

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 482/10
5283052

BETWEEN STEPHEN BIGGS
AND SUPALITE LIMITED

Member of Authority: Yvonne Oldfield
Representatives: Max Whitehead for Applicant
 Max McGowan for Respondent
Investigation Meeting: 26 April 2010
Further Information and 1 May from Applicant
Submissions received: 6 May, 10 May 2010 from Respondent
Determination: 16 November 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Biggs was employed by the respondent, Supalite, as a Sales Executive on 28 October 2008. On 22 June 2009 he suffered the first of a series of strokes. He was then in his late thirties, married, and the father of a baby daughter. He had just five days of sick and annual leave available to him altogether. The respondent paid him for all of his three weeks in hospital and then on to the end of July (the period covered by the medical certificate he was given upon his discharge.)

[2] By the time his pay stopped, Mr Biggs considered himself ready to return to work, but the respondent's regional general manager, Adam Johnstone, took the view that a medical clearance would be required first. Over succeeding weeks Mr Johnstone made several requests for a medical clearance. Mr Biggs provided material which he believed confirmed his position, but Mr Johnstone was not satisfied that it did. Finally, on 18 September Mr Biggs supplied a letter from his General Practitioner

(dated 17 September 2009) that satisfied Mr Johnstone that Mr Biggs was fit to return to work.

[3] Mr Biggs claims that he was disadvantaged and discriminated against by being prevented from returning to his employment between 3 August and 18 September. These claims are the first two parts of the employment relationship problem.

[4] The third element is a claim for unjustified dismissal. Just before he received the letter from Mr Biggs's GP, Mr Johnstone heard that Mr Biggs had started work for a company he regarded as a competitor. Mr Biggs was reinstated to the respondent's payroll only to be suspended on pay pending a short disciplinary process which concluded, on 23 September, with his dismissal for serious misconduct. Mr Biggs says that this dismissal was substantively unjustified. He says he had no choice but to take work to survive, and there was no breach of duty because the company for which he was working was not a competitor of the respondent.

[5] Supalite denies all Mr Biggs' claims. Mr Johnstone says that in circumstances where Mr Biggs had suffered such a serious medical problem it was reasonable and responsible for the employer to seek a medical clearance before putting him back on the job. He also says that the letter of 17 September was the first clear indication that Mr Biggs was ready to return to work. As for the dismissal, he says this was justified in a context where Mr Biggs had already taken up other employment with a competitor.

Issues

[6] The issues for determination are:

- i. whether the respondent's action in preventing Mr Biggs from returning to his duties amounted to an unjustified action to Mr Biggs's disadvantage;
- ii. whether those same actions amounted to discrimination, and

- iii. whether the respondent was justified in terminating Mr Biggs's employment for serious misconduct.

- (i) **Disadvantage**

[7] Mr Biggs was discharged from hospital on 9 July. Towards the end of July a Stroke Foundation vocational guidance counsellor visited Mr Biggs at home to discuss how his return to work might be managed. In line with standard practice for stroke victims, Mr Biggs was not permitted to drive a motor vehicle for three months (that is, until the beginning of October.) Mr Biggs did not expect this to cause problems in a work context because, he said, visiting clients was a small part of his role. (In their evidence respondent witnesses strongly disputed this saying that driving to visit clients was central to the role of sales executive.)

[8] At the counsellor's instigation, she and Mr Biggs met with Mr Johnstone on 3 August. No formal return to work plan had been prepared but the counsellor suggested that Mr Biggs might start back on a reduced working week of two to three days. There was some discussion of Mr Biggs taking up a project manager role (which would not involve any driving) but it was felt that this would be too demanding to begin with. Mr Johnstone then said that he felt unable to make a call about Mr Biggs returning to his usual duties without a medical report from his doctors. Mr Biggs told Mr Johnstone he could contact doctors Mitchell and Kumar at Middlemore hospital for information about his readiness for work and signed a consent form authorising Mr Johnstone to do so.

