IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 385
5639238

	BETWEEN	PETER RHODES Applicant
	AND	MODERN TRANSPORT ENGINEERS (2002) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	John Dewar, Advocate for the Applicant Simon Scott, Counsel for the Respondent
Investigation Meeting:	10 November 2016
Determination:	23 November 2016

DETERMINATION OF THE AUTHORITY

A. The decision by Modern Transport Engineers (2002) Limited (MTE) to dismiss Peter Rhodes for medical incapacity, at the time it was made and in the way it was made, was not justified.

B. In settlement of Mr Rhodes's personal grievance for unjustified dismissal, and within 28 days of the date of this determination, MTE must pay him $5000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

C. Costs are reserved, with a timetable set for memoranda on costs if the parties are not able to resolve any issue of costs themselves.

Employment Relationship Problem

[1] Modern Transport Engineers (2002) Limited (MTE) dismissed Peter Rhodes on 2 March 2016. In a letter sent to Mr Rhodes that day, MTE group accountant Mark Flyger wrote that MTE dismissed him because "you advised that you are unable

to return to work and that your condition is such that you may take up to 1-2 years to fully recover from your back injury".

[2] MTE had employed Mr Rhodes as a painter in February 2014. While working on 3 September 2015 he fell off a ladder onto a concrete floor. The impact of the fall injured his back and neck. He had not attended work since the injury. He was still receiving ACC weekly earnings compensation at the time of his dismissal.

[3] Sometime around mid-February, on a date that neither Mr Rhodes nor Mr Flyger could recall, Mr Flyger rang Mr Rhodes to ask when he might be able to come back to work. Following that phone call Mr Flyger wrote a letter to Mr Rhodes with the subject heading "work absence" and dated 22 February 2016. His letter said MTE understood Mr Rhodes was "considered to be not fit for work at present" and was "currently receiving ACC support". It then said Mr Rhodes' role was "essential to the smooth running of our business". It asked Mr Rhodes "to return to work no later than 1 March 2016".

[4] Mr Rhodes said he did not receive the letter until Tuesday, 1 March because he was out of Hamilton on trip to Hastings from the morning of Friday, 26 February. He rang Mr Flyger on 1 March and discussed his situation. The call lasted between two and five minutes. The next day Mr Flyger sent Mr Rhodes the letter of dismissal.

[5] Mr Rhodes raised a personal grievance. It was not resolved in mediation. In his subsequent application to the Authority Mr Rhodes said MTE had not followed the requirements of "due process" referred to in a term in his employment agreement that allowed for MTE to terminate his employment on medical grounds. He said MTE had failed to enquire in a fair and open-minded way whether he had any realistic prospects of returning to work within a reasonable time, had not sought information or a response from him, and had not given him an opportunity to seek advice before making a decision to dismiss him. He sought remedies of lost wages and $5000 as compensation for hurt and humiliation.

[6] MTE's reply said it had received regular updates and medical reports from Mr Rhodes, and ACC, following his accident. However MTE said the information it got indicated Mr Rhodes would not be able to continue in his role as a painter as he was not comfortable working underneath awkward spaces doing painting work.

[7] The information referred to was a letter, dated 2 February 2016, from an orthopaedic surgeon sent to Mr Rhodes' GP. As best as can be ascertained from what Mr Rhodes and Mr Flyger recalled, Mr Rhodes had sent Mr Flyger a copy of that letter on 1 March before their telephone conversation that day.

[8] After setting out his assessment of Mr Rhodes' condition at the time, the surgeon said:

> I am not sure though, given the fact that Peter is still uncomfortable now, that he would be able to continue in his current role where he needs to be crouching underneath fairly awkward spaces doing his painting work. He has mentioned that he is going to try and find alternative work in something that is a little lighter and I would certainly support that. At this point I do not think surgery would necessarily help, and instead would recommend a core strength and aerobic fitness programme and have discharged him back to your care.

