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**Arthurs v Lyttelton Port Company Limited (Christchurch) [2017] NZERA 1053;
[2017] NZERA Christchurch 53 (7 April 2017)**

New Zealand Employment Relations Authority

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**Arthurs v Lyttelton Port Company Limited (Christchurch) [2017] NZERA 1053
(7 April 2017); [2017] NZERA Christchurch 53**

Last Updated: 30 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 53
5625694

BETWEEN CHRIS MILES ARTHURS Applicant

A N D LYTTELTON PORT COMPANY LIMITED

Respondent

Member of Authority: T G Tetitaha

Representatives: D Beck, Counsel for Applicant

T McKenzie, Counsel for Respondent Investigation Meeting: 21 and 22 March 2017 at Christchurch Submissions Received: 22 March 2017 from both parties

Date of Determination: 7 April 2017

DETERMINATION OF THE AUTHORITY

A. Chris Miles Arthurs was unjustifiably dismissed by the Lyttelton

Port Company Limited.

B. I order Mr Arthurs be reinstated to his former position as a Cargo Handler at the Lyttelton Port Company upon the following conditions:

a. He must file two medical certificates one from his physiotherapist GN and one from his doctor treating his PTSD within 20 working days of the date of this decision. The medical certificates should state whether he is fit to resume work as a Cargo Handler at the Lyttelton Port Company and the date this should occur;

b. Reinstatement shall take place upon a date to be determined by the Lyttelton Port Company Limited;

c. Mr Arthurs is to fully cooperate with any retraining required to meet any changed conditions of the workplace during his absence; and

d. During the first six months of his return to employment, he is to present himself twice for random drug and alcohol tests to be determined by Lyttelton Port Company's drug testing agency. He is to sign the written consent forms. He is not required to undergo the rehabilitation programme unless he refuses to undergo or fails the drug testing.

C. An order that the Lyttelton Port Company Limited is to pay Chris Arthurs the sum of \$20,000 compensation pursuant to [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).

D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Chris Miles Arthurs was employed as a Cargo Handler by the Lyttelton Port Company Limited (LPC) in 2000. His employment was terminated for medical incapacity on 8 December 2015. Mr Arthurs submits this was unjustified. He seeks reinstatement and compensation.

Relevant facts

[2] Mr Arthurs began working at the Lyttelton Port in the 1990s. He was employed full time as a Cargo Handler in 2000. Members of his whanau have been employed at the Lyttelton Port in various roles for over four generations.

[3] In 2008 Mr Arthurs witnessed the death of a workmate at the Lyttelton Port. He took one month's paid sick leave. He then returned and continued to work without incident.

[4] On 15 November 2011 LPC held a meeting with Mr Arthurs about his recent

'lost time injury' (LTI) – time lost on the job due to injuries suffered at the container

terminal. Mr Arthurs suffered an accident on a lines job. During that meeting, Bo Samuelsson, Container Terminal Manager raised several other issues - five other LTIs' and Mr Arthurs' use of the maximum amount of sick leave over the last several

years. A further meeting to discuss his LTI was to be arranged.

PTSD

[5] On 25 March 2013 Mr Arthurs had obtained a medical opinion that he had “*ongoing psychological issues from the trauma related to the witnessed death of his workmate*”. The medical certificate recommended that he see a specialist psychologist DP. He provided a copy to LPC.

[6] On 28 August 2014 a close personal friend and workmate of Mr Arthurs’ was killed at the Lyttelton Port.

[7] By 12 September 2014 Mr Arthurs was diagnosed as suffering severe post- traumatic stress disorder (PTSD). This was caused by his witnessing the death of his co-worker in 2008 and had been reactivated by the recent death of another worker resulting in a major exacerbation of his condition. His medical certificate noted his struggles with PTSD affecting both his personal and work life. His absences from work due to illness were identified as related to PTSD. The medical certificate sought paid sick leave beyond his entitlement and funding to allow him to access appropriate counselling.

[8] Mr Samuelsson replied on 3 October 2014. He gave Mr Arthurs an additional five days sick leave, noted on 30 October 2014 Mr Arthurs would gain another 10 days’ sick leave that LPC was happy for him to use to seek treatment. LPC asked for more detail about funding appropriate counselling. No agreement about paid counselling was reached. Mr Arthurs eventually sought and paid for a specialist DP’s services from his own resources.

