

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 440/09
5141683

BETWEEN MARK SCRAGG
Applicant

AND McALPINE HUSSMAN
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Michael Bradley, for Applicant
Nicola Dowling, for Respondent

Investigation Meeting: 1 July 2009

Submissions Received: 10, 16 and 22 July 2009

Determination: 9 December 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Scragg was employed by McAlpine Hussman in its Tauranga sheet metal factory from 2 October 2006 until 1 August 2008. The factory manufactures refrigerated display cabinets for supermarkets. In his role Mr Scragg operated computer software into which he entered cutting specifications for metal sheets. The cut sheets are then assembled in the factory.

[2] During his employment Mr Scragg developed a medical condition which impacted on his work and lead, ultimately, to the end of his employment.

[3] Mr Scragg says his employment did not end by operation of law (ie, frustration of contract) but by dismissal and that his dismissal was unjustified. He says his medical condition could have been accommodated and McAlpine Hussman unreasonably refused to implement those accommodations. He seeks remedies consequent.

[4] McAlpine Hussman says Mr Scragg's employment ended by operation of law because the obligations owed under his employment agreement could not be fulfilled. In the alternative it says Mr Scragg was justifiably dismissed – there were ongoing issues with Mr Scragg's performance and he was treated fairly and reasonably in the process leading up to his employment ending including the fair consideration of his suggestions as to how his medical condition could be accommodated.

[5] This determination considers whether Mr Scragg's employment ended by operation of law or whether he was dismissed. If I find his employment ended by operation of law then there is not inquiry into justifiability. If I find Mr Scragg was dismissed then the Authority must assess the justifiability of that dismissal against the section 103A test.

Frustration of contract?

[6] During a meeting on 1 August 2008 Mr Scragg was advised his falling asleep during working hours had frustrated the terms of his employment agreement to such a degree that his employment was at an end. The *dismissal notice*¹ records:

Reason for dismissal *Frustration of Agreement of employment due to inability to fulfil obligations as a result of a continual need to sleep.*

Previous warnings (verbal or written) if applicable 27/9 – *increased error levels and poor productivity.*

[7] The Employment Court discussed the doctrine of frustration of contract in *Taylor v Air New Zealand*²:

[28] ... As the Court of Appeal in *Power Co* noted had been said by Lord Simon in the seminal House of Lords case of *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 700:

“Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to

¹ The title of McAlpine Hussman's standard form

² 28/10/04, Judge Colgan, ARC53/03

hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.”

[29] The test is a high one including such phrases as “fundamentally different” and “radically different” from the situation earlier contemplated by the parties. Frustration occurs by operation of law: it does not depend on the action or inaction of the parties.

[8] In that case the Court found Mr Taylor’s employment did not end by frustration and that he was unable to fulfil his obligations under the employment agreement by reason of his medical condition and not a supervening event not amounting to default³.

[9] This is an analogous situation. Mr Scragg fell asleep at work as a consequence of his medical condition. There was no supervening event – without default of the parties – which significantly changed the nature of the agreed outstanding contractual rights and/or obligations.

[10] I find, for the foregoing reasons, Mr Scragg’s employment with McAlpine Hussman did not end by operation of law – there was no frustration of contract.

Was Mr Scragg justifiably dismissed?

[11] The test for justification of a dismissal is set out in section 103A of the Employment Relations Act:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 or action occurred.

[12] Section 103A imposes an obligation on the Authority to consider the employer’s decision to dismiss against the objective standard of a fair and reasonable employer⁴.

[13] As recorded in the dismissal notice Mr Scragg’s performance had been the subject of a disciplinary warning in September of the preceding year.

³ Para 31

⁴ *Air New Zealand v V* 3/6/09, Colgan CJ, Travis, Shaw & Couch JJ, AC15/09

[14] During the September disciplinary meeting Mr Scragg disclosed to Alan Prestage, his manager, that his increased error rate was caused by tension headaches

and this reduced his ability to concentrate in the late afternoon. Mr Scragg advised during the meeting that this was short term, that he had been referred to a pain clinic to review his medication and would keep the company up to date, which he did. Mr Prestage said in his written evidence that this was the first time Mr Scragg had advised of a medical problem.

[15] In late 2007 staff told Mr Prestage Mr Scragg was closing his eyes at work. Mr Prestage did not take the matter up with Mr Scragg because he had not seen it himself and was not sure if it was true. Mr Scragg did not advise Mr Prestage he was having difficulty staying awake at work.

[16] In early 2008 Mr Scragg advised Mr Prestage that he had a sleep disorder. Mr Scragg kept Mr Prestage up to date as to progress. Mr Prestage knew and accepted that improvement would not be immediate.

[17] In February ACC commissioned an assessment of Mr Scragg's workplace by an occupational therapist. For the purposes of this determination the relevant sections of the workplace assessment summary are:

...

Given that key indicators of a chronic sleep apnoea include issues with concentration and somnolence, it is reasonable that this health issue is likely impacting on concentration and ability to achieve work quality.

...

Until this time [completion of medical case review] Mark is advised to:

...

- Explore implementing power naps (as outlined during assessment) as part of the lunch break routine, to assist with "re-fuelling" for the afternoon demands.

[18] A copy of the assessment was given to Mr Prestage.

[19] Mr Prestage discussed the assessment with Mr Scragg and encouraged him to rest his eyes or go for a walk during his lunch break. Mr Scragg did not implement power naps and chose to read a book or use the computer during his lunch breaks. He told the Authority he did this because he felt he needed to sleep when he felt drowsy (which might not coincide with his scheduled lunch break) and was waiting for the advice of the consultant physician.

