

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN David Bisley (Applicant)
AND Brake & Transmission NZ Limited (Respondent)
REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Ian Davidson, Advocate for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 1 February 2005
DATE OF DETERMINATION 30 March 2005

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant (Mr Bisley) alleges that he was unjustifiably dismissed from his employment by the respondent, Brake & Transmission NZ Limited (BTL) and that BTL has breached express terms of his employment agreement.

[2] BTL denies that.

[3] The parties attempted mediation without success and the matter falls for the Authority to determine.

[4] Mr Bisley was a customer services representative for BTL with whom he commenced employment on 1 February 2000 although he had previously been employed in a similar role on the same site by BTL's predecessor.

[5] One of the consequences of that earlier period of employment which had commenced in 1997 was that the parties agreed to treat Mr Bisley's service as continuous.

[6] In October 2003 Mr Bisley went to his general practitioner with a sore back. Various tests were done and on 15 October Mr Bisley was told that he might have prostate cancer. Mr Bisley promptly advised Michael Lawler of this. Michael Lawler is BTL's manager. On 6 November 2003 Mr Bisley was told he had prostate cancer and also had an infection of the prostate. Mr Bisley told Mr Lawler. Mr Lawler advised Mr Bisley to take the next day off work.

[7] The following day Mr Bisley was still unwell and went again to see his general practitioner whose view was that Mr Bisley's infected prostate had become worse and that it would be wise for

Mr Bisley to stop work, get over the infection and gather his strength for the operation that would be required in relation to the cancer.

[8] On 10 November 2003 Mr Bisley had a long discussion with Mr Lawler and either on that date or earlier on 7 November gave to Mr Lawler a copy of the medical certificate which Mr Bisley's general practitioner had prepared. The parties discussed on this occasion Mr Bisley's upcoming surgery which was tentatively scheduled for 17 December 2003 and there was certainly some discussion about the prognosis and the likely recuperation period. Mr Bisley indicated his wish to return to work.

[9] The medical certificate issued by Mr Bisley's general practitioner was for 4 weeks and in fact, from the point which Mr Bisley went off sick in early November, he never worked for BTL again.

[10] Other matters from this 10 November 2003 meeting are in dispute. Mr Bisley says that there was discussion about how much time he would need to take off following his cancer operation and claims Mr Lawler referred to another employee who had taken 12 months off on maternity leave and allegedly made the point that if it was good enough for her it was good enough for Mr Bisley. Mr Lawler denies having said any such thing.

[11] Further, Mr Bisley remembers Mr Lawler saying that he had 40 days paid sick leave due to him and the pair of them agreeing to his taking 20 days paid sick leave. Accordingly, Mr Bisley's evidence was that his mind set was that he had a period of paid leave (which would effectively take him pretty well to the date of his operation) and then he could expect another period of paid leave followed by a more extended period of leave without pay. For his part, Mr Lawler denies absolutely that any such discussion took place. Mr Lawler's evidence was that he told Mr Bisley that he had 20 days sick leave and that at no time did he say that he had 40 days sick leave available. Mr Lawler makes the point that Mr Bisley's service simply was not long enough to generate that sort of huge sick leave entitlement.

[12] Mr Bisley's evidence was that there was a further discussion on 13 November 2003 which was overheard by his daughter Maree, who had come in to the work place with Mr Bisley (who was still on sick leave) so that Mr Bisley could arrange to purchase some car parts for her through his work. Mr Bisley's daughter, Maree Shelling, gave evidence at the Authority's investigation meeting via a telephone link having previously submitted a brief of evidence. Ms Shelling is clear that she was present at a meeting between her father, David Bisley and Mr Lawler of the respondent on 13 November and at that meeting Mr Lawler said words to the effect that head office had confirmed Mr Bisley's paid sick leave at 40 days. In speaking to Ms Shelling by telephone she remained adamant that she had heard that discussion when she was physically present on 13 November 2003.