[9] MTE's reply statement said it had no light duties to which Mr Rhodes could have been assigned. Rather, after having allowed what it said was "some additional time" to return to full time employment, MTE felt it was "necessary" to terminate his employment once Mr Rhodes confirmed on 1 March that he was not able to return to work at that time, some six months since his injury.

The Authority's investigation

[10] For the purposes of the Authority investigation Mr Rhodes and Mr Flyger lodged witness statements. A Member's Minute issued after a case management conference on 12 September noted that the Authority also expected witness statements from MTE production manager Steve Annan and MTE proprietor Robin Ratcliffe. It did so because, during the conference call, Mr Flyger said Mr Ratcliffe "made the ultimate decision" to dismiss Mr Rhodes after Mr Flyger and Mr Annan "presented findings" to him about the situation with Mr Rhodes. However MTE, through counsel instructed after that conference, lodged only Mr Flyger's witness statement with a note stating that "no other witness statements will be filed by the Respondent".

[11] Mr Rhodes and Mr Flyger attended the investigation meeting and, under oath or affirmation, answered questions asked by me and the parties' representatives. The representatives also made oral closing submissions on the issues for determination.

[12] At the end of the investigation meeting an oral indication of preliminary findings was given, now confirmed by this written determination.[1]

[13] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[14] The issues requiring investigation and determination were:

(i) Was the decision of MTE to dismiss Mr Rhodes for medical incapacity, and how the decision was reached, what a fair and reasonable employer could have done in all the circumstances at the time, including what was or was not done in:
   (a) Gathering medical and other information about the prognosis for his return to work; and
   (b) Consulting Mr Rhodes about the prospects for a successful return to work; and
   (c) Assessing alternatives to dismissing him?

(ii) If MTE's actions were not justified, what remedies should be awarded, considering:
   (a) Lost wages; and
   (b) Compensation under s123(1)(c)(i) of the Act?

(iii) If any remedies are awarded, was there any blameworthy conduct by Mr Rhodes that contributed to the situation giving rise to his grievance and required a reduction of remedies under s 124 of the Act?

(iv) Should either party contribute to the costs of representation of the other party?

The contractual and statutory obligations

[15] At clause 37 MTE's employment agreement with Mr Rhodes included the following term:

[1] Employment Relations Act 2000, s 174 and s 174B.

> **37.0 Termination for medical reasons**
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> The Employer may terminate the employee's employment after due process on the grounds of incapacity due to illness or injury.
>
> 37.1 The employer may terminate this agreement by giving such notice to the employee the Employer deems appropriate in the circumstances if, as the result of mental or physical illness an Employee is rendered incapable of proper and ongoing performance of his or her duties under this agreement.

[16] Both parties had statutory obligations to be active and constructive in establishing and maintaining a productive employment relationship, including by being responsive and communicative.[2] If proposing to make a decision that would, or was likely to, have an adverse effect on the continuation of Mr Rhodes' employment, MTE was required under s 4(1A)(c) of the Act to provide him with:

> (i) access to information, relevant to the continuation of [his] employment, about the decision; and
>
> (ii) an opportunity to comment on the information to [his] employer before the decision is made.

[17] In making its decision, and how it made it, MTE's actions had to be what a fair and reasonable employer could have done in all the circumstances at the time.[3] In applying this statutory test of justification the Authority had to consider whether MTE's concerns about the prospects for the continuation of Mr Rhodes' employment were sufficiently investigated and, before a decision was made, whether MTE raised those concerns with him, gave him a reasonable opportunity to respond and, then, genuinely considered any response made.[4] If any defects in its process were more than minor and resulted in Mr Rhodes being treated unfairly, his dismissal could be determined to be unjustified.[5]

[18] Those statutory requirements are to the same effect as long standing principles developed earlier in case law on assessing the fairness of an employer's decision to dismiss a worker for medical incapacity. In *Barry v Wilson Parking New Zealand (1992) Limited* the Court confirmed an employer making such a decision should

[2] Employment Relations Act 2000, s 4(1A)(b).
[3] Section 103A(2)
[4] Section 103A(3).
[5] Section 103(5)

consider fairness to the worker as well as "the reasonable dictates" of the employer's business needs:[6]

