

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 206/10
5152574

BETWEEN

SUPHAKORN MORRIS
Applicant

AND

OCEANIA CARE COMPANY
(NO 1) LTD
Respondent

Member of Authority: Dzintra King

Representatives: Applicant In Person
Rebecca Kroon, Counsel for Respondent

Investigation Meeting: 29 March 2010

Submissions received: 21 April from Applicant
6 April and 29 April 2010 from Respondent

Determination: 3 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Suphakorn Morris, says she has been unjustifiably dismissed by the respondent, Oceania Care Company (No 1) Ltd (“Oceania” or “the company”).

[2] The respondent runs an aged care service at 61 sites within New Zealand. Each site is separately run by a facility manager; the main administrative function for the whole business is based in Auckland.

[3] One of the sites owned by the respondent is West Harbour Lodge in Auckland (“WHL”).

[4] WHL employed Ms Morris as a laundry assistant from 18 April 2006 until 15 July 2008. Her duties included emptying dirty laundry into commercial washing

machines, removing washed laundry and placing it in the dryer and removing the dry laundry and folding it.

[5] Over a period of ten weeks in late 2007/early 2008 the laundry at WHL was upgraded and enlarged so that WHL could process the laundry of smaller facilities as well as its own laundry.

[6] The person who made the decision to dismiss, Ms Carol Lee, was no longer an employee of the respondent at the time of the filing of the personal grievance and the respondent has been unable to trace her. However, documentary evidence was supplied.

Background

[7] Ms Morris suffered a work injury on 29 October 2007 and was absent as a result of that from 29 October 2007 until 12 June 2008.

[8] On 5 November Ms Lee met with Ms Morris and Ms Fiona Mooney, then the laundry manager, for an informal discussion regarding Ms Morris' injury and return to work. It was agreed that it was very difficult to provide work which did not entail heavy lifting. Ms Morris agreed to see her GP for a further two weeks' leave as there were no light duties available at WHL.

[9] On 7 November Ms Lee spoke to Ms Morris' ACC case manager, Ms Anne Crozier, regarding the fact that there were no light duties available in the laundry. According to the notes, Ms Lee seems to have suggested that Ms Morris could put clothes away and do a morning tea round. ACC advised Ms Lee to tell Ms Morris to attend her GP and remain home for two weeks.

[10] On 7 January 2008 WHL received a letter from ACC regarding Ms Morris' rehabilitation plan and preparation for her return to work. Attached to the letter was a work rehabilitation plan dated 1 January 2008 and a worksite assessment form dated 7 January conducted by Ms Lesley Baker.

[11] The rehabilitation plan envisaged that Ms Morris would return to work on 1 May 2008.

[12] The worksite assessment was undertaken before the WHL laundry facility had been upgraded. The way in which the laundry was conducted at that time was different from the time when Ms Morris returned to work in June 2008. At the time of the workplace assessment Ms Lee had stated there were light duties available. However, at that time the laundry was being contracted out so there were no duties available in the laundry at all. The duties Ms Morris would have carried out, had she returned to work as envisaged in May, would have been work in the rest home, not the laundry itself.

[13] The worksite assessment recommended that a review be conducted in a further 4 weeks' time to assess the return to work situation.

[14] On 10 January 2008 the company received a report from Dr Mark Paton, her GP. Ms Morris' injury was a back injury which occurred when she lifted a patient at the rest home. Dr Paton wrote that Ms Morris had stated that her workplace could not offer her light duties as her job required heavy lifting in the laundry. He stated that she was able to undertake work that did not involve heavy lifting and would enable her to regularly change position from sitting to standing. He went on to say he doubted that she would ever be able to return to her former job because of its physical demands. This report was sent to ACC.

[15] On 14 March Ms Lee wrote to Ms Morris saying the laundry was due to re-open and be fully functional on 7 April and the company wanted it fully staffed. She noted that Ms Morris' last medical certificate, dated 7 March 2008, advised she was unable to resume duties until 1 May 2008. She reiterated that there were no light duties and that Ms Morris had agreed with that. Ms Lee requested a meeting on 26 March to discuss Ms Morris' medical condition and its impact on her ability to perform her normal duties. She asked that Ms Morris bring any medical certificates and any submissions she wanted to make regarding her medical condition. She was encouraged to bring a representative.

