

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 356/08
5125130

BETWEEN TROY WARREN
 Applicant

AND LINCOLN FOOD
 WAREHOUSE LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Greg Lloyd for Applicant
 Daniel Erickson for Respondent

Investigation Meeting: 24 and 25 September 2008 at Auckland

Determination: 16 October 2008

DETERMINATION OF THE AUTHORITY

[1] Troy Warren seeks reinstatement to a job as a butcher at the “Pak’n Save” supermarket operated by Lincoln Food Warehouse Limited in Henderson.

[2] LFWL dismissed Mr Warren on 11 March 2008. Its store manager Mark Dunford decided to end Mr Warren’s employment because of ongoing uncertainty about when he would be fit to resume his usual duties.

[3] Mr Warren had suffered a wrist injury at work on 7 June 2007. He was away from work for most of June, July and August 2007.

[4] LFWL’s butchery manager Simon Peet did not want Mr Warren to return to work until he was medically cleared as fully fit for usual tasks and hours. In July Mr Peet declined the offer of an ACC-funded ‘work trial’ proposed by a workplace assessor reviewing the situation for ACC.

[5] In September Mr Warren returned to work but his wrist injury recurred in November 2007. In December 2007 he began a graduated return-to-work trial during which ACC continued to pay him earnings-related compensation.

[6] In agreeing to the work trial Mr Dunford set “*late February 2008*” as the time by which Mr Warren must be carrying out full normal duties and hours.

[7] In late January 2008 Mr Dunford again warned Mr Warren of the prospect of losing his job if he could not return to normal rostered shifts and duties by the end of February.

[8] Between June 2007 and February 2008 Mr Warren was examined four times by Dr John de Waal, a surgeon whose specialties include hand surgery. On 20 February 2008 Dr de Waal “*reluctantly*” gave Mr Warren clearance to return to full-time duties from 1 March 2008.

[9] Mr Warren suffered a further recurrence of his wrist injury in late February. At the time Dr de Waal was on leave and could not examine Mr Warren until 19 March. In those circumstances Mr Warren’s General Practitioner gave him a medical certificate stating Mr Warren was unfit to work until 19 March 2008.

[10] After a meeting with Mr Warren and his union representative on 10 March, Mr Dunford considered the medical information provided was “*inconsistent and inconclusive*”. Mr Dunford resolved to dismiss Mr Warren for incapacity, as he had foreshadowed in late January.

[11] Mr Warren says his dismissal was unjustified and seeks remedies of lost wages, compensation and costs as well as reinstatement to his job.

[12] LFWL says its decision was what a fair and reasonable employer would have done. It says reinstatement is impracticable and no other remedies are warranted.

Issues

[13] The issues for the Authority to resolve were:

- a. Whether dismissing Mr Warren for incapacity was what a fair and reasonable employer would have done in the circumstances on 11 March 2008; and
- b. If it were not, whether it is practicable to reinstate Mr Warren and, if so, whether he should be reinstated; and
- c. Whether other remedies of lost wages and distress compensation should be awarded to Mr Warren, after considering whether any blameworthy conduct by him contributed to the situation giving rise to his grievance (if any); and
- d. Costs.

[14] To assist the Authority's investigation, written witness statements were lodged by the Applicant, his union organiser Terry Tuiletufuga, specialist hand surgeon Dr John de Waal, LFWL's store manager Mark Dunford, operations manager Don Howson and butchery manager Simon Peet. Relevant documents, including correspondence and medical certificates, were provided by the parties. At the investigation meeting Mr Warren, Mr Dunford, Mr Howson and Mr Peet – each under oath – answered questions from the Authority and the parties' counsel. Dr de Waal, under affirmation, was interviewed by conference telephone call during the meeting. Counsel provided written submissions and oral closing arguments.