Drug Testing

[9] On 3 November 2014 LPC introduced a new Drug and Alcohol Impairment Free Workplace policy. Mr Arthurs was selected on 28 November to undertake a random drug and alcohol test. He initially refused then agreed to testing. He then refused to sign the consent form. Shortly after he went on sick leave.

[10] On 10 December 2014 LPC required Mr Arthurs’ to undergo the health and rehabilitation programme as set out in its Drug and Alcohol Impairment Free Workplace policy.

[11] Mr Arthurs and his brother, Glen Arthurs, met with Sally Williams, HR Manager on 19 December 2014. Mr Arthurs was happy to do the test but would not sign the written consent form due to privacy concerns and breaches of the drug policy. On 5 January 2015 he produced a further medical certificate stating he was medically unfit to resume work until 9 February 2015.

[12] On 16 January 2015 LPC received notice of Mr Arthurs’ ACC claim for mental injury associated with witnessing an event at work in 2008. That same day Mr Samuelsson sent a lengthy letter regarding Mr Arthurs’ refusal to undertake the random drug testing. LPC gave him one final opportunity to undertake the rehabilitation agreement or face a disciplinary investigation.

[13] On 19 January 2015, the “Arthurs whanau” sent an email complaining about harassment and victimisation. It set out concerns about the drug testing consent form and the requirement he undergo the rehabilitation programme. It noted again Mr Arthurs’ agreement to further random drug testing. It explained the effect of PTSD upon his ability to comprehend and

make decisions. It also referred to attempts by Mr Arthurs' GP to discuss a treatment plan and the feeling that he was being "stonewalled" or ignored by LPC.

[14] LPC sent a further letter on 27 January 2015. It acknowledged his PTSD but struggled to see any link between the incident six years ago and his refusal to undergo a random drug test. It also raised the risk of his return to a safety-sensitive role and its wish to inquire further "*into your prognosis and ability to carry out your role safely and in adherence with our drug policy*".

[15] On 5 February 2015 LPC sought a meeting on 10 February to discuss his refusal to undertake the rehabilitation programme and its impact upon his return to work. Mr Arthurs produced a medical certificate as unfit to resume work until 23 March 2015.

[16] On 10 February 2015 Glen Arthurs emailed Ms Williams. He wished to support his brother at the meeting but was unavailable due to having completed a night shift just before. They would reply to Mr Samuelsson's correspondence.

[17] On 16 March 2015 LPC wrote again asking Mr Arthurs to meet to discuss the refusal to undertake the rehabilitation programme. It suggested a meeting on 20 March 2015.

[18] On 17 March 2015, Mr Arthurs provided a medical certificate stating he

should be fit to return work in approximately 10 weeks' time.

[19] On 19 March 2015 Ms Williams contacted Glen Arthurs to reschedule the meeting due to Mr Samuelsson's unavailability. He indicated LPC would be receiving correspondence the next day to update on the situation. Ms Williams followed up several times. By 27 March 2015 Glen Arthurs rang her to say he was dropping off a medical certificate and other information.

[20] Mr Samuelsson wrote again advising that he sought a further meeting on

8 April 2015.

[21] On 8 April 2015 at 1.25am, an email was sent by the "Arthurs whanau" stating Glen Arthurs had provided a new medical certificate to the Timekeeper's Office. The Arthurs whanau raised concerns about information they had provided going missing due to changes in email addresses. They were also unhappy with the dates and times of meetings. A lengthy reply was then provided to Mr Samuelsson's letter dated

27 January 2015.

[22] On 19 May 2015 LPC noted his current medical certificate was due to expire on 2 June 2015. It noted his failure to respond about attending a rehabilitation programme and his absence from the workplace on sick leave for approximately six months. It wished to discuss his long term absence and sought further information and prognosis about his ability to return to work.

[23] On 29 May 2015 the "Arthurs whanau" sent a further email alleging poor treatment by the respondent. It reiterated Mr

Arthurs consent to undertake the test and concerns about breaches of his privacy in the written consent form. It noted improvement in his PTSD and a return to work soon. On 2 June 2015, a further medical certificate was provided stating Mr Arthurs was unfit to resume work until

16 June 2015.

[24] Mr Arthurs' ACC claim was accepted for PTSD on 8 June 2015. The

employer's letter attached a "*work-related injuries – an employer's guide*". This set

out how an employer could assist an employee's recovery by "*preparing a return-to-work plan with your employee, setting out goals, responsibilities and timeframes*".