[16] The meeting was held on 17 April. It was attended by Ms Lee, Ms Janice White (the minute taker), Ms Crozier, the ACC case manager, and Ms Morris.

[17] It was reiterated that there were no light duties as all duties in aged care had an element of heavy lifting and manual handling. Ms Crozier proposed a week long ACC funded return to work trial if the steroid injections Ms Morris was to start the

following week worked. Ms Morris recognised that if they did not work she would need to look elsewhere for work. Ms Morris could not guarantee that she would be able to return to work on 4 May 2008. She was told that if she could not it might not be possible to keep her position open and her employment might have to be terminated due to medical incapacity.

[18] On 29 April the company wrote to Ms Morris asking her to attend a meeting to discuss her prognosis and likely return to work following the steroid injection. Ms Morris asked that the Service Workers' Union ("SWFU") attend the meeting with her as support.

[19] On 2 May a meeting was had with Ms Lee, Ms White as note taker, Ms Pine Ielemia from the SWFU, Ms Morris and her husband.

[20] Ms Morris said she felt better following the injection and her current medical certificate stated she could return to work on 24 May. She had a meeting later that day with Dr Quinn for further assessment.

[21] Ms Lee wanted Ms Morris to have an independent medical assessment as required pursuant to clause 28, the termination on medical grounds clause in the employment agreement.

[22] Ms Ielemia wrote to Ms Lee saying that Ms Morris had agreed to an independent medical assessment.

[23] On 5 May Ms Lee wrote to Ms Morris confirming an assessment had been arranged on 19 May 2008 at 2pm.

[24] On 19 May Dr Scott Adams, the independent assessor, cleared Ms Morris for a return to work. Dr Adams said Ms Morris was eager to return to work but worried that it might exacerbate her symptoms, especially by lifting laundry bags. He wrote:

Nida understand (sic) that the workplace has been upgraded with a new laundry facility and hence a follow-up worksite assessment will be required prior to a graduated return to work. Nida feels she would be able to manage all tasks except lifting the laundry bags but previously these were lifted into a shopping trolley but are now put on a low level trolley. A return to work initially on 2hrs per day, 5 days per week as soon as possible is recommended

with the oversight of an OT (Lesley). The rest of her day Nida should engage in exercise programme/pain management programme. The number of hours worked could then be slowly increased over the following 6-8 weeks, depending on progress.

It is essential that all health providers involved in Nida's care agree on a rehabilitation pathway and a case conference/regular feedback is recommended.

[25] A return to work assessment was completed by Ms Baker on 28 May. It provided that Dr Adams had indicated she could return to work for 2 hours per day. Ms Baker recommended a work trial to ascertain whether Ms Morris had the capacity to return to her pre-injury work. Ms Baker noted that when lifting and handling she keep the loads as close as possible to her centre of gravity; and that there were no alternative duties available.

[26] The final medical certificate from Ms Morris' GP (before her termination) is dated 23 May and states she is unfit to return to work for 30 days commencing 23 May 2008. She was to be restricted from doing any heavy lifting for the next two weeks, that is, she was restricted from heavy lifting from 23 May to 8 June 2008.

[27] On 5 June Ms Lee wrote to Ms Morris asking her to attend a meeting on 10 June to discuss Dr Adams' report, the assessment and a return to work plan.

[28] On 10 June Ms Morris, Mr Morris, Ms Crozier and Ms Lee met. It was agreed Ms Morris would return to work on the basis propose by Dr Adams with weekly assessments being made by Ms Baker.

Return to work

[29] When Ms Morris returned to work she was not required to do any heavy lifting – that is, lifting the laundry bags – but was nonetheless unable to cope with the duties. On the day of the trial Ms Morris attempted to load the washing machine and to load the dryer but was unable to do either task. She had pushed the trolley and had folded items but experienced pain when loading and unloading the machines.

[30] She did not return to work the following day and provided a further medical certificate stating she was unfit for work.

[31] On 16 June Ms Baker provided a closure report which stated that Ms Morris did not cope with the work.

[32] The letter raising the personal grievance dated 18 August 2008 asserted that Ms Morris had been made to lift heavy laundry bags.

[33] Ms Lee had statements from two employees, Ms Mooney, the laundry manager and Ms Jessica Sampson, the laundry assistant, stating that Ms Morris had not been asked to lift heavy laundry bags. At the hearing Ms Morris agreed she had not been asked to and had not lifted laundry bags.

[34] On 18 June Ms Lee emailed Ms Crozier who said she felt that because of the rapid onset of Ms Morris' symptoms she did not have the capacity to return to her pre-injury work.

[35] On 1 July 2008 Ms Lee met with Ms Morris and Mr Morris to discuss the failed return to work and the closure report and its conclusions. There was discussion about the lack of alternative light duties. Ms Morris' employment was terminated.

Decision

[36] Ms Morris was unable, through no fault of her own, to carry out the duties of a laundry assistant. In her closing submissions Ms Morris conceded that she was not fit to return to normal duties on 13 June but says that although she had been approved for a workplace trial together with a managed return the employer instructed her to return to normal duties. She says that her injury was aggravated as a result. She also says that a successful return to work could have been possible if the employer had acted within the limits set by the medical people. The failure to do that resulted in her losing the opportunity to make a successful return to work.

[37] She claims the employer showed a total disregard for the advice of the medical practitioners engaged in her care. The respondent made her undertake duties that she was clearly not capable of doing.

[38] Ms Morris says that Dr Adams made her graduated return to work conditional upon a workplace assessment (which was done) and subject to the oversight of an OT. The evidence was that a meeting had been arranged for the following week. Oversight does not imply that an OT will be present at all times throughout the work trial. At the meeting on 11 June Ms Morris indicated she was happy to return to work and Ms Lee stated that initially there would be weekly meetings with the OT to assess progress.

[39] The work assessment recommends “an unpaid work trial as per appendix 1 to ascertain whether Nida has the capacity to return to her pre-injury trade” and recommends monitoring of that trial. Ms Baker stated that the work in the laundry was physically demanding, that staff were required to stand and walk throughout their shifts, that frequent forward flexion, spinal rotation and lateral flexion were required. There were no alternative duties available. Barriers to a return to work were her standing tolerance and ability to undertake repetitive spinal forward flexion, rotation and lateral flexion. Appendix 1 recommends that she avoid spinal rotation and lateral flexion. When lifting and handling she is to keep loads as close as possible to her centre of gravity. Given the functional analysis provided by Ms Baker it is difficult to see what if any tasks in the laundry would fit the specified criteria.

[40] The medical certificate provided by Dr Paton on 23 May states that she is unable to resume any duties for 30 days from 23 May and no heavy lifting for the next two weeks. The activity restrictions are specified as “standing, stretching up or across, heavy lifting, pulling or carrying.”

[41] The employment agreement provides that the employer is to take into account the opinion of their medical advisor and any other relevant medical reports or recommendations. Dr Adams referred to a joint consideration of all medical persons.

[42] Had a joint approach been taken it is likely that it would have been clear that Ms Morris did not have the capacity to return to work, either on a trial basis or any

other. However, she wanted to try to return and had apparently told Dr Adams she could manage all the tasks apart from lifting the laundry bags. She was unable to carry out the work. She could not return to her previous position.

[43] What Ms Morris undertook was a work trial. She says she was unable to do normal duties. It had been made clear there were no light duties. The work trial, therefore, had to be whether she could do the work that constituted her normal duties but for a short period each day; and avoiding lifting the laundry bags. This was what she endeavoured to do but was unable to do without suffering pain and discomfort.

[44] Suffering from an incapacitating physical injury is distressing both physically and emotionally. Not being able to work as a result in one's usual occupation is also distressing.

[45] Ms Morris wanted alternative, light duties. These were not available. She returned to work on a trial basis doing what she had told Dr Adams she believed she could do, but unfortunately she was unable to do so.

[46] The work trial was unsuccessful. Ms Morris could not return to work. The termination of her employment was justified.

Costs

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

Dzintra King

Member of the Employment Relations Authority