[13] Despite Mr Lawler's inability to recall this conversation, it is certainly more rather than less likely that Ms Shelling was physically present at the time because there was evidence presented at the investigation meeting of an invoice on the company's letter head to Mr Bisley in respect to parts which in his evidence he said were for his daughter's car. The date of the invoice is 13 November 2003 and critically Mr Lawler is the operator referred to on the printed invoice.

[14] Mr Bisley had his operation on 17 December and Mr Lawler visited Mr Bisley in hospital. Mrs Bisley confirmed that she had been physically present at the hospital when Mr Lawler visited. Mr Bisley and Mr Lawler had, prior to the operation date, talked about a possible return to work and agreed that they would talk again once Mr Bisley was home from the hospital. Both parties expected that Mr Bisley's recuperation would be quicker than it actually was.

[15] On 29 January 2004 there was a further conversation between Mr Lawler and Mr Bisley which both parties have given evidence about, although Mr Bisley says there was an earlier conversation in which Mr Lawler had again talked about the 40 days paid leave. Mr Lawler has no recollection of that earlier January conversation. In any event, on 29 January Mr Bisley told Mr Lawler that he would not be able to return to work as quickly as planned because his condition was not as good as it was expected to be. He told Mr Lawler that it might be up to 12 months before he was able to return to work. Mr Lawler enquired of Mr Bisley whether a return date of March (2 months in effect after this conversation) was realistic and Mr Bisley said that he could not guarantee that and asked that his job be kept open until his return.

[16] Mr Lawler's evidence was that he had told Mr Bisley that he needed to talk to his superior and he did in fact do that. The results of that discussion and further discussions within the company were not helpful to Mr Bisley as the consensus from BTL was that they were not in the position to hold the position open.

[17] Accordingly, Mr Lawler rang Mr Bisley at home on 3 February 2004 to advise Mr Bisley that BTL could not hold the job open. Mr Lawler's evidence, which I accept, was that it was a difficult and unpleasant call to have to make as he had a good relationship with Mr Bisley and admired and respected his work for the company. Mr Lawler says that Mr Bisley asked for a letter setting out the employers decision in writing and although Mr Bisley does not recall that, such a request seems likely to have been made. For his part, Mr Lawler asked Mr Bisley to provide further medical evidence and Mr Bisley agreed to that. Mr Lawler said that he required this further medical evidence for his file notwithstanding the fact that he had already effectively dismissed Mr Bisley in this telephone call.

[18] There then seems to have been a series of telephone requests from Mr Lawler to Mr Bisley for the extra medical evidence that Mr Lawler was seeking and on each of these occasions Mr Lawler's evidence (which I accept) was that Mr Bisley was not able to provide the evidence because he had yet to received the requisite information from his doctor.

[19] Mr Lawler's evidence was that on Wednesday 18 February 2004 he decided that he needed to formalise the position and accordingly he sent to Mr Bisley a letter of termination which was dated 4 February. Clearly the letter had been prepared in advance (presumably about the time of the telephone discussion between the parties on 3 February).

[20] On 19 February Mr Bisley received a fax form headed *TERMINATION OF EMPLOYMENT* confirming that his employment was to end on 20 February and on that date (in other words the following day) he received a final pay slip and a note giving a summary of his final pay.

[21] On 22 February 2004 Mr Bisley suffered a major heart attack which resulted in him being admitted to hospital.

[22] Doctor Andrew McGuire gave evidence to the Authority. Dr McGuire is Mr Bisley's general practitioner. There was significant medical evidence offered in the way of documents from a variety of specialists' as to Mr Bisley's health status. There is some debate between the medical experts as to precisely what the causes of the February 2004 coronary event were, and whether it was predicated by any earlier similar events.

[23] Dr McGuire took the view in his evidence that stress was part of the disease process. He noted that Mr Bisley had seen cardiologists some years previously and that no disease had been found so the significant question was why he had suffered a coronary episode on this particular occasion. Dr

McGuire's own view was that stress had precipitated the event and he referred to the stress occasioned by the loss of Mr Bisley's job as being a more than likely precipitating factor.