[15] The common law test of justification for the dismissal of an employee for incapacity has for some time effectively been the same standard that now applies to all dismissals under s103A of the Act: whether the decision to dismiss was one that a fair and reasonable employer would have made at the time. The question, as sometimes expressed, is whether circumstances have come to the "*point at which an employer (particularly in a small shop) can fairly cry halt*".¹

[16] That decision must fairly balance the employee's interests in continued employment and the employer's interests in practical operation of its business.

Was the decision to dismiss Mr Warren justified?

[17] LFWL's 11 March letter dismissing Mr Warren refers to the following as the

¹ *Hoskin v Coastal Fish Supplies Limited* [1985] ACJ 124, 127.

rationale for its decision:

- a. medical information from specialist Dr De Waal was “*inconclusive*” about Mr Warren’s ability to return to full duties; and
- b. a further medical certificate from his GP certified Mr Warren as unfit to resume usual duties until at least 19 March; and
- c. there was “*no guarantee*” of Mr Warren being able to return to work on 19 March and there might be a further period of absence; and
- d. Mr Warren had already been unable to resume rostered shifts and duties for a long time; and
- e. the company’s “best interests” did not allow a situation of uncertainty to continue.

[18] LFWL submits it could not reasonably have been expected to continue incurring significant costs keeping Mr Warren’s position open in light of the ongoing uncertainty on when he would fully recover from his injury and the “*apparent failure*” of the gradual return to work plan in place from late December.

Determination

[19] Mr Warren’s case is not about the procedure of his dismissal. Throughout, he was given appropriate notice of meetings, adequate information and opportunity to comment, and had the benefit of representation and support from a union organiser or a delegate.

[20] Rather Mr Warren’s application concerns the substantive justification for LFWL’s decision on 11 March to dismiss him.

[21] I have found that decision was not what a fair and reasonable employer would have done in all the circumstances at the time for these five reasons:

- a. LFWL’s earlier refusal to start a graduated return to work programme or arrange light duties sooner after his work injury are likely to have some impact on what it deemed the “*apparent failure*” of the later ACC-funded work trial; and

- b. LFWL's deadline for a return to full duties and hours, on which it later based its decision to dismiss Mr Warren, was set on an arbitrary basis; and
- c. Faced with apparent uncertainty of medical information available to it on March 11, LFWL did not wait a reasonable short period for further information from Mr Warren's specialist, or take steps to get its own independent information; and
- d. LFWL's evidence about supposed additional business costs attributable to Mr Warren's absences for injury is unconvincing; and
- e. The length of the incapacity – around nine months before dismissal – taken in context with the contractual obligations between the parties, the nature of the business and the nature of the position does not alter this conclusion in the particular circumstances.

No earlier work trial

[22] Although Mr Warren's work injury was diagnosed in June 2007, it was not until December that LFWL agreed to allow a graduated return to work programme, despite earlier suggestions that this was the appropriate measure.

[23] In July a workplace assessor reporting to ACC noted LFWL said a graduated return to work hours was "*not available*", even if funded by ACC, and said "*lighter tasks*" were already covered by other staff.

[24] In August Dr de Waal, in a written opinion written to ACC and copied to Mr Warren's GP and physiotherapist, was critical of LFWL's requirement that Mr Warren not return to work until he was "*100% fit*". He said the "*best way*" to get Mr Warren "*back to full duties in the shortest possible time*" was "*a graduated return to work programme*". He encouraged the ACC case manager to "*take some action in terms of negotiating a more rational return to work programme*" with LFWL. It was not until 18 December that LFWL agreed to that approach.

[25] It is clear from Dr deWaal's evidence to the Authority that – according to now conventional medical wisdom that strained or inflamed joints need to be kept in use to

aid recovery – LFWL’s refusal to allow an earlier, graduated return to work did not assist Mr Warren’s prospects of full recovery and may in fact have contributed to the delay.

[26] A fair and reasonable employer would have taken more account of the advice of the relevant health professional and occupational advisor and acted on a return to work programme earlier.

Arbitrary deadline

[27] In agreeing to a graduated return to work programme in December, Mr Dunford also set what he described as a “*time frame of end of February 2008 for full return to work on full duties*”. At this point he also cautioned Mr Warren that beyond then the supermarket could “*no longer keep the position open as it is effecting the operations of the business*”.