> … the employer had to act with justice in a way that was fair to the employee. What this amounts to, speaking generally, is that the employer has to wait a reasonable time to give the injured employee an opportunity to recover (what is reasonable being a question of fact in each case) and after that it has to inquire in a fair and open-minded way whether the employee has any realistic prospects of returning to work within a further reasonable time. This necessarily has to include seeking information from the injured employee, making it known at the time that the information may be used for the purposes of a decision to discontinue the employment relationship. This is to ensure that the employee understands the seriousness of the issue and will have a motive to ensuring that the information is as full and accurate as he or she can make it be. It would not be reasonable to expect so diligent a response to a mere casual inquiry after the employee's health. Sometimes an employer can safely act on information volunteered by the employee such as periodic medical certificates but, in general, will need to inquire from the employee in case there have been any recent developments, especially if the information held is stale. Once armed with all the necessary information the employer has to consider whether (balancing fairness to the employee and the reasonable dictates of its practical business requirements) it is prepared to keep the employee's position open for the indicated period of time. Reconsideration of this question might need to be undertaken more than once from time to time.
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> In the present case, the respondent was ungenerous in the times that it allowed … However, the Court's function is not to compel employers and employees to be generous or kind to each other but only to see to it that they treat each other justly.

[19] The Court's decision in *Barry*, and other such cases, established that the period for which incapacity should reasonably be tolerated by an employer will vary significantly according to a range of factors to do with the employee, the nature of her or his position, length of previous service and likely length of future service, the nature of the illness and prospects for recovery, and the nature of the employer's business and its practical requirements. In each case what is reasonable in the particular circumstances of the employer and the worker is a question of fact.

[20] The point at which an employer "can fairly cry halt" will vary according to business size, complexity and its reliance on the specific skills or input of the particular worker.[7] This point may come sooner for what judges have called 'a small shop'. However a larger or more sophisticated business may have more room to move and resources to call upon in taking measures to accommodate a worker's limitation

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[6] [1998] 1 ERNZ 545 at 549.
[7] *Hoskins v Coastal Fish Supplies Limited* [1985] ACJ 124 at 127 (AC).

on her or his return to work and to consider alternatives to his dismissal for incapacity.

Gathering information

[21] Mr Flyger had access to Mr Rhodes' medical information because Mr Rhodes sent copies of his monthly medical certificates and other reports to his MTE supervisor. This included the surgeon's letter of 2 February but not a 19 January letter from the surgeon. However the 19 January letter was of little consequence because it stated no conclusions on Mr Rhodes' fitness for work and the surgeon wanted MRI scans done so he could review that information (which he did and reported on in the 2 February letter). The 19 January letter did note Mr Rhodes was "concerned that he may not be able to return to his previous employment but will be keen to get into some lighter work if that were possible". It recorded an anxiety Mr Rhodes had expressed. It was not an opinion or conclusion by the surgeon about when or whether Mr Rhodes might eventually be fit to work.

[22] When he talked to Mr Rhodes by telephone on 1 March Mr Flyger had the surgeon's 2 February letter to the GP and a copy of a report that the surgeon had sent to Mr Rhodes' ACC case manager. Mr Rhodes had sent both the letter and the report to his MTE supervisor.

[23] In his witness statement for the Authority investigation, Mr Flyger noted a page was missing from the copy of the surgeon's report to the ACC case manager. However it was clear from the context, for anyone who had looked at and read the report at the time Mr Rhodes sent it to MTE, that the last section was missing. The end of the second page had a question: "Are the effects of his ACC covered injury now spent?" The answer was obviously on a subsequent page, either not sent or not received. Mr Rhodes got no benefit from MTE not having that missing page at the time. The copy of that page provided in evidence to the Authority investigation showed the surgeon's answer was: "No, I do not think so. In any patient an annular tear can result in discomfort which can last over a period of 2 years. The other changes in his back and neck will likely have predated his injury and were asymptomatic". The answer did not indicate whether Mr Rhodes was, or was not, or would not be, fit for work, or when he might be.

[24] There was no significant deficiency in the information Mr Rhodes supplied MTE.

[25] Mr Flyger relied on his assessment of the content of the 2 February letter and what Mr Rhodes said when he telephoned Mr Flyger on 1 March.

[26] Mr Flyger's account was that, during the phone call, Mr Rhodes said he was unable to return to work for one to two years. Mr Rhodes account was that he said he had no medical clearance, it would take up to a year or more for his back to recover, and he would need alternative work as he said was recommended by the surgeon.

[27] However Mr Flyger had not made sufficient direct enquiries about Mr Rhodes' actual fitness for work (or otherwise) from anyone with medical expertise. Instead he made some assumptions based on what he understood from the surgeon's letter and what Mr Rhodes said in their telephone conversations. Those assumptions were relevant to conclusions Mr Flyger then drew on whether light duties could be attempted (if any suitable duties were available at the workplace) and whether MTE was safe to move to halt its employment of Mr Rhodes.

[28] However the evidence, as a whole, did not establish to the necessary standard of the balance of probabilities that those assumptions were ones a fair and reasonable employer could have made in all the circumstances at the time. The surgeon's letter of 2 February was equivocal – he was "not sure" about Mr Rhodes's current position but "certainly" supported him doing light duties if possible. The surgeon was not making a full occupational assessment or offering an opinion on Mr Rhodes' fitness to work that MTE could have reasonably relied at that point. It was not sufficient to rely on Mr Rhodes' view. Rather Mr Flyger, on MTE's behalf, should have asked for Mr Rhodes to provide an up-to-date assessment from his GP or have arranged for a suitably qualified occupational assessor to provide reliable information.

Consulting Mr Rhodes about the prospect of dismissal

[29] Mr Rhodes was not adequately on notice that what he said during his telephone calls with Mr Flyger in mid-February and on 1 March was to be relied on to make a decision about the future of his employment. The 22 February letter had included a statement that if he did not return to work on 1 March, "your inability to return to work would place your continued employment with [MTE] in jeopardy". At

best it was a statement alerting him to the start of a process by which his employment might be terminated. He was not adequately advised that his call to Mr Flyger on 1 March, which Mr Rhodes initiated, was the sum total of involvement he would have in the process.

[30] Mr Flyger said Mr Rhodes "knew full well the nature of our discussion" when they spoke on 1 March. However, in his oral evidence at the investigation, Mr Flyger said he was trying to put it "as nicely as I could on the telephone". Although Mr Flyger insisted that he told Mr Rhodes that MTE would "probably" have to terminate his employment, Mr Rhodes denied Mr Flyger mentioned dismissal during their 1 March telephone call. Mr Rhodes said "the first I knew was the letter" of 2 March he received in his letterbox on 3 March with a final payslip.

[31] If MTE made a decision, as allowed by clause 37 of its employment agreement with Mr Rhodes, that he was not capable of proper and ongoing performance of his duties, it had to be able to show (when called upon to do so) that it reached that conclusion through the "due process" that the clause also promised would occur. A fair and reasonable employer could not have made the decision to dismiss without having done so.

[32] MTE's failures to follow such a process included the following. MTE did not give Mr Rhodes a proper opportunity to seek advice about the prospect of dismissal, once he knew that it was in contemplation by his employer. He did not get an informed opportunity to provide information about whether he could work and, if so, whether he was able to perform the full range of duties expected of him. And, if he was fit for only reduced duties, he did not get any real opportunity to discuss whether there were any such arrangements that might be acceptable to his employer.

Assessing alternatives

[33] Mr Flyger said there were no 'light duties' or alternative positions to which Mr Rhodes could have been assigned.

[34] MTE is part of a relatively large business employing around 150 people in the Waikato, including 80 or so working at its production factory at Te Rapa where Mr Rhodes had worked. He was one of four painters employed to paint trailer units. Mr

Flyger said other staff were welders or engineers and the only job that might be categorised as having 'light duties' was a yardman's role already held by someone else.

[35] Although Mr Flyger said he considered the prospect of light or alternative duties, and had discussed that topic with Mr Annan and Mr Ratcliffe, Mr Rhodes did not have a proper opportunity for input into that discussion. One option could have been for Mr Rhodes to have attempted a return to work on reduced hours, although Mr Flyger said it was operationally difficult to integrate and supervise part-time workers. At the time of their 1 March discussion Mr Rhodes had a medical certificate from his GP stating he was "fully unfit" for work but neither his GP nor an occupational specialist were asked to assess if he had capacity to attempt a gradual return to work.

[36] Neither was a proper assessment made, with input from Mr Rhodes, over whether some re-organisation of the painters' work could have been attempted, even for a short period, so that Mr Rhodes only did tasks within his capability. His evidence was that he believed, at the time, he could have done painting work on the outside and tops of the trailers and it was only the painting work that required crouching underneath the trailers that he could not do. In his oral evidence at the Authority investigation meeting Mr Flyger doubted such a division of labour was feasible as the painters had to use a continuous spray from one end of the trailer to another to avoid 'dry lines'. However it was not sufficiently clear from his evidence that MTE's consideration of such alternatives, even on a trial basis and before deciding to dismiss Mr Rhodes, was anything but cursory.

Was the process defective, resulting in Mr Rhodes being treated unfairly?

[37] Mr Flyger's letter of 22 February was inherently unreasonable in what it required of Mr Rhodes. It stated MTE understood Mr Rhodes was "considered to be not fit for work at present" but then Mr Flyer wrote that he felt it was "reasonable to ask" Mr Rhodes to return to work no later than 1 March 2016. While MTE had business needs it could legitimately pursue, it had not fairly balanced its interests with those of Mr Rhodes and had not explained why his dismissal was necessary before it could employ someone else to work meanwhile.

[38] MTE may well have been in a situation whether it could fairly have cried halt in its employment relationship with Mr Rhodes but it needed to have first done more to fairly establish the grounds on which it might do so.

[39] An employer, acting justifiably, could not have: (i) failed to get a clear medical assessment of whether or not Mr Rhodes was fit to work; (ii) failed to give him an opportunity to squarely address the prospect that he was to be dismissed; and (iii) failed to give him an opportunity for a fully-informed discussion of whether or not alternative work arrangements could reasonably be attempted by his employer. They were defects in its process that resulted in Mr Rhodes being treated unfairly by MTE's actions, in the way they were taken and at the time they were taken. As a result, in all those circumstances, what MTE did was not what a fair and reasonable employer could have done. Its decision to dismiss Mr Rhodes, at the time it was made and in the way it was made, was not justified.

[40] A further element of doubt was whether Mr Rhodes had the opportunity to speak directly to the actual decision maker, which is a fundamental element of fairness where a worker faces dismissal.[8] It is likely Mr Ratcliffe effectively made the decision. Mr Flyger said he had told Mr Ratcliffe about his 1 March phone call to Mr Rhodes and the medical information from the surgeon and Mr Rhodes' GP. He said Mr Ratcliffe had told him that he "needed another painter". Mr Flyger sent the letter of dismissal soon after his discussion with Mr Ratcliffe. However if Mr Flyger was in fact, as he said, the person who made the dismissal decision on MTE's behalf, he did so without having first taken all the steps necessary for an employer to have done so fairly and reasonably at the time.

Remedies

Lost wages

[41] In the event of a finding that MTE acted unjustifiably in dismissing him, Mr Rhodes sought an order of $15,000 for lost wages. The period of loss claimed was from 3 March to 3 June 2016. The amount of loss claimed was based on gross weekly pay of $1250.

[8] *Irvine Freightlines Limited v Cross* [1993] 1 ERNZ 424 at 442 and *Quinn v BNZ* [1991] 1 ERNZ 1060 at 1070.