[24] I asked Dr McGuire whether he considered that Mr Bisley was a personality more likely to be affected by coronary artery disease than others and Dr McGuire said that he did not think so. Dr McGuire's view was that Mr Bisley was not a *Type A* personality nor was he anxious by nature. He would not agree that personality was a factor in Mr Bisley's disease.

[25] Dr McGuire accepted the proposition that sudden exertion could bring on a coronary event – in Mr Bisley's case he had lifted a heavy suitcase immediately prior to having his coronary episode. However, Dr McGuire said that it was not common for a coronary event to be precipitated by sudden physical exertion and in this particular situation he would *struggle with that idea*.

[26] Dr McGuire also accepted in response to a question that being told he had cancer would have of itself been a stressful event for Mr Bisley but again he was not persuaded that factor would have precipitated the coronary event.

[27] Whatever the cause, Mr Bisley had coronary bypass surgery after the February event and his claim includes the allegation that his employer effectively precipitated the onset of the coronary episode.

[28] That is contested by BTL who say amongst other things that Mr Bisley had an underlying heart condition which could have deteriorated suddenly at any time.

[29] Certainly it seems clear that he had some coronary issues that concerned him immediately after the prostate surgery (which would predate the coronary attack by some 2 months). In addition, there was an earlier assessment by a heart specialist for a possible cardiac condition as early as 1995 although it seems that at that point the specialist view was that Mr Bisley did not have an underlying heart condition.

Issues for decision

[30] The issues I am required to decide are as follows:

- What was agreed between Mr Bisley and Mr Lawler in respect to his taking of sick leave, paid and unpaid?
- Was Mr Bisley unjustifiably dismissed?
- Did BTL cause Mr Bisley's heart attack in February 2004 or materially contribute to it?
- If BTL are at fault in any or all of the above matters, what remedies should flow?

Sick leave

[31] As has already been established, there are quite different recollections of the discussions between Mr Bisley and Mr Lawler prior to Mr Bisley's prostate operation.

[32] No one argues that Mr Bisley had 40 days paid sick leave as of right. That would not accord with his length of service. However, it is clear that BTL have discretion to grant additional sick leave and Mr Lawler confirmed as much in his oral evidence.

[33] That being the position, I have reached the conclusion on the balance of probabilities that Mr Lawler did tell Mr Bisley that he had 40 days paid sick leave.

[34] Mr Bisley's daughter heard such a figure in the conversation she was privy to. Notwithstanding Mr Lawler's failure to remember that Ms Shelling was present at one of the conversations he had with Mr Bisley, it seems more likely than not given the evidence that she was there, and her evidence about what she heard was unequivocal and straight forward.

[35] I think it less likely however that Mr Lawler would have committed to up to 12 months unpaid sick leave which Mr Bisley recalls Mr Lawler proffering.

[36] I reach this split conclusion because the 40 days paid leave seems a not unreasonable discretion in the circumstances of a valued employee who has some service and where there is some corroboration of that arrangement. Conversely, in relation to the up to 12 months unpaid leave situation, there is no corroboration and that seems much less likely to have been agreed by the employer at first blush.

Was Mr Bisley unjustifiably dismissed?

[37] By Mr Lawler's own frank admission when giving evidence before the Authority, Mr Bisley was dismissed over the telephone in the conversation between Mr Bisley and Mr Lawler on 3 February 2004. On that basis, the only possible conclusion that the Authority can reach is that the dismissal was unjustified for want of a fair process.

[38] Whatever the matters that BTL considered in reviewing the decision to dismiss, the way in which the decision was conveyed has to be an abuse of process.

[39] No doubt an employer, faced with a lengthy period of convalescence, might well be able to justify a dismissal on substantive grounds but the process by which that decision is effected must be fair. This process was not fair.

[40] Moreover, the fact that Mr Bisley was effectively summarily dismissed is also unfair and unsustainable. It seems clear from the investigation meeting that Mr Lawler, who gave genuine evidence of his distress at having to dismiss Mr Bisley, did not turn his mind to the provisions of Mr Bisley's employment agreement. Accordingly, I find that Mr Lawler failed in his obligation to carefully consider and discuss with Mr Bisley what options there might be around the dismissal issue. In simple terms, to use Mr Goldstein's phrase, Mr Lawler should have *found out more* before dismissing Mr Bisley. The only prudent way to do that would have been via a face to face meeting.

[41] I also find that Mr Lawler overlooked Mr Bisley's entitlement to notice in that Mr Bisley was effectively summarily dismissed and there was no basis for a dismissal on that footing.

Did BTL cause Mr Bisley's heart attack?

[42] The evidence of Mr Bisley's general practitioner was that BTL's conduct *precipitated* the heart attack in the sense that the stress occasioned by the manner of the dismissal triggered the coronary event.

[43] That evidence is powerful support for Mr Bisley's argument. However, Mr Bisley's counsel quite properly provided to the Authority documentary evidence on Mr Bisley's medical history for the previous decade or so and that evidence suggests that there may have been an underlying heart condition. There was evidence of that as far back as 1995 to support the contention of BTL that Mr Bisley had a weakened cardiac system when he joined the firm.

[44] That view is supported by the fact that Mr Bisley had some sort of cardiac event around the time that he had his prostate surgery. It is common ground that the first that BTL knew of this event was when they received the documents prior to the Authority's investigation meeting.

[45] In all the circumstances, I have reached the conclusion that it would be drawing a very long bow to sheet home to BTL complete responsibility for Mr Bisley's cardiac event on 22 February 2004. I reached this conclusion partly because my understanding of the medical evidence is that the causal factors for that cardiac event are not absolutely explicit and partly because there is some evidence that Mr Bisley had a predisposition to coronary artery disease prior to the event complained of.

[46] However, I do think that the way in which BTL dealt with Mr Bisley's dismissal may well have been a cause of Mr Bisley's coronary episode in February 2004 and I take that into account in reaching a conclusion on remedies.

Remedies

[47] I have found that Mr Bisley was promised 40 days paid sick leave. The evidence was that he was paid 20 days sick leave. Accordingly he is entitled to the outstanding balance. BTL is to pay Mr Bisley 20 days' sick leave at the appropriate rate.

[48] I have found that Mr Bisley was unjustifiably dismissed. It follows that Mr Bisley has a personal grievance. I consider the way in which the dismissal was effected was particularly unfortunate but I do not wish this determination to be seen as being critical of Mr Lawler who I believe was every bit as much affected by the stress of the situation as Mr Bisley was.

[49] Notwithstanding that, Mr Bisley is entitled to a substantial award of compensation partly because the dismissal was effected in such an unfortunate way and partly because I think the evidence is clear that an element of his coronary event in February 2004 was attributable to the stress occasioned by the employer's process at dismissal.

[50] There was ample evidence provided to the Authority of Mr Bisley's stress and humiliation as a consequence of the dismissal and the subsequent coronary event, which I have found was in part precipitated by the stress of the dismissal, only exacerbated that hurt, humiliation and injury to feelings. He gave evidence of his complete devastation in the days after being dismissed. He spoke of feeling *gutted, humiliated and betrayed* and of being *shattered and numb*.

[51] Accordingly, I direct that BTL pay to Mr Bisley the sum of \$13,500.00 in compensation under section 123(c)(i) of the Employment Relations Act 2000.

[52] Mr Bisley ought to have been paid notice when he was dismissed. His employment agreement provides for notice to equate to the pay period. Mr Bisley was paid monthly. It follows that he is entitled to a months pay on account of notice and BTL to pay that sum to Mr Bisley.