[28] This is effectively the timeframe that LFWL subsequently worked too, making its decision to dismiss Mr Warren some 11 days after its expiry. This “*timeframe*” was set by Mr Dunford at a meeting with Mr Warren and a workplace assessor on 18 December. At the time it was clearly an arbitrary deadline, made without reference to background medical information about whether it was a reasonable or feasible period. This is clear because Mr Dunford’s own meeting notes record that he needed to be supplied with “*documentation*” about Mr Warren’s condition and proposed a meeting with the ACC case manager so he could “*access*” that information.

[29] A fair and reasonable employer would set such timeframes or goals on the basis of the advice of an appropriate health professional – whether a specialist, GP or physiotherapist – or a qualified occupational advisor.

No further inquiries

[30] It is against this background that LFWL’s concern about what it describes as Dr de Waal’s “*inconclusive*” opinion of 20 February 2008 must be assessed.

[31] The specialist’s preference was for Mr Warren, at that stage, to slow down his

return to work schedule. Dr de Waal suspected comments from Mr Warren about some “*niggle in his right wrist*” might indicate the beginnings of a further “*flare up*” of the injury. However he records Mr Warren’s strong preference for a clearance for full duties. While he regarded that as a “*relatively high-risk strategy*” he gave the clearance to apply from 29 February. He also recommended that the ACC case manager encourage LFWL to ‘temper’ its stand on the requirement for full duties to be performed within the deadline it had set.

[32] There is nothing inconclusive in Dr de Waal’s opinion. He agreed Mr Warren could attempt full duties but considered it was too much, too fast.

[33] The real ambiguity came from the situation which developed a few days later when Mr Warren did experience a “*flare up*”. His evidence was that his GP recommended waiting for the first available appointment with Dr De Waal rather than returning to work. The GP wrote a medical certificate declaring Mr Warren unfit for work until that appointment date on 19 March.

[34] I accept that LFWL fairly considered the situation uncertain when it met with Mr Warren and his union representative on 11 March, having scheduled that meeting after Mr Warren advised Mr Peet of his latest injury and absence until the 19 March specialist appointment.

[35] However I am not satisfied that a fair and reasonable employer would have proceeded on 11 March to dismiss an employee in Mr Warren’s position.

[36] Faced with that uncertainty a fair and reasonable employer would have deferred its decision until it had the benefit of a further and up-to-date opinion from Dr de Waal. An impartial observer would, I find, consider this the reasonable course of action for a number of reasons.

[37] Firstly, waiting a further week or so for the specialist’s report and a rescheduled meeting with Mr Warren would have been a relatively minor inconvenience in the scheme of things, particularly for an employer balancing not only its interests but also those of the employee.

[38] Secondly, if there were real uncertainty, LFWL could have – either then or earlier – exercised its right under a term of the collective agreement to have Mr Warren under a medical assessment by a practitioner chosen by LFWL and sought a more certain prognosis.² It did not do so because, according to Mr Dunford’s evidence, he was content to rely on Dr de Waal’s advice. However that reliance had not extended to following much earlier advice about when a graduated return to work programme should have been put in place, or advice that the programme by then in place should continue at a slower pace.

[39] Thirdly, some of LFWL’s evidence implied Mr Warren may have failed to do enough to speed his own recovery, from the original injury and its several recurrences. He is criticised, for example, for having taken oral steroids rather than steroid injections and not having had surgery to treat his tendonitis. The implications are unfair. There was no suggestion from Dr de Waal or other health professionals involved that Mr Warren had not taken every necessary step to aid his recovery or that treatment options taken were not satisfactory. Dr de Waal’s evidence confirmed that surgery was not a necessary measure for the treatment of Mr Warren’s tendonitis.

[40] Fourthly, for the reasons discussed below, LFWL’s evidence does not support the contention that its business needs required a decision to be made on 11 March,.