[25] Paul Monk, Operations Manager, then became LPC's decision maker and contact for Mr Arthurs' matters. He wrote on 12 June 2015 rejecting Mr Arthurs' reasons for refusing to sign the consent form as "somewhat belatedly" raised and should have been made known to LPC at the time, not six months later. It acknowledged receipt of his ACC confirming his claim for PTSD stemming from a workplace incident but until he engaged in the rehabilitation programme, "*we cannot allow your return to work and we will need to raise this with ACC if they wish to discuss a graduated return to work programme*".

[26] On 17 June 2015, Mr Arthurs provided a further medical certificate stating he was unfit to resume work until 15 July 2015. This certificate noted a new non-work injury to his right shoulder and elbow on 22 May 2015. On 15 July 2015, Mr Arthurs provided a further medical certificate stating he was unfit to resume work until 31

August 2015.

Medical Incapacity

[27] On 29 July 2015 Mr Monk wrote to Mr Arthurs. LPC had received a medical certificate with a return to work after 31 August 2015, Mr Arthurs had been away for approximately nine months and LPC had no information about when he would return. Any return must include completion of the rehabilitation programme. Mr Monk noted his absence "*has left a gap in the roster for some time now and we wish to gain some certainty as to your future here.*" LPC sought a GP report addressing his current prognosis, ability to return to full time work and when that might be and permission to discuss this with his GP. It also wanted an independent assessment by an occupational physician to report on his prognosis, ability to return to work and timeframes. It suggested a meeting on 7 August 2015.

[28] Glen Arthurs met with Mr Monk on 7 August 2015 and informed him Mr Arthurs was indecisive about what to do. He sought more time. On 17 August 2015, the Arthurs whanau emailed detailing Mr Arthurs' concerns and seeking a meeting the following week.

[29] On 27 August 2015 Mr Monk replied stating he had checked with Ms Williams and they had not been able to locate any information or reference to Mr Arthurs' shoulder injury.

[30] On 28 August 2015, the Arthurs whanau emailed Mr Monk stating Mr Arthurs would have been back at work if it had not been for the shoulder injury for which he was having ongoing treatment. They were hopeful he would not require an operation. They invited LPC to contact his doctor and ACC case manager. The next day the Arthurs whanau wrote confirming that Mr Arthurs was happy to see the company's doctor.

[31] On 31 August 2015, Mr Monk emailed confirming Mr Arthurs' willingness to visit a LPC-appointed specialist. It further noted again that if Mr Arthurs was to return to work, he would be required to engage in the rehabilitation programme. The same day the Arthurs whanau sent an email which, amongst other things, confirmed Mr Arthurs' willingness to attend an appointment with an independent specialist.

[32] On 3 September 2015, Mr Monk wrote to the Arthurs whanau. He disputed LPC had any record of information regarding Mr Arthurs' shoulder injury. Further, he alleged that Mr Arthurs was now refusing to see the respondent's specialist. It noted he intended "*to make a decision based on the information available to me on Monday, 7 September 2015*". LPC still required he complete the rehabilitation programme. This letter was inconsistent with Mr Monks' own previous correspondence and inaccurate.

[33] On 24 September 2015, Mr Arthurs' GP provided a detailed medical certificate about his PTSD. There was no timeframe given for a return to work. Mr Arthurs subsequently provided two further medical certificates that he was unfit to resume work until 1 December 2015.

[34] On 19 November 2015 LPC's expert doctor DH provided a report. DH identified three medical issues impacting upon his work capacity - the PTSD, right shoulder and right elbow pain. Overall it did not appear the PTSD would prevent a return to work. The major issues preventing his return to work was his right shoulder and right elbow injury. He was not currently fit to return to his usual range of work activity. However he was regarded as fit for light or alternative duties which do not involve elevation of the right upper limb and did not involve any forceful loading to

the right shoulder. Timeframes for return to normal work activities were measured in months rather than days or weeks. He invited further contact if there were any questions about his report.

