

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 147  
5425766

BETWEEN                      RAN CHEN  
   Applicant  
  
A N D                              ONE STOP PAK LIMITED  
   Respondent

Member of Authority:      K J Anderson  
  
Representatives:            Ran Chen in person  
   Amos Poh, Advocate for Respondent  
  
Investigation Meeting:     13 February 2014 at Auckland  
  
Date of Determination:     16 April 2014

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] Mr Ran Chen says that he was unjustifiably dismissed on or about 19 April 2013. Mr Chen asks the Authority to find that he has a personal grievance and award him various remedies, including reinstatement to his previous position. Mr Chen also claims the sum of \$3,783.02 being wages that he alleges that he is owed, plus a further 8% holiday pay on this amount; making a total of \$4,085.66.

[2] The respondent, One Stop Pak Limited (OSP) refutes Mr Chen's claims and says that his dismissal was justified on medical grounds and he has been paid all monies that are due to him.

**Background**

[3] Mr Chen commenced his employment with OSP as a driver/storeman on 26 February 2013. On Thursday, 28 February 2013, Mr Chen injured his back; diagnosed

as a “lumbar sprain” when he attended his doctor on Friday, 1 March 2013. The medical certificate shows that Mr Chen was unable to resume work and there would be a review of his condition on 12 March 2013. Mr Chen delivered the certificate to OSP on Wednesday, 6 March 2013.

[4] The medical certificate indicates that it would be possible for Mr Chen to do: “Light work but with restrictions on ‘bending, lifting heavy things, stretching, climbing”.

[5] Mr Chen returned to his doctor on 12 March 2013. He was assessed to be unfit to resume normal duties, with a review of his condition to take place on 22 March 2013.

[6] The evidence of Mr Chen is that he took the medical certificate dated 12 March 2013 to OSP on 13 March 2013. Mr Chen says that because the certificate suggested that he could carry out light duties, he asked his manager, Mr Beng Ong, for suitable work. Mr Ong informed Mr Chen that as there was no light work available, he should go home until he was medically cleared as being fit to work. Mr Chen did not accept this advice and he insisted on remaining at the workplace. In a letter dated 15 March 2013 Mr Ong confirmed to Mr Chen that his “... current condition was unsuitable to carry out the type of work here and you were advised to go home until you are medically fit to work”.

[7] The letter of 15 March 2013 from Mr Ong to Mr Chen was, apparently, in response to an email received by OSP from Mr Chen on the evening of 13 March 2013. The Authority has not seen a copy of this email but it appears that Mr Chen raised some concerns about being paid and he was insistent that he should be given work because the medical certificates made a reference to him being able to carry out light work. Mr Chen seems to have been resistant to the fact that OSP had concluded that there was no suitable light work available for him.

[8] Mr Ong advised Mr Chen that he would need to provide a “certificate of fitness” in order to satisfy the company that he could return to the workplace.

[9] While Mr Chen was expected to return to his doctor on 22 March 2013 for a review of his medical condition, there is no evidence that he did so. Rather, his evidence is that he returned to the workplace every day from 13 March to 4 April

2013, asking for work and was consistently told that he could not return to work until he had a medical clearance to do so.

[10] It seems that Mr Chen's presence at the work place soon became of some concern to his employer as he appears to have become quite belligerent, to such a degree, that Mr Ong contacted the Police and a trespass notice was served on Mr Chen on 4 April 2013. Mr Chen was warned to stay away from the OSP work place located at 268C Neilson Street, Onehunga.

[11] On 22 March 2013, Mr Ong wrote again to Mr Chen advising him that the position he was employed in required heavy physical work and that his present medical condition did not allow that. In response to Mr Chen's arguments about being paid by OSP, Mr Ong informed that the company did not have a duty to pay him during the injury period. This was not entirely correct as Mr Chen injured himself at work and hence the company was liable for the first week's pay; with Mr Chen having an entitlement to Accident Compensation related payments thereafter.<sup>1</sup>

[12] In concluding his letter of 22 March 2013, Mr Ong reminded Mr Chen that OSP required him to notify the company of the date that he would expect to be returning to work; and that he would also be required to provide a certificate evidencing his fitness for work.