[9] He also informed Mr Johnstone that on 5 August he was scheduled for an assessment of his progress. The meeting ended with an agreement that the matter would be followed up after that assessment. Mr Biggs was however very uneasy about what Mr Johnstone had said. Mr Biggs believed that Mr Johnstone should have accepted that he was ready to come back to work part time. He left the meeting feeling that he was not wanted back.

[10] On 5 August Mr Biggs forwarded to Mr Johnstone two letters he had previously received from his doctors. The first, provided to him upon his discharge

from hospital on 9 July, was addressed “*to whom it may concern*” and signed by the stroke registrar, Dr Mitchell. It read:

“Mr Biggs has been an inpatient at Middlemore Hospital from 22 June and was discharged today.

As part of his ongoing convalescence in the community Stephen has been advised to take it easy for the next three weeks and should not return to full time employment at this stage. A graduated return to work would be most appropriate.

He has also been told that he should not drive for three months from 07/07/09.

Any assistance you can give him with these issues would be most appreciated. If you have any further concerns please do not hesitate to contact me...”

[11] The second, dated 28 of July, was also written by Dr Mitchell. It set out the following:

“Thank you for your continued patience with respect to Stephen’s recovery.

Stephen suffered from a number of strokes over the course of his illness. There were no immediate cognitive concerns on the ward at the time of Stephen’s discharge.

I understand he is to see a neuropsychologist on 05 August, and I would urge you to wait for the assessment from this professional before making any decision with respect to Stephen’s ongoing employment. The changes to one’s brain following a stroke are very individual and the detailed assessment provided by the neurologist will form the basis of any recommendations we make.

Stephen is obviously very keen to return to work, both for satisfaction and pecuniary reasons. I fully endorse him in this regard.”

[12] After repeating his earlier advice about the restriction on Mr Biggs driving, Dr Mitchell concluded:

“If you have any further concerns or questions please liaise with Stephen or don’t hesitate to call me at Middlemore Hospital...”

[13] Mr Biggs felt that the two letters from Dr Mitchell sufficed to confirm what the counsellor had already said. In the email of 5 August (to which these letters were attached) Mr Biggs had stated:

“Hi Adam

Please find attach [sic] the requested work clearance from Middlemore Hospital. I will be in touch shortly to confirm you have received this and to discuss further what happened at my appointment today. “

[14] By this time, Mr Johnstone had already sent a comprehensive letter to Dr Mitchell and Dr Kumar asking for information about Mr Biggs’s prognosis and proposed treatment (if any) and seeking advice about whether this would impact on his capacity to do his job. He copied this to Mr Biggs (later on 5 August) and noted in his cover email:

“From the companies [sic] point of view we would welcome your return on the proviso that you could fulfil all the duties that we would require from you. Steve, if you could communicate with your Doctor on the letter I have sent to ensure we receive a report as soon as possible.”

[15] Mr Biggs was alarmed and concerned by the fact that Mr Johnstone was not satisfied by the letters from Dr Mitchell. He arranged to meet with Mr Johnstone again on 11 August, this time accompanied by his father in law as a support person.

[16] Nothing was progressed at this meeting. Mr Biggs asserted that he had provided a medical clearance, and suggested that he could return to normal duties if the company provided someone to drive him around during the course of his work. Mr Johnstone responded that this was not a viable option because the company could not supply a driver. There was also some discussion of a negotiated exit from the

company, but the company was not prepared to agree to the sort of exit package Mr Biggs wanted.

[17] By the end of the meeting, the mutual distrust between the parties had deepened. Afterwards, Mr Johnstone wrote to Mr Biggs again, summarising what had happened so far and concluding:

“we will make a decision on your continued employment totally based on the advice that we have from your medical team that you will be totally fit to return to work which we currently still do not have.

Therefore we need the information as asked for...so that we can make a considered decision...

If this information is not forthcoming as asked for by Tuesday 18th August 2009 we will be giving you notice that your employment with the company will terminate on September 18th 2009...based on your inability to carry out all the functions of your position. However we reiterate that should medical evidence be provided to endorse your return to work within the four weeks or within a reasonable period, we would reevaluate [sic] this termination notice.”

[18] After receiving Supalite’s letter of 11 August Mr Biggs engaged Mr Whitehead’s assistance. Thereafter Supalite’s communications were with Mr Whitehead. Meanwhile, there was still no response from Dr Mitchell to Mr Johnstone’s earlier inquiries. Mr Johnstone wrote to Mr Whitehead again on 19 August, reiterating that he needed information about Mr Biggs’s medical condition. Finally on 7 September Mr Johnstone wrote to Mr Whitehead saying:

“I repeat that the company has received no evidence from Steve, Steve’s specialist team or yourself as his representative as to his ability to return. We can only presume that the lack of information means that Steve’s health is such that he is not able to return by 18 September 2009 or within a reasonable period.”

[19] On 18 September Mr Whitehead forwarded to Mr Johnstone a medical certificate from Mr Biggs's GP, dated 17 September, which advised that Mr Biggs "should be" able to resume work on 18 September. The original three month prohibition on driving was also due to end shortly thereafter. Mr Biggs told me that his GP had reached his opinion after reviewing the other medical information that was available and after giving Mr Biggs a physical examination. Mr Biggs also told me that he had not asked his GP to provide a clearance at any stage prior to this because he did not think it necessary.

[20] Mr Biggs was reinstated to the payroll on 21 September.

[21] I note for completeness that Mr Johnstone never received the report arising out of the 5 August assessment (conducted by a consultant psychiatrist and a clinical psychologist.) Nothing much turns on this as it did not, in any event, provide the level of information Mr Johnstone was seeking¹.

[22] The respondent's position is that an employer is entitled to require a medical certificate confirming an employee's fitness for work. Indeed it says that in this case the employer was under a responsibility to do so in terms of its obligations under the Health and Safety in Employment Act. Specifically, it is noted for the respondent that:

- i. as of 3 August all Mr Johnstone knew was that Mr Biggs had suffered a series of strokes that had kept him in hospital for three weeks and at home for a further three more after that;
- ii. the vocational guidance counsellor was not authorised to make decisions about when Mr Biggs could return to work;

¹ It stated only:

"Stephen is recovering from a recent right parietal stroke. Stephen has made a remarkable recovery with no residual motor deficits, normal visual fields and no left hemispheric inattention. No significant neuropsychiatric symptoms were elicited.

There are some mild residual visual spatial difficulties which we assume will continue to improve over the next few months. At this stage it would be premature to perform formal neuropsychological testing as this would give a distorted picture and one anticipates significant improvement in neurological function over the foreseeable future."

- iii. despite the fact that the letters of 7 July and 28 July appeared to be written for provision to an employer, they were not made available to Mr Johnstone until 5 August, after he had specifically requested medical information;
- iv. neither letter provided an unequivocal clearance for Mr Biggs to return to work;
- v. the letter of 28 July gives the instruction to wait for the 5 August assessment before making any decisions about Mr Biggs ongoing employment;
- vi. the report of the 5 August assessment was not made available to the respondent, and
- vii. Mr Johnstone made timely and reasonable attempts to obtain the information himself, with no response.

[23] It was also the respondent's position (as stated in Mr Johnstone's evidence) that it was Mr Biggs who first initiated discussions of an exit package, and that there can be no inference, from those discussions, that the respondent wished to be rid of Mr Biggs.

[24] In submissions on behalf of the applicant Mr Whitehead conceded that the employer was entitled, pursuant to section 68 (4) (a) of the Holidays Act 2003 to require proof of fitness for work. That section provides that an employer is not prevented (if otherwise legally authorised to do so):

“from requiring an employee to establish that there are no relevant health and safety reasons or hygiene reasons that would prevent the employee from working.”

[25] It was also conceded that the employer has a duty to meet its obligations under the Health and Safety in Employment Act 1993, which include taking all practicable steps to safeguard the health of employees (like Mr Biggs) returning to work after an illness.

[26] Despite these concessions it is submitted for Mr Biggs that the Respondent's actions were not those of a fair and reasonable employer. It is submitted that the Respondent already had sufficient medical information by 3 August to the effect that Steve was fit to return to work or had "*at least the means to get the information it wanted*" and failed to do so.