Additional business costs not convincing

[41] The dismissal letter does not expressly identify the company’s practical business requirements or business costs as a reason for the dismissal although a reference to the company’s “*best interest*” may have intended to make that link.

[42] Neither were the alleged costs ever expressly identified in meetings with Mr Warren – at least from what can be identified from Mr Dunford’s notes of meetings on 18 December 2007, 31 January 2008, and 10 March 2008. There is a reference in his December notes to Mr Warren’s condition “*effecting the operations of the business*”. Mr Dunford’s January notes do refer to this placing “*extra pressure on the day to day operations of the department*”.

² Considered as a factor in *Auckland and Tomoana Freezing Works IUOW v Wilson Foods Limited* [1990] 2 NZILR 939, 945 (LC, Travis J).

[43] However LFWL's evidence to the Authority suggested Mr Warren's absence resulted in the butchery having to purchase additional boxes of pre-processed beef and incurring additional costs of more than \$10,000 in the month of December 2007 alone. It also points to costs of more than \$5000 for employing locum butchers in that period as being attributable to Mr Warren's absence.

[44] It is doubtful that such detailed calculations had been made at the time of the decision to dismiss Mr Warren. They were made much later in preparing evidence for the Authority. It is likely however that the impression Mr Warren was responsible for various additional costs was held by the managers at the time. It appears to have been a view that was neither fair nor accurate.

[45] Purchase of pre-processed boxes had begun before Mr Warren's absence. Increased orders for those related not only to his absences but those of other butchers and the seasonal boost in demand in December.

[46] Neither were locum butchers solely required to cover Mr Warren's work. Rather, as Mr Peet confirmed, the department had wider problems of absenteeism and staff turnover affecting productivity in busy periods.

[47] LFWL's evidence of additional business costs did not allow for the fact that, from December 2007 to March 2008, it had no ordinary wage costs for Mr Warren. During that period ACC was picking up the tab by continuing to pay him earnings related compensation. This meant that LFWL had the benefit of the hours he did work in those months, without the wage costs.

[48] Similarly I do not accept that LFWL fairly assessed the hours that Mr Warren worked once the graduated return approach had begun. Its evidence pointed – by way of example – to limited hours worked in the last December and early January period without identifying that contributing factors were Mr Warren being away of pre-approved annual leave and then a period of sick leave for an unrelated injury.

[49] LFWL's managers also knew that, in September 2007, Mr Warren's wife had been diagnosed with Multiple Sclerosis and that some of his reduced hours in the last

quarter of 2007 related to annual leave and approved 'early finishes' to care for her and take her to hospital appointments.

Other factors

[50] Mr Warren's dismissal, just more than nine months after his initial injury, was after a relatively long period of incapacity.

[51] While the exact figures were disputed in the evidence, it was generally clear that Mr Warren had been unable to work anywhere near his full weekly roster for much of this period. Figures taken from his timesheets suggest he worked a total of only 497 hours over 42 weeks – less than a third of the total time he would otherwise have worked. This includes some weeks he was off work entirely on medical advice and some weeks when he was considered fit to work in at least some capacity, including some time in September and October and then, after mid-December, the ACC-funded "work trial" which covered a 15-week period. This includes some days in December 2007 and January 2008 when he was either absent on annual leave or absent of some sick leave necessary for reasons unrelated to his wrist injury.

[52] The cases emphasise 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.

[53] LFWL's supermarket is not the 'small shop' contemplated in the *Hoskin* case. Rather it is one of Australasia's largest supermarkets. It has some 460 employees. Mr Dunford's evidence was that it successfully accommodates a range of staff illnesses and injuries, including managing returns-to-work as part its overall business.

[54] Mr Warren's job was not a 'key' position. He was one of ten qualified butchers in a butchery department of more than 40 staff working under Mr Peet's direct management. This differs significantly from a smaller business where the absence of one skilled tradesperson, for example, might prevent some or all other parts of the business from operating.

[55] Mr Warren, although he had some previous work attendance issues, was otherwise regarded as a satisfactory worker with more than three years service. Although staff turnover of butchers was around 70 per cent over the last two years, there was a fair likelihood Mr Warren would have remained in the job for the foreseeable future, but for injury and his dismissal for incapacity.

[56] The applicable collective employment agreement – between LFWL and the National Distribution Union – has an express term on employee incapacity. The term sets no definite period after which a worker may be dismissed for incapacity (which contrasts with, for example, periods prescribed for abandonment, or providing medical certificates for sick leave). Rather it refers to circumstances where a worker is off for “*an extended period*” due to injury and may not be able to work within a “*reasonable period*”. Accordingly the contractual terms must be taken to accept that the reasonable period of incapacity for illness or injury depends on the facts of the particular circumstances of the individual case, and, in that way, is consistent with the common law. In some cases that might mean as short a time as a fortnight³ or even as long as a year or more⁴.

[57] In that light it cannot be said that the length of time over which Mr Warren was largely incapacitated from undertaking his full normal duties was inherently beyond a reasonable period. Rather the length of the incapacity is considered alongside with the other reasons given by LFWL at the time for coming to its decision to dismiss Mr Warren and the circumstances at the time. In this particular case, assessed objectively and taken overall, those reasons are found to have not justified the decision taken.

Remedies

[58] Reinstatement is the primary statutory remedy for Mr Warren’s grievance of unjustified dismissal. If practicable, he must be reinstated to his former position or be

³ Such as in *Hoskin*, supra, where the incapacitated employee was a shop manager not easily replaced on a temporary basis.

⁴ Such as in *McKean v Board of Trustees of Wakaaranga School* [2007] 1 ERNZ 1, where a junior school teacher was away on sick leave for almost a year, and *Taylor v Air New Zealand Ltd* (unreported, EC Auckland, AC61/04, 28 October 2008) where an aircraft engineer had ongoing sight problems more than a year after he suffered a stroke.

placed in a position no less advantageous to him.

[59] LFWL submit reinstatement is not practicable for the following reasons:

- a. Mr Warren cannot say with any certainty that he would be able to perform his role if reinstated; and
- b. His return to work would be disruptive to other staff who might have hours reduced or spend more time working on heavier tasks if Mr Warren initially does a greater proportion of lighter tasks.
- c. There is no vacant staff position; and
- d. There is a risk of further injury.

[60] The assessment of practicability is made by considering the “*future predicated on past and current events and circumstances*”.⁵

[61] Dr de Waal has examined Mr Warren on 19 March, 23 April and 3 September 2008 this year. His opinion – by letter to ACC and in evidence to the Authority – was that Mr Warren is fit to return to work but this should ideally be done on a graduated basis. He cannot say with absolute certainty that there will be no recurrence of the injury but says, on his latest examination, that there is “*no evidence of any residual effect of the injury*”. He notes that, since dismissal, Mr Warren has completed a gym-based strengthening programme over three months. The programme was designed to optimise hand function and strength.

[62] On that basis, LFWL’s propositions regarding certainty of performance and risk of injury may be correct. However it is also clear that LFWL can, to a large degree, control the level of certainty and risk by how it manages any reinstatement of Mr Warren so that a successful outcome is more likely than not. On that basis I do not accept reinstatement is impracticable.

[63] I do not accept there is no vacant staff position. The butchery has an establishment of ten qualified butchers with the work currently done by eight trade butchers, one experienced meat packer and Mr Peet. Mr Peet’s evidence was that he only carried out that role on a ‘relief’ basis additional to his overall management role.

⁵ *Sefo v Sealord Shellfish Limited* (unreported, EC Christchurch, CC 4A/08, 17 April 2008) at [55].

[64] Even if there were no position presently vacant for Mr Warren, likely staff turnover would create one within a relatively short period. Accordingly this is not a barrier to the practicability of reinstatement.

[65] It is true that Mr Warren's reinstatement could create some disruption to other staff – in terms of the allocation of hours and of duties, particularly if a graduated return required Mr Warren to carry out a larger proportion of 'lighter' duties for a limited period. However Mr Peet's evidence was that there were already measures to rotate duties within the butchery so that butchers did not spend all day on 'heavier' work such as boning. The existing rotation practices and the likely limited time for any graduated return by Mr Warren means any disruption to other staff should be able to be accommodated and does not make reinstatement impracticable.

[66] Reinstatement should be a carefully managed exercise.⁶

[67] The specialist – on whom Mr Dunford said he was content to rely – advises return on a graduated basis. That was the basis of the position at the time of Mr Warren's unjustified dismissal but the situation with his injury has progressed significantly in the intervening months. Dr de Waal reports no evidence of the injury and Mr Warren says he is ready to work with the benefit of his most recent strengthening programme.

[68] The parties, as a matter of good faith, would be expected to discuss and agree the appropriate measures to reacclimatise Mr Warren to his workplace and the full range of his duties. As discussed in Mr Warren's oral evidence to the Authority, that might involve him undertaking a range of duties, both in the butchery and elsewhere in the supermarket, as directed by his managers (clause 10.3 of the collective agreement applies).

[69] **Mr Warren is to be reinstated at a time and in circumstances to be arranged between him, with his union's assistance, and LFWL but, in any event, no later than 14 days after the date of this determination.** The parties should seek the assistance of a Department of Labour mediator if they cannot resolve any difficulties making those arrangements.

⁶ *Sefo*, supra, at [73].

Other remedies*Lost wages*

[70] Until 24 June 2008 Mr Warren received earnings related compensation. His lost wages claim applies only to the period from then.

[71] Although he did not provide supporting documentation, I have no reason to doubt his evidence of having applied for at least 12 jobs as a butcher with a number of employers and sales jobs that reasonably related to his trade and mechanical skills. He was not successful in gaining any of those positions. That may be partly attributed to his frank disclosure in those applications about his earlier injury but he should not be criticised or disadvantaged for being honest with prospective employers.

[72] Mr Warren is awarded ordinary time remuneration for three months under s123(1)(b) and s128 of the Employment Relations Act 2000. However, exercising the discretion under s128, I do not make an award for any further period in the absence of supporting documentation regarding job applications and interviews.

Compensation under s123(1)(c)(i)

[73] LFWL correctly submits that the claim for \$20,000 sought under this head is excessive for a case of this type.

[74] An award of distress compensation must be related to the effect of the dismissal and not to distress caused by the work injury. The latter aspect is subject to the accident compensation system – under which Mr Warren has had the benefit of earnings related compensation and rehabilitative care.

[75] His own evidence of humiliation, loss of dignity and injury to feelings was limited. Even allowing for Kiwi male stoicism, Mr Warren appeared to have been fairly resilient throughout a difficult period. However I accept that he felt humiliated by the experience of his dismissal and distressed by the consequent financial pressures of not having an income after 24 June.

[76] Considering the particular circumstances, the other remedies awarded, and awards in similar cases, Mr Warren is awarded \$3000 as compensation under s123(c)(i) of the Act.

Contribution

[77] Mr Dunford accepted in his evidence that Mr Warren had, as far as he knew, done everything expected of him to aid his own recovery from the work injury. Nothing else in the evidence suggests blameworthy conduct requiring remedies awarded to be reduced under s124 of the Act.

Costs

[78] Costs are reserved. Parties are encouraged to resolve any matter of costs between themselves. If they are unable to do so, Mr Warren's counsel may lodge and serve an application for costs within 28 days of the date of this determination. LFWL's counsel will then have 14 days to lodge any reply before the Authority determines costs.

Summary of outcome

[79] Mr Warren was unjustifiably dismissed.

[80] He is to be reinstated to his position no later than 14 days after this determination.

[81] He is to be paid three months ordinary remuneration in lost wages and \$3000 as compensation for the loss of dignity and injury to feelings of his injury

[82] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority