

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Vernon Murray Hiddleston (Applicant)  
**AND** WattyI (NZ) Ltd (Respondent)  
**REPRESENTATIVES** Rob Davidson, counsel for the applicant  
Emma Huston, counsel for the respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**INVESTIGATION MEETING** Christchurch 14 September 2006  
**DATE OF DETERMINATION** 24 November 2006

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] Murray Hiddleston worked full time for WattyI (NZ) Limited as a storeman from August 1986 until he was dismissed by written notice dated 10 October 2005. That letter advised Mr Hiddleston that his employment was terminated due to his inability on medical grounds to fulfil his obligations under his employment agreement.

[2] Mr Hiddleston says that his dismissal is procedurally and substantively unjustified. WattyI on the other hand points to the significant amount of time that Mr Hiddleston had been absent from work, its attempts to consult with him prior to the 10 October 2005 letter and a provision in the employment agreement in order to justify the decision made by its manager (Alan Barclay) to dismiss Mr Hiddleston.

[3] To determine Mr Hiddleston's employment relationship problem, I must explain the circumstances of Mr Hiddleston's absences, review the consultation with Mr Hiddleston prior to the dismissal decision, consider Mr Barclay's evidence about why he dismissed Mr Hiddleston then assess his decision in accordance with the test set out in s103A of the Employment Relations Act 2000.

[4] In the statement of problem and in evidence, Mr Hiddleston also refers to his actions in 2004 in reporting to a manager his concerns about another employee selling paint in a manner contrary to company policy; the ensuing termination of that employee's employment; Mr Hiddleston being shunned by some work colleagues; and Mr Barclay's changed attitude towards him. It will be necessary to consider whether this matter was relevant to the dismissal decision.

***Mr Hiddleston's absences***

[5] Mr Hiddleston was injured at work on 26 September 2003 when a container of paint fell on his foot. Mr Hiddleston continued working but with some discomfort. The discomfort increased and Mr Hiddleston eventually sought medical treatment. An x-ray revealed a bone chip fracture. By about August 2004 Mr Hiddleston knew that he needed an operation to repair the injury following which his foot would be in plaster for three months and he would require a

further two months off work to fully recover. Mr Hiddleston conveyed that information to his supervisor, the person subsequently dismissed following Mr Hiddleston's report about irregularities with paint sales.

[6] In May 2005, while still waiting for the foot operation, Mr Hiddleston took extended leave to travel overseas on holiday. He was due to return to work on 3 June 2005 but suffered a heart attack while in Stockholm. Mr Hiddleston returned to New Zealand on about 9 June 2005 and was referred by his GP to a cardiologist. The cardiologist wrote to WattyI around mid-June 2005 explaining that Mr Hiddleston required a further month off work. By mid-July, Mr Hiddleston required an echo cardiogram test to determine his fitness to return to work. The cardiologist was unable to schedule that test until late September 2005. Mr Hiddleston was advised on 13 September 2005 that the test was clear. He then received a clearance to return to work and did so on Thursday, 15 September 2005.

[7] In evidence, there was some disagreement about the precise details of contact between Mr Hiddleston and WattyI between June and September 2005. It is not necessary to resolve those differences.

[8] While Mr Hiddleston was away from work during this time, he received advice that he was scheduled for the foot surgery on 26 September 2005. On or about 5 August 2005, Mr Hiddleston called into the workplace to update his supervisor (Gary Wooddin) on developments. Mr Wooddin said that Mr Barclay wanted to see Mr Hiddleston so there was a discussion between Mr Hiddleston and Mr Barclay. Mr Hiddleston told Mr Barclay that he was still waiting for his final clearance following the heart attack. Mr Hiddleston also told Mr Barclay that the foot surgery was scheduled for the end of September, that it would involve a bone graft, that his foot would be in plaster for three months after and that he would need a further two months to recuperate. Mr Barclay said that Mr Hiddleston would need to be 100% fit to return to work and he asked Mr Hiddleston if he would consider an offer of early retirement. Mr Hiddleston said he was interested but would need to check it first and would consider it if the offer was satisfactory.

[9] During the evening following Mr Hiddleston's return to work on 15 September 2005, Mr Hiddleston suffered what was initially thought to be another heart attack and he was admitted to hospital. Tests in the hospital established that it was not a heart attack and it was decided that the episode was a panic attack which had induced an asthma attack. Mr Hiddleston had suffered from mild asthma for some years. Following this episode, Mr Hiddleston returned to work on Wednesday, 21 September 2005.

### ***Consideration given to dismissal***

[10] On or about Friday, 23 September 2005, there was a further discussion between Mr Barclay and Mr Hiddleston about early retirement. Mr Hiddleston's evidence is that Mr Barclay said that WattyI would pay no more than his normal superannuation entitlement. Mr Barclay's evidence, which I accept, is that he had to request special dispensation for full vesting rights for WattyI's contributions to Mr Hiddleston's superannuation scheme. Given that, it is not likely that Mr Hiddleston's evidence on the point would be correct. In any event, it became apparent that there would be no agreement about early retirement on the basis of the offer made by WattyI. Mr Hiddleston left work with Mr Barclay knowing that he would be having surgery on Monday, 26 September 2006 and would then be away from work recuperating for about five months.

[11] On 23 September 2005 after this discussion with Mr Hiddleston, Mr Barclay sent a fax to WattyI's HR manager (Chris Lind) in Auckland. In the fax, Mr Barclay detailed the statutory holidays, annual leave, sick leave and leave without pay taken by Mr Hiddleston since 1 July 2004. He also explained that Mr Hiddleston had not been happy at WattyI for some time reflecting on his workload, attitude and the morale of the team. The fax says that Mr Hiddleston had expressed an intention to work until well after age 65 which Mr Barclay found totally unacceptable based on Mr Hiddleston's recent attendances and work ethic. The fax concludes:

*Murray has now indicated that he will be off for a further five months from Monday. This is over the summer period and it is just not possible to hold his position. I need to immediately hire a replacement for this position to enable us to maintain an acceptable level of service. Thanking you in anticipation of your swift response to our problem.*

[12] Mr Hiddleston had his operation on 26 September 2005 and was discharged from hospital on 30 September 2005. After he got home, Mr Hiddleston opened a letter dated 29 September 2005 received from WattyI. The letter referred to Mr Hiddleston's current ill health, his long periods away from work due to this over the previous three months, WattyI's use of temporary cover and re-assignment of duties to cover this, the prospective absence of up to 4-5 months and WattyI's need to make a decision about whether it could hold the position open for Mr Hiddleston. The letter requested Mr Hiddleston to put forward any information within seven days for Mr Barclay to consider as part of the decision about Mr Hiddleston's ongoing employment. The letter ended by advising that it was probable that WattyI would have no realistic option other than to terminate Mr Hiddleston's employment due to his inability on medical grounds to fulfil his obligations under the employment agreement.

[13] Mr Hiddleston's evidence is that he phoned his supervisor (Gary Wooddin) on Monday, 2 October 2005 who told him he did not know what the story was with the letter because he had just returned from a period of parental leave. Phone records establish that Mr Wooddin phoned Mr Hiddleston on 3 October 2005, just before 1pm. The call lasted 14 minutes. There was a further phone call from Mr Wooddin to Mr Hiddleston on 4 October that lasted one minute and a third call on 6 October lasting 23 minutes. In the meantime, Mr Hiddleston got a medical certificate confirming that he would be unfit for work for the next six weeks.

[14] Mr Hiddleston's evidence, which I accept, is that he arranged for the specialist's secretary to fax the certificate to WattyI; that he later rang and checked with WattyI's receptionist to ensure it had been received and asked her to pass it on to Mr Barclay and asked him to contact Mr Hiddleston if anything further was required.

[15] Next, Mr Hiddleston received the dismissal letter. It reads:

*Further to my letter dated Thursday 29 September 2005. I have not heard directly from you, however today received an updated medical certificate stating that you would require 6 weeks off after your operation. This is somewhat different to the 4-5 months you told me you would need off. Gary Wooddin our Warehouse Supervisor has contacted you with regard to my letter of last week.*

*In the absence of any further information from you, WattyI is in a position where we are left with no realistic option other than to terminate your employment due to your inability on medical grounds to fulfil your obligations under the employment agreement.*

*Details of your final pay will be forwarded to you.*

*I wish you well for the future and hope that your health recovers.*

### **The law**

[16] In *Hoskin v. Coastal Fish Supplies Ltd* [1985] ACJ 124, the Arbitration Court held:

*There can come the point at which an employer (particularly in a small shop) can fairly cry halt.*

[17] To similar effect in *Canterbury Clerical Workers Union v. Andrews and Beavan Ltd* [1983] ACJ 875, the Arbitration Court found justified the dismissal of a worker who had been incapacitated and unable to perform his duties for about five months, stating:

*... it is well established law that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period.*

[18] The cases also establish the importance of the employer following a fair procedure before making the decision not to keep the job open any longer. In *Barry v. Wilson Parking NZ (1992) Ltd* [1998] ERNZ 545, the Employment Court held that an employer:

*... has to inquire in a fair and open minded way whether the employee has any realistic prospects of returning to work within a further 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 a purpose of a decision to discontinue the employment relationship).*

[19] Cases such as *Motor Machinists Ltd v. Craig* [1996] 2 ERNZ 585, and *Paykel v. Morton* [1994] 1 ERNZ 875, stress the importance of communication and information as part of a fair process.

[20] Section 103A provides that the question of whether a dismissal is justifiable must be determined on an objective basis, by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time. The effect of this statutory test is discussed in *Air New Zealand Ltd v. Hudson* 30 May 2006, Shaw J, AC30/06. There the Employment Court reviewed developments since 1973 in the test for justification to conclude that there had been a diminution of the importance of all the relevant circumstances including that of the employee and a focus rather on the particular employer and what it thought was reasonable. The Court went on to hold that:

*In the light of the wording of the amendment and the Parliamentary expressions of intent, I find that the effect of s103A is to separate out the employer's actions for consideration. It requires the Authority or the Court to consider those actions against what a fair and reasonable employer would have done. Although the amendment does not expressly prevent employers having recourse to a range of options from which it can choose, Parliament has legislated for the Authority or the Court to evaluate this choice against a specified objective standard: what would a fair and reasonable employer have done in the circumstances?*

### **Wattyl's actions**

[21] Wattyl had known since about August 2004 that Mr Hiddleston would require up to five months away from work for an operation and recuperation to fix the bone chip fracture caused by the work accident. Despite that, Wattyl never told Mr Hiddleston that it probably would not be able to hold open his position until after the operation, whenever that might be.

[22] Mr Barclay believed that Mr Hiddleston had not been happy at work for some time, reflecting on his workload, his attitude and the general morale of the warehouse team. Mr Hiddleston had got offside with other staff as a result of their perceptions of his involvement in the dismissal of the former supervisor. However, neither Mr Barclay nor Wattyl can be criticised for how they handled that situation. Indeed, Mr Barclay initiated an investigation when the problem was mentioned by Mr Hiddleston but it was not resolved because of intervening events. Mr Barclay considered that Mr Hiddleston suffered from a general poor state of health and he attributed the performance issues partly to that. Mr Barclay's evidence is that he was concerned that Mr Hiddleston wound up in hospital after his return to work despite being deployed on the lightest duties available. Mr Barclay said, and I accept, that he was concerned about whether Mr Hiddleston would return to 100% fitness and be able to complete his duties.

[23] While Mr Barclay's concern about Mr Hiddleston's general state of health was part of why he thought it *... probable that Wattyl would be in a position where we are left with no realistic option other than to terminate* [Mr Hiddleston's] *employment due to [his] inability on medical*

*grounds to fulfil* [his] obligations under the employment agreement, WattyI never specifically sought information about that concern from Mr Hiddleston. WattyI's letter of 29 September 2005 made a general request for information but Mr Hiddleston understood that related solely to his foot operation. Accordingly, he got the orthopaedic surgeon to fax the medical certificate to WattyI on 4 October 2005 certifying him as unfit for work for six weeks from 27 September 2005.

[24] It must be remembered that the heart specialist had certified Mr Hiddleston as fully fit to resume normal work several weeks earlier. To the extent that Mr Barclay's view about Mr Hiddleston's *general poor state of health* indicates that he did not accept that certificate, he should have specifically raised the point with Mr Hiddleston, as a fair and reasonable employer would have done.

[25] There were other matters that contributed to Mr Barclay's view about Mr Hiddleston's general poor state of health. Mr Wooddin gave evidence that Mr Hiddleston had developed a hip problem. Mr Barclay's evidence is that he did not understand at the time that the hip problem was connected to the foot problem. However, there is no reason to doubt Mr Hiddleston's evidence that his hip problem was caused by his gait favouring the sore foot. Mr Hiddleston had had a cataract operation in about March 2005. That and the asthma meant that he could not be deployed in the tinting room. Mr Hiddleston also has hearing difficulties, although there was no suggestion that this impeded his work performance as a storeman. Mr Wooddin's evidence is that Mr Hiddleston was seeing heart, foot and eye specialists. This general perception about Mr Hiddleston's state of health was conveyed as one of the *facts* in Mr Barclay's letter of 23 September 2005 to WattyI's HR manager. However, it misstates the true position. In September 2005, the only health problem preventing Mr Hiddleston from doing his normal job was the problem with his foot. There was no reason to doubt that Mr Hiddleston would fully recover from the surgery and be physically able to work within the originally indicated timeframe.

[26] The evidence for WattyI is to the effect that its busy trading period coincided with Mr Hiddleston's expected absence for his recuperation from the foot operation. There is also evidence to the effect that it would have been impracticable to hire a temporary employee to cover Mr Hiddleston. I accept the evidence substantiating the former point. The evidence is that the 2005 trading pattern was no different from earlier years. WattyI knew before Mr Hiddleston's foot operation was scheduled that it would be at least inconvenient for him to be absent during its busy trading period. WattyI could easily have told Mr Hiddleston before the operation was scheduled that it would not be able to hold open his position if his recuperation coincided with the busy trading period. A fair and reasonable employer in the circumstances would have advised Mr Hiddleston in a timely manner, perhaps as early as August 2004, giving him the option of having it scheduled for outside the busy season.

[27] The failure by WattyI to directly raise its concern about Mr Hiddleston's alleged general poor state of health and its failure to advise him in a timely way that it would not be able to keep open his position during the busy trading period lead to the conclusion that Mr Hiddleston was unjustifiably dismissed. He has established his personal grievance.

### **Remedies**

[28] There is a claim for lost remuneration to cover Mr Hiddleston from when he became fit for work until retirement. Mr Hiddleston was certified unfit for work for a further 30 days from 27 January 2006. A letter dated 28 February 2006 from the orthopaedic surgeon to Mr Hiddleston's GP indicates that Mr Hiddleston was keen to look for work rather than apply for a sickness benefit when seen by the surgeon on that day. There is written confirmation that Mr Hiddleston applied for an unemployment benefit on 27 February 2006 and was on ACC until 25 February 2006. Based on that evidence, I find that Mr Hiddleston's loss of remuneration as a result of his grievance began on Monday 27 February 2006.

[29] Mr Hiddleston's evidence is that he has applied for more than 40 positions since registering for the benefit but has not even been invited for an interview. Not all Mr Hiddleston's applications were even acknowledged. I have been given a number of the

relevant advertisements and some rejection letters. There is no reason to doubt his evidence on this point and I find that Mr Hiddleston has attempted to mitigate his loss of remuneration but without success. Mr Hiddleston is entitled to be fully reimbursed for his lost remuneration from 27 February 2006 until the date of this decision, Friday 24 November 2006.

[30] There is a claim for loss arising from the superannuation arrangements that ceased at the time of Mr Hiddleston's dismissal. The employer's contribution to the superannuation scheme is a lost benefit or lost remuneration and WattyI is to reimburse Mr Hiddleston for the whole of that loss between 27 February 2006 and Friday 23 November 2006.

[31] Mr Hiddleston also claims for future loss of remuneration including superannuation benefits to age 66 on the basis that he would have retired then, not earlier. First, this is an appropriate case for an award of future loss. Mr Hiddleston worked for a long time for WattyI and it is clear that he would have continued working there until his retirement but for the dismissal. Despite extensive efforts, Mr Hiddleston has not got close to obtaining any other job within his field of experience. That possibly reflects a preference on the part of prospective employers for younger employees. In any event it is more likely than not that Mr Hiddleston will continue to be unable to find replacement employment.

[32] I have considered Mr Hiddleston's evidence that he would have kept working until age 66. Mr Hiddleston will achieve that age on 29 April 2008 in a further 17 months. There is no reason to doubt Mr Hiddleston's evidence about his intentions but that does not take into account the possibility of a change to those intentions arising from any subsequent deterioration in health or other cause. It can be said with a fair degree of certainty that Mr Hiddleston would have worked at least until age 65, approximately 5 months from now. Limiting an award of future loss to that period of time makes a generous allowance for the vicissitudes of life and the benefit to Mr Hiddleston of a current lump sum payment. Accordingly, I order WattyI to pay Mr Hiddleston a lump sum representing his salary and the employer's superannuation contribution for a period of 5 months.

[33] Mr Hiddleston's rate of pay was \$15.02 per hour at the date his employment was terminated. The above awards are to be calculated using this rate or any higher rate that would have been applied to Mr Hiddleston from the relevant date. Leave is reserved if there is any disagreement about how to apply these orders.

[34] Mr Hiddleston seeks \$25,000.00 compensation for distress but the evidence does not support an award at that level. Mr Hiddleston says that he was devastated to be dismissed; that he could not understand how it could happen after nearly 20 years service; that he was extremely distressed and deeply hurt; that he began to question his worth in life; and that he suffered considerable distress and humiliation. There is no reason to doubt that evidence but it does not attract for Mr Hiddleston an award near to the top of the range of awards usually made in the absence of medical evidence of clinically significant injury. An appropriate award to compensate Mr Hiddleston for his distress is \$12,500.00. WattyI is ordered to pay that sum to Mr Hiddleston.

[35] Mr Hiddleston did not contribute to the situation giving rise to his grievance.

### **Summary**

[36] Mr Hiddleston was unjustifiably dismissed and has a personal grievance.

[37] To remedy the grievance, WattyI (NZ) Limited is to pay Mr Hiddleston compensation for lost remuneration and lost benefits from the date of dismissal until 24 November 2006; and future loss of remuneration and benefits for a further 5 months.

[38] WattyI (NZ) Limited is to pay Mr Hiddleston \$12,500.00 compensation for distress pursuant to section 123 (1) (c) (i) of the Employment Relations Act 2000.

[39] Costs are reserved.

Philip Cheyne  
Member of Employment Relations Authority