[20] In early June Mr Prestage found Mr Scragg fast asleep with his head on his key board and had to wake him up. Mr Prestage met with Mr Scragg and told him falling asleep at work was unacceptable. Mr Prestage said Mr Scragg's sleeping was visible to staff and was effecting team morale – staff members dropped a book to wake Mr Scragg up, the factory complained of delays and made negative comments about the design team, in which Mr Scragg was employed.

[21] Following this incident Mr Prestage, in discussion with the human resource manager and the facility manager, decided to have a formal meeting with Mr Scragg. On 29 July the following invitation was sent to Mr Scragg:

Re: Sleeping on the job

With regard to the above, as you are aware via previous meetings, the company has been concerned for a number of months about your health issues which have impacted significantly on your output of work. We have tried to work with you in terms of leniency regarding the quality and output of work, and have also supported you in relation to the rehabilitation programs (sic) that you have undertaken.

More recently, your ability to stay awake for the working day has been hugely impacted and not only I, but also other team members, have found you asleep on the job on several occasions. Regretfully I advise that this cannot continue as it is now having an extreme impact on both the department and site operations in general. We have no alternatives to offer at this point in time, however this issue does need to be resolved.

I would ask that you take time to consider your health issues and your ability to fulfil your contractual obligations. In this regard, we would like to meet with you to discuss this further on Friday 1 August at 8.30am. We strongly advise that you have a support person/representative present at that time. If you require additional time to arrange this, please advise me by the end of business today and we will agree another meeting time.

[22] Mr Scragg attended the meeting supported by one of the draughtsmen from the design team. Mr Prestage outlined that sleeping on the job was unacceptable, that the company had provided a lot of support to Mr Scragg but the situation needed to be resolved. Mr Scragg said he was falling asleep at work and that he could not control this. He told Mr Prestage he had seen a sleep physician who had recommended power naps (the report was pending). Mr Scragg then proposed a daily 20 minute nap taken in his car when he felt drowsy.

[23] The meeting broke and Mr Prestage and the facility manager (also present in the meeting) sought advice from the human resource manager. The decision was made that the power nap request could not be accommodated and to give Mr Scragg

one month's notice. The meeting reconvened and Mr Scragg was advised of the decision.

[24] This dismissal deviates in many respects from how a fair and reasonable employer would have acted in all the circumstances. I wish to emphasize that all the circumstances of this case include the fact Mr Scragg suffers from an accident related disability with associated pain, the treatment for which led to his sleep apnoea the cause of the sleeping on the job.

[25] The dismissal process was deficient in the following respects. The allegation was not clearly articulated and Mr Scragg was not put on notice that dismissal could be an outcome of the meeting. Given the reliance on frustration of contract it is clear why the process set out in the disciplinary policy document⁵ was not complied with however, this approach was mistaken. The delay in convening the meeting undermines the respondent's claim that Mr Scragg's situation had reached a point where it could not continue. In such circumstances it would have been fair and reasonable to have waited the few days necessary to receive, consider and discuss the consultant physician's report dated 30 July. There was no assessment, other than in very general terms, of how Mr Scragg's sleeping on the job had impacted on the discharge of his duties and the rest of the factory. A fair and reasonable employer would have made such an assessment and put that assessment to Mr Scragg to comment on prior to any decision being made.

[26] For the foregoing reasons I find Mr Scragg's dismissal was unjustified.

⁵ **Unsatisfactory Performance** Employees who are unable or unwilling to perform to a satisfactory standard will be advised of any shortfall in performance and coached to assist them to reach the required standard. However, unsatisfactory performance, which continues even after repeated warnings and coaching, may result in dismissal. Note: Warnings do not have to be for the same offence to result in dismissal. Warnings are initiated due to an unacceptable pattern of behaviour.

Remedies

[27] Mr Scragg has received earnings-related compensation from the end of his paid notice period. He seeks an order from the Authority for wages off set against those compensatory payments (ie, a 20% top up). The claim is declined. Mr Scragg receives earnings related compensation because he has been assessed as unable to work. The relevant statutory scheme determines what compensatory payments he is

entitled to. The causal link between his employment ending and his lost wages is severed.

[28] Mr Scragg also seeks an award pursuant to section 123(1)(c)(i) of the Act. He and his partner gave detailed evidence of the negative impact and distress caused by his dismissal. Mr Scragg is entitled to an award of \$5000.

Contribution

[29] Having made an award of remedies I must now consider whether Mr Scragg has contributed in a blameworthy way to the circumstances which gave rise to his dismissal⁶.

[30] I find he did in two regards – Mr Scragg took no active steps to draw his falling asleep on the job to his employer’s attention despite the expressed concerns about performance and he failed to implement the lunch time power naps as recommended by the occupational therapist (a recommendation repeated by his consultant physician). I accept Mr Scragg told Mr Prestage about his sleep disorder but he did not tell Mr Prestage he was regularly falling asleep during working hours. This is a serious issue; it was remiss of Mr Scragg not to advise Mr Prestage of it and inconsistent with his scrupulous approach to advising the company of the details of his medical condition and treatment. Also inconsistent was the failure to implement lunchtime power naps – Mr Scragg had a possible solution to his afternoon drowsiness which he inexplicably refused to implement despite expert advice and Mr Prestage’s encouragement to do so.

⁶ Section 124 Employment Relations Act 2000

[31] Accordingly, the awarded remedies should be reduced by 20%.

Costs

[32] Costs are reserved. The parties are invited to attempt to resolve this issue between them. If they are unable to then application can be made to the Authority to set a timetable for the filing of costs memoranda.

Marija Urlich

Member of the Employment Relations Authority