[13] There is no evidence that Mr Chen returned to his doctor to have his fitness for work reviewed, despite being reminded that he was required to do so by letters dated 15 and 22 March and 2 April 2013 from the company. As the Authority understands it, Mr Chen kept presenting himself for light work, which he had been told on a number of occasions was unavailable, until he was eventually issued with the trespass notice on 4 April 2013.

[14] The company wrote again to Mr Chen on 4 April 2013, thus:

We refer to our letters/emails to you dated 15th, 22nd March and 2 April requesting you to give us an expected date that you are able to return to work as a driver/storeman that involves bending, stretching, climbing and lifting of heavy stock. In accordance with the company employment policy, you will be required to undergo a medical assessment by an accredited ACC lumbar specialist on your current medical condition and rehabilitation after the work place injury to

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<sup>1</sup> A payslip provided by OSP shows that Mr Chen was paid \$495 for the first week of his employment. Advice from ACC shows that Mr Chen received payments from them beginning on 8 March 2013.

assure us that you are physical (sic) to carry out the work required for that position. This is part of the health and safety requirements for our staff. The company would be happy to pay for the medical costs. We are keeping this position open for you and would like you to let us know your reply as soon as possible.

[15] It appears that Mr Chen responded via an email the same day albeit the Authority has not viewed this. Nonetheless, OSP acknowledged Mr Chen's email in their letter of 5 April 2013. Relevant to the matter before the Authority, Mr Chen was again reminded that the company required that a review by a medical professional was required to assess his physical condition as to his ability to carry out his normal duties before he could return to work.

[16] On 12 April 2013, OSP again wrote to Mr Chen, thus:

As advised in our last letter, the company would require from you a confirmed date that you are fit to return to work supported by a medical review certificate from an independent accredited medical professional at our cost. We would keep the position open until 19 April 2013.

[17] Mr Chen attended his own doctor on 17 April 2013 and was assessed as being fit to work from that day. Mr Chen wrote to OSP on the same day. He informed that:

I have already informed company for many times before that I can work normally after 25/03/2013 according to the doctor's suggestion and I requested company to arrange my work many times. The company ignored it or refused it. I can work immediately. I wait for replying from company to inform me when I can work. I need not to submit the certificate that you request, it is not my obligation. But to express my sincerity for problem solving, the certificate of fitness to work issued by doctor has been prepared. I will hand over when I go back to work.

[18] The company responded to Mr Chen on 18 April 2013 informing that they required "... a medical review certificate from an independent accredited professional" approved by both parties.

### **The dismissal of Mr Chen**

[19] Remarkably, in the light of their letter of the day before, OSP terminated the employment of Mr Chen via a letter dated 19 April 2013:

As at 19.04.2013, 5.30pm, we have not received from you a medical certificate from an accredited independent medical professional stating that you are fit physically to perform due to the special nature of your injury.

Under this circumstance, we are unable to keep the position open for you and therefore have to terminate your employment with us which take (sic) effect immediately. This decision is made after consultation with the relevant authorities and after the mediation meeting.

We would like to thank you for your patience in this matter and wish you luck in your next endeavour.

[20] But it seems that the above letter may not have been received by Mr Chen until sometime after 20 April 2013, as on this date he emailed OSP informing that he received a letter from the company on Thursday evening (18 April 2013). This appears to be the letter of 18 April from OSP that informed Mr Chen that he was required to provide a medical certificate from an independent medical professional, approved by both parties. Consistent with this, Mr Chen enquired from OSP if they could provide him with a list of appropriate medical professionals. Mr Chen also enquired as to how he could get “a check up” from an appropriate medical person, albeit he expressed doubt about whether the company had the right to insist on such action.

[21] It is established that OSP did not reply to Mr Chen’s email and there was no further contact between the parties. Mr Chen challenges his dismissal and says that it was unjustified.