[27] It is also submitted that the employer did not put its concerns about Mr Biggs health to him, or even explain what they were, did not give sufficient consideration to his suggestion that he hire a driver at his own expense, and imposed an unreasonable deadline for the provision of information. Finally it is submitted that the evidence establishes that the respondent initiated discussions about an exit package.

Determination

[28] The respondent's arguments are accepted in their entirety. I am satisfied that it was reasonable and prudent, given the self-evident seriousness of the medical problem that Mr Biggs had faced, for Mr Johnstone to seek a medical clearance before returning Mr Biggs to the job. I accept, also, that nothing that was provided to the respondent before 17 September could be said to amount to a medical clearance. The stroke counsellor's suggestion did not provide sufficient basis for putting Mr Biggs back on the job nor did either of the July letters from Dr Mitchell.

[29] I am also satisfied that Mr Johnstone acted in good faith in attempting to obtain the information himself and engaged appropriately with Mr Biggs and his representative about the best way to do this. Mr Biggs on the other hand has not been able to give a satisfactory explanation as to why (if he was in fact ready to return to work) he did not see his GP sooner to have this fact confirmed.

[30] In the meantime, without any information as to the likely timeframe until Mr Biggs would be able to resume work, the respondent could not be expected to

continue to pay the applicant. The respondent acted reasonably in giving Mr Biggs five weeks of discretionary paid leave and then keeping his job open until a medical clearance was finally provided (a period of almost two more months.)

[31] In short, I am satisfied that Mr Johnstone's actions (on behalf of the respondent) were reasonable in all the circumstances. The respondent was justified in declining to have Mr Biggs back at work during August and September. Mr Biggs has not made out a disadvantage grievance.

(ii) **Discrimination**

[32] In relation to the discrimination claim, the submission for Mr Biggs is that the respondent unjustifiably discriminated against Mr Biggs pursuant to sections 104(1) (b) and 105(1) (h) of the Employment Relations Act 2010 in that it subjected Mr Biggs to a detriment because of his disability (being a stroke victim.)

[33] It is submitted for the applicant that the employer cannot justify its discriminatory actions because it could have managed any risk to Mr Biggs without unreasonable disruption, by taking reasonable measures to reduce the risk to a normal level.

Determination

[34] Mr Biggs was treated differently on account of having had a stroke than he would have been if he had never fallen ill, but in the circumstances, as I have already concluded, that treatment was justified.

[35] Had Mr Biggs been able to supply a medical clearance immediately there would have been no difference in treatment. In the period until it was, the respondent was justified in declining to return him to normal duties. Without further information it was not possible to assess what risk there might be to him, or whether the employer could manage any such risk to Mr Biggs without unreasonable disruption to the respondent's business. In seeking further information Mr Johnstone took the first step toward ensuring that the respondent complied with all its responsibilities under both the Health and Safety in Employment Act and the Employment Relations Act 2000.

[36] For similar reasons to the claim for disadvantage the claim for discrimination also fails.

(iii) **Dismissal**

[37] During the month of August, having no income, Mr Biggs started looking for other work. His wife told the Authority he had “many interviews” but, because of the recession, he had a hard time finding suitable employment. In the end he took up the role of Business Development Manager at “Speedy Signs West Auckland” (“Speedy Signs.”) This position was on a much lower rate of pay than he had received at Supalite and was not expected to be a permanent. Payroll records show that he started on 30 August 2009.

[38] Mr Biggs did not tell Mr Johnstone that he was looking for work or that he had started another job. On 17 September, Mr Johnstone heard about it through other contacts in the industry. His concern was that Mr Biggs was working for a company he considered to be a competitor. He wrote to Mr Whitehead immediately, enclosing a Speedy Signs business card bearing Mr Biggs’s details and alleging that Mr Biggs was in breach of his duties to Supalite. Mr Johnstone cautioned that if this were found to be the case it would be regarded as serious misconduct and would lead to summary dismissal from the company. Mr Johnstone advised that Mr Biggs would be required to honour the restraint provision in his contract, which prohibited him from working within a 50 kilometre radius of the employer’s business for three months following the date of his termination.