Dismissal

[35] Following receipt of that report, Mr Monk wrote to Mr Arthurs on

25 November 2015. He set out his preliminary view Mr Arthurs may be dismissed for medical incapacity. He attached copies of Dr Wynn-Thomas' 24 September 2015 medical report and the 19 November 2015 medical report from DH. He sought a meeting with Mr Arthurs.

[36] On 27 November 2015, Mr Arthurs provided a further medical certificate stating he would not be fit to resume work until 1 February 2016.

[37] Instead of meeting on 4 December 2015, the Arthurs whanau sent a lengthy reply by email.

[38] On 8 December 2015, Mr Monk sent a letter confirming Mr Arthurs'

dismissal. This was on the grounds that:

The reality is that you have been absent on for over one year, and there is no certainty regarding any return to work. The latest medical certificate states you are still unfit for work and should be fit for work on 1 February 2016. The numerous medical certificates we have received over the past year have all been similarly non-specific about a return to work date.

I have therefore decided to terminate your employment for medical incapacity.

[39] Mr Arthurs raised a personal grievance of unjustified dismissal. The parties have been unsuccessful in mediating this matter. They now require a determination.

Issues

[40] At the beginning of the hearing, Mr Arthurs confirmed the withdrawal of his disadvantage and discrimination personal grievances.

[41] Therefore the sole issue for hearing is whether Mr Arthurs was unjustifiably dismissed by LPC.

Law

[42] The fact that Mr Arthurs' employment was terminated is accepted. LPC must justify whether the decision was one that a reasonable and fair employer could have reached in all the circumstances.¹ It is not appropriate for the Authority to substitute its own opinion where the employer has made a genuine management decision².

[43] A dismissal for medical incapacity must be justified both in substance and procedurally. But there can come a point at which an employer can fairly cry halt.³

[44] It is well established that an employer is not required to keep a job open indefinitely when an employee is suffering from a prolonged illness⁴. The reasonableness of this decision will depend on the particular circumstances, including the employer's needs and what can and cannot reasonably be accommodated, and the anticipated timeframe for any return. A fair process must be followed. The employee must be provided with an opportunity to provide relevant information and input. The interests of both parties must be balanced⁵.

[45] There are decisions indicating that "*fault*" on the part of the employer in causing the incapacity may limit their ability to dismiss the employee⁶.

[46] An 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 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 the employee understands the seriousness of the issue and will have a motive for ensuring the information is as full and accurate as he or she can make it. 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

¹ [Section 103A\(2\)](#) of the [Employment Relations Act 2000](#) (the Act).

² *Wilson v Johnathons Catering Co Ltd* [2000] NZEmpC 229; [2000] 1 ERNZ 660 (AC 44A/00) citing *Lang v Eagle*

Airways Ltd [1996] 1 ERNZ 574 (CA 36/95)

3. *Barnett v Northern Regional Trust Board of the Order of St John* [2003] NZEmpC 136; [2003] 2 ERNZ 730 (AC 49/03) at [35] citing *Hoskins v Coastal Fish Supplies Ltd* [1985] ACJ 124, at p.127.

⁴ *Dunn v Waitemata District Health Board* [2014] NZEmpC 201 at [25]

⁵ See *Dunn* at [43]

6. *Canterbury Clerical Workers IUOW v Printing & Packaging Corp Ltd* [1988] NZILR 1213 (LC); *Auckland & Toamoana Freezing Works Etc IUOW v Wilson Foods Ltd* [1990] 3 NZILR

939 (LC).

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 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 time⁷.

[47] The learned authors in *Mazengarb* opined that the caselaw indicates, in the case of incapacity, the central elements of procedural fairness are ensuring that all relevant medical information is obtained, and that a fair decision is made on the basis of that evidence. A prudent employer is likely to insist on a clear and recent medical certificate that can allow the employer to believe with certainty that the incapacity is likely to continue beyond what the employer decides is a reasonable date for

resumption of work⁸.

Determination

[48] I have considered the evidence and determined Mr Arthurs' dismissal was

both procedurally and substantively unjustified. My reasoning is set out below.

No commercial need to replace

[49] It was conceded LPC had no commercial need to replace Mr Arthurs at the time of the dismissal or even now. His work has been absorbed by full time and casual workers.

No possibility of return to work

[50] Mr Monk admitted at the hearing he made no further enquiries of the medical professionals. Both believed Mr Arthurs could eventually return to the workplace.

[51] Despite this Mr Monks believed Mr Arthurs' GP and the numerous medical

certificates indicated there was no possibility of him returning to work at all. Neither

⁷ *Barry v Wilson Parking New Zealand (1992) Ltd* [1997] NZEmpC 311; [1998] 1 ERNZ 545 (WEC 61/97).

8. LexisNexis, *Mazengarb's Employment Law* (online ed) at ERA 103.42 Illness and other absences.

of the experts said this. None of the medical certificates said this. At best further investigation should have been undertaken by LPC.

Drug and Alcohol Testing

[52] From the correspondence the drug rehabilitation programme was a pre-condition to Mr Arthurs return to work. Mr Monks discarded Mr Arthurs' explanation for refusing to sign the agency's drug consent form. He believed it was a recent invention. This was incorrect. The evidence showed the Arthurs whanau had raised this at the time it occurred with both Mr Samuelsson and Ms Williams.

[53] The non-receipt of information provided by the Arthurs whanau was a theme throughout the hearing. This included medical certificates addressed to LPC and left at the Timekeepers office at work and non-receipt of emails sent to Mr Samuelsson and Mr Monks email addresses.

[54] There was a link raised between Mr Arthurs PTSD and his reaction to the drug testing. Glen Arthurs' gave compelling evidence of his brother's obvious distress when asked to do the drug testing. Mr Arthurs believed he had "fucked up". He had consented to a random drug test but refused to sign the consent form believing it had breached his privacy rights and the drug policy. As a result LPC required he complete a rehabilitation programme. In his evidence he believed the handling of this event may have retriggered his PTSD.

[55] LPC was also dealing with another worker suffering from PTSD due to witnessing a death in the workplace in August 2014. Sally Williams, HR Manager, had some knowledge of this case. She was aware that PTSD sufferers became "fixated" on following rules to feel safe. For that reason LPC created a role for this worker in health and safety.

[56] There were obvious parallels to Mr Arthurs' situation around his perception of the "breaches of rules" around the drug testing. This was addressed in the lengthy submissions by the Arthurs whanau prior to dismissal. They identified Mr Arthurs' PTSD and the difficulties it caused for his decision making.

[57] Despite this information LPC disregards any link between Mr Arthurs' PTSD and his response to the drug testing. Whilst it is accepted this is a sensitive health and safety area, drug testing could have been re-administered prior to starting work. Mr

Arthurs had no prior health and safety concerns involving drugs or alcohol. He was prepared to undertake further random drug testing. This issue should not have prevented his return to the workplace upon a graduated return to work programme. However it seems to have dominated the parties discussions prior to termination.

"No light duties"

[58] At the hearing Mr Monk confirmed it was his belief there were no suitable light or alternative duties in the cargo handling area for Mr Arthurs. He did not tell Mr Arthurs of this conclusion or his reasoning prior to dismissal. This was unfair because Mr Arthurs disputed this at the hearing.

[59] There was corroborating evidence for Mr Arthur's view. The expert LPC had engaged to assess Mr Arthurs' shoulder and elbow injury believed there were duties in the cargo handling area available to Mr Arthurs based upon the list of tasks he had been given. An LPC witness Terrance Holt gave evidence there were injured workers in the cargo handling area on graduated return to work programmes. He described how ACC funded a support person to assist the injured worker. The ACC support person would undertake any heavy lifting jobs the injured person could not do during the period of disability. Glen Arthurs believed there were duties for Mr Arthurs in the rail gang.

[60] LPC cannot have reasonably discarded the possibility of Mr Arthurs being able to undertake duties within the cargo handling area at the time of dismissal.

Return to work programme

[61] It is accepted Mr Monk made no contact with the experts, ACC or Mr Arthurs to discuss a return to work programme prior to dismissal.

[62] At the time LPC had a policy about return to work by injured employees. It required the manager to complete a return to work programme with the injured person, their GP and the ACC case manager. Mr Monk believed this policy was "dormant" i.e. was no longer used. I do not accept this. The examples given by Mr Holt above showed LPC were following this policy for other workers, but not Mr Arthurs.

[63] LPC could not have reasonably discarded Mr Arthurs completing a return to work programme without making any further enquiries.

Disparity

[64] At the hearing Mr Monk confirmed he was aware of several cases of medical incapacity at the time of the dismissal. These included workers suffering PTSD, more than one injury and injuries that at the time had required longer periods of time off work than Mr Arthurs had had at the time of dismissal. At the time of the dismissal, Mr Arthurs had been absent from work for 12 months. From LPC's own evidence, these workers situations could not be easily distinguished from Mr Arthurs at the time.

[65] Mr Monk was aware LPC had retained an injured worker where no light duties were available. This worker had been injured for a longer period of time than Mr Arthurs had been at the time of dismissal. This worker was absent for a total of 21 months (December 2009 and September 2011).

[66] At the time of dismissal LPC was dealing with another employee in an identical situation to Mr Arthurs. This worker had a workplace injury of PTSD from witnessing a workmate's death. They were aware of the effects of PTSD based upon this workers case. They made substantial concessions for this worker - granting 30 weeks' sick leave and creating a new role in health and safety. They did not take the same view of Mr Arthurs' circumstances.

[67] Other employees whom have suffered two injuries contributing to elongated absences were retained. One employee in the cargo handling area suffered an initial injury in November 2013 and re-injured himself prior to a return to work. He did not resume full duties until January 2015, 14 months later.

[68] In my view this dismissal was not justified because LPC did not approach the decision making in a fair and open-minded

way. The expert opinion that he could return to work was disregarded. No return to work was investigated despite its policy to do so. The finding there were no light duties was never told to Mr Arthurs. There was evidence this was incorrect. The “numerous” medical certificates were not unusual in situations of long term medical incapacity. LPC could have accommodated his return to work after a lengthy absence. They had done so for several other injured employees in the same area. There was insufficient evidence to

conclude Mr Arthurs’ had little or no prospects of returning to work within a reasonable timeframe. These defects were not minor and did cause Mr Arthurs unfairness. Mr Arthurs was unjustifiably dismissed.

Remedies

[69] Having proven he has a personal grievance of unjustified dismissal, Mr Arthurs seeks permanent reinstatement and compensation. He does not seek remuneration because he has been in receipt of ACC compensation in the period leading up to the hearing.

Should reinstatement be granted?

[70] Reinstatement is no longer the primary remedy. It is however a valuable remedy given the current financial climate. Reinstatement must be both reasonable and practical.

[71] Assessing the reasonableness of reinstatement requires “*a broad inquiry into the equities of the parties’ cases*” and into the prospective effects of an order for reinstatement upon the parties and others such as work colleagues.⁹ There is no evidence to show Mr Arthurs’ reinstatement is unreasonable and may have a negative effect upon LPC or his work colleagues. There may be some retraining required but that is within LPC’s capabilities to provide. Despite concerns expressed about the protagonists, I accept his Counsel’s submission this is a robust working environment. The protagonists did not appear to be unable to work together if reinstatement occurred.

[72] Practicability concerns the prospects for successfully re-establishing the employment relationship. It involves the question of whether the applicant could be a sufficiently harmonious and effective staff member if he were ultimately reinstated to his former position (or a similarly advantageous one).¹⁰ Practicability has been described in the following way:¹¹

[P]racticability is not the same as possibility. ... Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

⁹ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [65] and [68].

¹⁰ *Northern Hotel IUOW v Rotorua RSA Inc* (1989) ERNZ Sel Cas 535, 540 (LC).

¹¹ *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate*

School [1992] NZEmpC 176; [1992] 3 ERNZ 243 at 286 (confirmed by the Court of Appeal in [1994] NZCA 509; [1994] 2 ERNZ 414 at 416).

[73] Evidence about Mr Arthurs’ fitness to return to work is limited. His physiotherapist GN at 26 September 2016 was optimistic about his health but gave no clear timeframe for when Mr Arthurs may return to work. He is seeing a specialist for PTSD. It would be useful to have that information available prior to reinstatement occurring. There is no updated

information on his ability to return to work at this time. An assessment of his mental and physical wellbeing should be undertaken.

[74] Mr Arthurs has been out of the workplace for a period of 27 months. The delay in his return to the workplace has largely been outside of his control and partially due to a workplace injury. This is not a workplace where Mr Arthurs could not be successfully reintegrated. He has worked there for 22 years without disciplinary incident. Other employees have had similar time off work for injuries and successfully returned to work.

[75] Mr Arthurs raising his grievance immediately and has sought to bring his matters to the Authority in a timely fashion. Recent delays were due to Counsel's personal bereavement.

[76] Reinstatement has been ordered by the Court after 3 years absence from the workplace and in absence of clear fitness to return to work evidence.¹²

[77] I had a concern about Mr Arthurs' motivation to return. When asked about this he replied he wished to "*resign with dignity*." I accept this was not fully explored and may have as his Counsel pointed out been misstated.

[78] Despite my oral indication to the contrary and by a slim margin I am persuaded to grant the order sought. It shall be upon conditions about Mr Arthurs' fitness to return to work and random drug testing.

[79] Therefore I order Mr Arthurs be reinstated to his former position as a Cargo

Handler at the Lyttelton Port Company upon the following conditions:

a. He must file two medical certificates one from his physiotherapist GN and one from his doctor treating his PTSD within 20 working days of the date of this decision. The medical certificates should state whether he is fit to resume work as a cargo handler at the Lyttelton Port Company and the

date this should occur;

¹² *Peter James Walker v Firth Industries* [2014] NZEmpC 60;

b. Reinstatement shall take place upon a date to be determined by the

Lyttelton Port Company Limited;

c. Mr Arthurs is to fully cooperate with any retraining required to meet any changed conditions of the workplace during his absence; and

d. During the first six months of his return to employment, he is to present himself twice for random drug and alcohol tests to be determined by Lyttelton Port Company's drug testing agency. He is to sign the written consent forms. He is not required to undergo the rehabilitation programme unless he refuses to undergo or fails the drug testing.

Compensation

[80] The Court has recently observed that while there is a need for a degree of consistency with other cases given the low levels, the starting point must be the particular circumstances of the case.¹³ Awards of \$18,000 to \$20,000¹⁴ have been made for dismissals involving incapacity.

[81] There is no doubt in my mind the effect of this dismissal upon Mr Arthurs has been devastating especially given his PTSD. The evidence from Glen Arthurs about the effects of the dismissal for his brother was saddening. Chris Arthurs is a 44 year old single man with no children. He currently resides with his brother. He suffers from the loss of not only his work but his dignity. He comes from a whanau with four generations involvement in this workplace. He had worked at Lyttelton Port for 22 years. It has affected his ability to socially interact with others. His previously open fun loving personality has gone. He has become withdrawn and does not see friends. He suffers survivor's guilt.

[82] In my view this justifies an award at the upper end of the compensation range. An award of \$20,000 is justified subject to any reduction for contributory behaviour.

Contribution

[83] I do not accept that Mr Arthurs has contributed to this matter by not engaging with LPC or contacting ACC. There were emails giving detailed replies to

¹³ *Hall v Dionex* [2015] NZEmpC 29 at [88].

14. *Waititi v Pedersen Industries Ltd* [2016] NZERA Auckland 82; *Ringrose v Brazin Ltd* ERA Auckland AA31/08, 5 February 2008.

correspondence and inviting LPC to contact his GP and case manager. While there were elements of the correspondence that may have been antagonistic, it did not cause the dismissal. The contributory behaviour must be both blameworthy and causative. In my view it was neither. I decline to make any reduction for contribution.

Orders

[84] The following orders are made:

A. Chris Arthurs was unjustifiably dismissed by Lyttelton Port Company

Limited.

B. I order Mr Arthurs be reinstated to his former position as a Cargo Handler at the Lyttelton Port Company upon the following conditions:

a. He must file two medical certificates one from his physiotherapist GN and one from his doctor treating his PTSD within 20 working days of the date of this decision. The medical certificates should state whether he is fit to resume work as a cargo handler at the Lyttelton Port Company and the date this should occur;

b. Reinstatement shall take place upon a date to be determined by the

Lyttelton Port Company Limited;

c. Mr Arthurs is to fully cooperate with any retraining required to meet any changed conditions of the workplace during his absence; and

d. During the first six months of his return to employment, he is to present himself twice for random drug and alcohol tests to be determined by Lyttelton Port Company's drug testing agency. He is to sign the written consent forms. He is not required to undergo the rehabilitation programme unless he refuses to undergo or fails the drug testing.

C. Lyttelton Port Company Limited is to pay Chris Arthurs the sum of

\$20,000 compensation pursuant to s.123(1)(c)(i) of the Act.

D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha

Member of the Employment Relations Authority

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