### **Analysis and conclusions**

[22] The question of whether the dismissal of Mr Chen was justifiable must be determined by the Authority on an objective basis by applying the following test: Whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time that the dismissal occurred. (See s.103A(2) Employment Relations Act 2000)

[23] And in applying the above test the Authority must give consideration to the criteria set out at s.103A(3) of the Act.

**Was the dismissal of Mr Chen unjustified?**

[24] I find that Mr Chen was unjustifiably dismissed. It is accepted that OSP had understandable concerns about the failure of Mr Chen to provide information regarding when he would be fit to return to work, despite several requests made of him to do so. It is also accepted that given the nature of Mr Chen's back injury, OSP were entitled to seek an assurance from an independent medical professional that Mr Chen was properly fit to return to carry out his normal duties. While it could be said that OSP may have been taking a more cautious approach than many employers would adopt, I accept that due to the lack of any detail within Mr Chen's medical certificates, obtaining a further medical opinion was a reasonable stance for OSP to take given all the circumstances.

[25] It is obvious that Mr Chen is an obstinate and difficult individual to deal with, as evidenced by OSP having to trespass him from their premises because of his behaviour and general attitude towards management. The Authority was also subjected to arrogant and belligerent behaviour by Mr Chen and regrettably I have to say that I was certainly not impressed by his overall behaviour at the investigation meeting.

[26] But notwithstanding the unfortunate behaviour of Mr Chen towards his employer, he eventually took the necessary steps; firstly to obtain a medical clearance certificate from his own doctor and then, he indicated his intentions to cooperate with OSP in regard to being examined by an independent medical practitioner.

[27] However, while it is established that Mr Chen informed OSP on 17 April 2013 that he apparently had a medical certificate,<sup>2</sup> he failed to inform the company that his doctor had certified him as being medically fit for work as of that day. Mr Chen also took no steps to ensure that OSP received the medical certificate dated 17 April 2013. Indeed, his stance was that it was not his obligation to provide the certificate and that he would bring it with him when he returned to work.

[28] Nonetheless, given the general content of Mr Chen's email of 17 April 2013 and his confusing sentence structure,<sup>3</sup> there was an onus upon OSP to make further

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<sup>2</sup> A medical certificate dated 17 April 2013 was produced to the Authority.

<sup>3</sup> English is the second language for Mr Chen and he writes in Chinese. He also required an interpreter at the investigation meeting.

contact with him and invite Mr Chen to attend a meeting to discuss all aspects of his medical status and ascertain what would be necessary for him to return to his normal work duties.

[29] Even though OSP was aware on 17 April 2013 that Mr Chen had another medical certificate, albeit Mr Chen never provided it, regrettably a decision was made on 19 April 2013 to terminate his employment. This was without first obtaining, or even attempting to obtain, appropriate medical information from him before contemplating what should be done. Notwithstanding Mr Chen's less than helpful attitude, there was an onus upon OSP to ensure that Mr Chen was fully aware of his obligations to participate in an appropriate process that would ensure that OSP had a reliable medical prognosis before making any decisions about Mr Chen's future with the company.

[30] And while it is accepted that Mr Chen is a difficult person to communicate with, and he must be deemed to be blameworthy to some degree, the failure by OSP to take appropriate steps to ensure that they fully understood Mr Chen's medical status, before making a decision to dismiss him, leads to an inescapable conclusion by the Authority that the dismissal was unjustified.

### **Remedies**

[31] Having found that Mr Chen was unjustifiably dismissed, it follows that he has a personal grievance for which remedies are available under s.123 of the Employment Relations Act 2000 (the Act) as follows:

- (1) Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for 1 or more of the following remedies:
  - (a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee;
  - (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;
  - (c) the payment to the employee of compensation by the employee's employer, including compensation for –
    - (i) humiliation, loss of dignity, and injury to the feelings of the employee; and

- (ii) loss of any benefit whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:

### ***Reinstatement***

[32] Mr Chen asks to be reinstated to his previous position with OSP. Under s.125 of the Act the Authority may provide for reinstatement if it is “practicable and reasonable” to do so.

[33] Taking into account all the circumstances pertaining to this matter, I do not consider it is practicable and reasonable for Mr Chen to be reinstated to his previous position. This is because the behaviour of Mr Chen towards his employer, culminating in his being subjected to a trespass order, was such that it would not be reasonable to return Mr Chen to the employment of OSP. Mr Chen was only employed for two days before incurring an injury and unfortunately he has shown a total distain towards his employer since. It is simply not an option for the Authority to return Mr Chen to his employment with OSP.

### ***Reimbursement of lost wages***

[34] Conditional upon showing reasonable attempts to obtain new employment, Mr Chen would have been entitled to an award of three months wages. However, in a response to an inquiry from the Authority, Mr Chen was unable to provide evidence of any attempt to obtain alternative employment, apart from a rather vague reference to responding to an advertisement on *SKY KIWI*, an information website for Chinese people. Perhaps Mr Chen may have been unaware of the requirement to mitigate his loss. However, he certainly had the essential knowledge required to pursue a personal grievance and he was fully aware of the various remedies that may be available to him. It seems reasonable to assume that he had received some advice about all of this.

[35] The onus is on Mr Chen to prove any loss of income resulting from his dismissal. In *Allen v. Transpacific Industries Group Limited, (trading as Medismart Limited)*<sup>4</sup> Chief Judge Colgan explained the obligations of a dismissed employee in relation to a loss of earnings claim, thus:

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<sup>4</sup> (2009) 6 NZELA 530 (EmpC)

[78] Dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[36] No such evidence has been produced by Mr Chen and it is up to him in relation to his unjustified dismissal claims to produce the evidence to prove any loss of income. The same applies in relation to the obligation to mitigate loss. The Authority should not be left to speculate or guess.<sup>5</sup>

### *Compensation*

[37] There was very little evidence given by Mr Chen in regard to his claim for compensation in the sum of \$12,000 for hurt and humiliation. But there is a letter from a consultant psychiatrist with the Counties Manukau District Health Board. This refers to Mr Chen being treated for "... major depression as a result of stress that he suffered in his job earlier this year". However, judging by the aberrant behaviour exhibited by Mr Chen while he was still employed by OSP and the inappropriate behaviour that Mr Chen demonstrated at the investigation meeting on 13 February 2014, it appears that he has a propensity for extreme, bordering on irrational, behaviour in any event.

[38] Nonetheless, I accept that Mr Chen was affected by the manner of his dismissal and that, in a cultural sense, this was an affront to his dignity and was humiliating to him. I have also considered whether, pursuant to s.124 of the Act, Mr Chen contributed to the circumstances that gave rise to the personal grievance. I find that the failure by Mr Chen to make an appropriate response to OSP when several requests were made for medical information as to his fitness for work, was blameworthy behaviour of a substantial nature, that eventually led to his dismissal.

[39] Therefore, taking this into account I conclude that an award of \$3,000 is appropriate.

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<sup>5</sup> *Radius Residential Care Limited v. McLeay* [2010] NZEmpC 149

**Other claims**

[40] Mr Chen has alleged that his dismissal was on the ground of age discrimination. I do not accept this is so, and I do not find that there is any substance to his claim that he was “illegally paid” or that he was subjected to “personal security threats”. In regard to the latter, as evidenced by the trespass order issued against him, it is more probable that the actions of Mr Chen were seen as being threatening to the management and staff of OSP.

**Determination**

[41] For the reasons set out above, I find that the dismissal of Mr Chen was unjustified. Pursuant to s.123(1)(c)(i) of the Employment Relations Act, One Stop Pak Limited is ordered to pay Mr Chen the sum of \$3,000.00.

**Costs**

[42] As Mr Chen represented himself the consideration of costs does not arise.

**K J Anderson**  
**Member of the Employment Relations Authority**