfield and whose opinions were considered when the decision was made.

[34] Quite understandably, and the evidence more than confirmed this, Mr Marsh did not want to retire. He therefore took issue with any opinion that may support

another outcome and was effectively shopping around to gather support for the answer he sought – namely affirmation he was capable of continuing as a fireman. Unfortunately he did not get it and attempted to nullify the effect of negative outcomes and opinions as is exhibited by his attempt to preclude the Fire Service from considering Dr Cutfield's report. That however, does not mean the report ceased to exist or that the Fire Service was not aware of it.

[35] As said earlier, there was more than sufficient medical evidence to support the conclusion Dr Robinson reached. Mr Marsh could no longer be deemed capable of safely fulfilling his role. The situation is a no fault one but the Fire Service was entitled to conclude the relationship could not continue at the point in time it made that decision. It had more than sufficient evidence to support that conclusion, which in the circumstances was, I hold, a decision a reasonable employer would reach.

[36] Mr Marsh's claim therefore fails.

Costs

[37] Cost are reserved.

M B Loftus
Member of the Employment Relations Authority