[42] However Mr Rhodes' own evidence did not support an award on those grounds. He accepted it was unlikely he would have been able to return to work at MTE in the period for which he claimed lost wages, if he had not been dismissed. In that sense an award of lost wages would not, on compensatory principles, put him back into a position he would have been but for the wrong done to him by MTE.

[43] Around the time that he was dismissed ACC advised Mr Rhodes his weekly entitlement compensation was to end from 8 March. ACC had decided his condition, by that time, was the result of "long standing wear and tear in the lower lumbar spine" rather than any continuing effects of his work accident on 3 September 2015. Mr Rhodes later sought a review of that decision, which was still awaiting an outcome by the time of the Authority investigation.

[44] What was relevant about that situation was that, by early March 2016, Mr Rhodes had every incentive to return to work if he could. He had lost his income from ACC. However he said he was not really able to work at that time.

[45] His own description of his capacity in March and the following months meant that, if he had not been dismissed, there was real doubt about the probability that he would have been back working at MTE. As a result, it was likely that (in the counterfactual scenario) he would not have been able to earn the wages he claimed he had lost and should now be reimbursed by MTE.

[46] There was some prospect that he might have been able to persuade MTE to attempt a trial of reduced hours or to reorganise how work duties were shared (so he did not have to do painting work that involved crouching under trailers). However, as a matter of likelihood, such an arrangement probably would not have been made or not have lasted for long before MTE could then have, fairly, 'cried halt' to the employment. The earlier finding in this determination about that issue of alternative duties concerned MTE's failure to properly look into the prospect and include Mr Rhodes in a fair discussion of it, rather than a finding that MTE was at fault for not providing such an arrangement. As a "contingency of life" and given Mr Rhodes'

condition at the time, it was likely that a trial of such an arrangement may not have lasted long, so any associated loss of wages would have been small anyway.[9]

[47] A further element undermining the claim was Mr Rhodes' limited attempts to mitigate his loss. He had enquired of two employers about the prospects of any work (in his general range of skills in panel and paint work) but was not clear about when he had done so. His limited efforts were however consistent with a conclusion that he would probably not have been able to work and earn wages in that period, so had not really lost any wages that MTE should be ordered to now pay by way of an award of compensation under s 123(1)(b) of the Act.

Compensation for humiliation, injury to feelings and loss of dignity

[48] Mr Rhodes' dismissal was carried out in a way that his advocate submitted was "fairly brutal and summary". While Mr Flyger did not intend his letter to have that effect, a dismissal by letter was an unexpected shock that was humiliating and undignified for Mr Rhodes. While he was relatively stoic in his evidence about the effect of the dismissal on him, what he said about his worries about not being able to meet his financial commitments revealed the injury to his sense of self-worth. And, as Mr Flyger's oral evidence revealed, Mr Rhodes had a personal friendship with Mr Ratcliffe. That inevitably added to a loss of dignity and sense of humiliation Mr Rhodes felt as a result of how his dismissal occurred.

[49] Mr Rhodes sought the sum of $5000 as compensation under s 123(1)(c)(i) of the Act. It was a modest amount and appropriate to award in the light of how MTE ended his employment.

Any reduction required for contributory conduct?

[50] There was one instance where Mr Rhodes' conduct at work was said to have been below MTE's expectations and one instance where his performance of a piece of work was questioned. Neither instance, to the extent they were or could have been subject to disciplinary scrutiny at the time, were relevant to situation giving rise to his grievance over his dismissal on the grounds of medical incapacity. Mr Flyger confirmed neither instance was relevant to the decision made by MTE. On those

[9] *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 at [73].

grounds there could be no finding of relevant blameworthy conduct or a requirement of reduction of the remedies granted.[10]

Costs

[51] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[52] If they are not able to do so and an Authority determination on costs is needed Mr Rhodes may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum MTE would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[53] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[11] The meeting finished by 3.30pm so, allowing for breaks, took up five-sevenths of a day for the purpose of applying the daily tariff.

Robin Arthur
Member of the Employment Relations Authority

[10] Employment Relations Act 2000, s 124.
[11] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].