[39] Mr Johnstone asked for a response by noon the following day, otherwise, he said, Mr Biggs’s employment would be terminated and steps taken to enforce the restraint. Mr Whitehead did respond promptly, explaining that Mr Biggs had undertaken what work he could find in order to earn money. He advised that Mr Biggs did not consider Speedy Signs to be a competitor and that there was, therefore, no breach.

[40] On receiving this response Mr Johnstone wrote back calling Mr Biggs to a meeting to discuss the alleged serious misconduct and restraint issues. That meeting

took place on 23 September. Mr Whitehead put forward the same explanation for Mr Biggs action, but there was very little discussion at the meeting of the differences between the two companies. Mr Johnstone advised that the company wanted Mr Biggs to agree to a 12 month restraint in respect of certain customers. Mr Biggs was prepared to agree to this, and to resign, if he received one month's pay in lieu of notice. The meeting adjourned while Mr Johnstone considered this proposal and talked it over with the managing director of the group, Grant Mirkin. He decided to reject the offer and to proceed to dismiss Mr Biggs, effective immediately. Mr Biggs was notified of the decision by letter dated 23 September.

[41] Speedy Signs West Auckland is a franchise operation with a limited geographic area. Its primary business is arranging signage for small retailers, the actual production of which was usually outsourced. The respondent also produces signage but is an engineering company with in house manufacturing capability. Its clients tend to be larger corporates. In short, the two companies tend to operate at different ends of the market but have the potential to compete.

[42] As things turned out, Mr Biggs agreed to refrain from approaching an agreed list of the respondent's clients (all outside the area in which Speedy Signs West Auckland operated.) The respondent has taken no action to pursue any rights under the restraint provision. Mr Biggs remained at Speedy Signs West Auckland until the end of 2009, when he started his own small signwriting business in Pukekohe, near his home.

[43] Meanwhile, on September 22 Mr Biggs underwent a comprehensive assessment by a neurologist and occupational therapist, and obtained a full clearance. On 5 October a copy of the resulting Occupational Therapy Functional Capacity Assessment report was provided to the respondent, but by then, of course, he had already been dismissed.

Determination

[44] The respondent says that the justification for the dismissal arises out of the fact that Mr Biggs had been working full time for a competitor for a period of four weeks. The respondent says that this conduct breached the duties of fidelity and good faith,

which encompass an obligation to abstain from conduct likely to damage the employer's business or having the potential to undermine the relationship of trust and confidence.

[45] The respondent did not develop the argument (made previously) that Mr Biggs was dismissed for breach of the restraint of trade provisions in his agreement, except to say that Mr Biggs should have addressed the issue of future employment prior to accepting employment with Speedy Signs.

[46] The respondent says that the penalty of dismissal was appropriate in all the circumstances including the fact that Mr Biggs had not disclosed what he was doing, and took until 18 September to see his GP supply a medical clearance. It is submitted for the respondent that:

“the Respondent justifiably dismissed the Applicant for breach of his duties of good faith and fidelity by working for another, opposition company while still employed by the Respondent. The Respondent could no longer have trust and confidence in the Applicant's ability to act honestly towards his employer.”

[47] In submissions for the applicant it is argued that there is no evidence that Mr Biggs breached confidentiality, and in any event, he had not had access to any proprietary information between 22 June, when he went off work, and taking up work with Speedy Signs at the end of August.

Determination

[48] The respondent's submissions are accepted. As set out already in the previous section of this determination, the respondent behaved as a reasonable employer throughout the time after Mr Biggs first suffered the series of strokes. The respondent gave Mr Biggs five weeks discretionary paid leave and kept his job open until late September when he finally obtained confirmation of his fitness for work.

[49] Meanwhile, Mr Biggs had already gone to work for someone else: a company which was a potential competitor of the respondent. I am satisfied that in all these

circumstances the respondent was justified in dismissing Mr Biggs for breaches of the duties of fidelity and good faith.

Costs

[50] Both parties included in their main submission a brief submission on the question of costs. However since costs usually follow the event it is the Authority's practice to reserve the issue of costs and I see no reason to depart from that practice in this case. The issue of costs is reserved. Any submission on costs should be made within 28 days from the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority