

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

Under the Employment Relations Act 2000

BETWEEN Duane Izett Applicant
AND Axiam Diecasting Ltd Respondent
Member of Authority: P R Stapp
Representatives: Duane Izett in person
 Tim Hayes for and on behalf of the Respondent
Investigation Meeting: Wanganui, 10 May 2007
Determination: 15 May 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Izett claimed that he was constructively dismissed on 16 December 2005 when he resigned. The claim was denied by the Respondent.

Issues

[2] Was there any action that would constitute a breach by the employer of such seriousness in regard to Mr Izett's employment or terms and conditions of employment to make it foreseeable that he would resign from his employment?

[3] There were a number of factual matters in dispute but I will deal with them as I need to because there will be questions about their relevance.

[4] The law in this matter is to determine from the facts whether there was a serious breach of Mr Izett's employment or terms and conditions of employment by the employer that made it

foreseeable that he would resign. There was no ultimatum for him to resign. There was no issue of any coercion for him to resign.

The proceedings

[5] Mr Izett filed his statement of claim against Axiam Diecasting Ltd (Axiam or the company). By consent the parties agreed that Axiam was Mr Izett's employer at the time. Despite the proceedings being filed against Axiam the notice of investigation meeting named another company, Axiam Plastics Ltd as the Respondent, being the name used by Mr Izett in raising his personal grievance and taking the matter to the mediation service of the Department of Labour.

[6] Tim Hayes the general manager of the Axiam Group told the Authority he was authorised to represent Axiam. By consent the parties agreed that I should correct the error, and accordingly I corrected the citation of the Respondent to Axiam Diecasting Limited to proceed. I was supported in making the correction because Messrs Hayes and Izett agreed the employer was Axiam Diecasting Ltd and the respondent's preparation related to the employer, Axiam, and Mr Hayes had authority to represent the company, which I accepted.

The facts

[7] Mr Izett commenced a second period of work at Axiam in March 2005 as a process operator (called a finisher) in the Finishing Area on the day shift (6.00am to 2.30pm).

[8] He reported to the day shift supervisor.

[9] The parties signed off an individual employment agreement and a subsequent collective also applied. Mr Izett's start time at work was changed by mutual agreement to 8.30am.

[10] In October 2005 Mr Izett requested Mr Hayes to move to the night shift. Mr Hayes agreed that he would consider it although Mr Hayes says that there were no positions available. An issue then arose over Mr Izett approaching the night shift supervisor who Mr Hayes says Mr Izett told he was allowed to move to the night shift, with Mr Hayes's approval. Mr Hayes denied giving any such approval. Mr Izett says what he actually said to the supervisor was to ask to work the night shift if Mr Hayes allowed it.

[11] Mr Hayes and the night shift supervisor had a discussion about the above situation and despite what happened they did consider the request. They decided to decline that request. Mr Izett says he did not understand the reasons for the decision at the time, but is now more aware of them. The reasons at the time were: that there were no vacant positions, that moving Mr Izett's role in the finishing area would impact on the production flow from the day shift, that Mr Hayes considered Mr Izett did not have the skill set for diecasting or "CNC" duties required on the night shift, and that there were no resources for training on the night shift to accommodate Mr Izett.

[12] On 20 October 2005 an issue arose between Mr Izett and the day shift supervisor about a task Mr Izett was required to do. Mr Izett queried if it was part of his duties. He claimed at the time he had been verbally abused and discriminated against by his supervisor.

[13] His complaint was investigated by Mr Hayes. Mr Hayes completed a report of his inquiries. The report was given to Mr Izett and although Mr Izett did not agree with the outcome he did not take the matter any further. I accept he felt that the outcome was wrong.

[14] On 7 November 2005 another operator carrying out the same work left Axiam Diecasting and went to work for Axiam Engineering. Mr Izett was the only finisher operator left. The only relevance of this is that that related to Mr Izett's claim that he was overworked.

[15] On 7 November 2005 there were 11 redundancies: they did not include Mr Izett. Mr Izett says his workload increased because of this. Mr Hayes says that Mr Izett willingly worked any overtime available. Mr Izett agreed that he did at the time. Mr Hayes says that Mr Izett did not raise any concerns about his hours and work, which was not challenged.

[16] On 1 December 2005 Mr Izett complained about a sore back. He was referred to a GP that Axiam paid for and was off work from 2-9 December.

[17] Mr Izett obtained a medical certificate for time off work from the GP but there was no consultation with the employer of any cause and effect about the injury. From this point an issue arose about Axiam's policy that employees needed to tell the doctor there were no light duties available at Axiam and that any clearance needed to be a full fitness clearance to resume normal duties. Mr Hayes accepted that the communication of this policy might not have been as it should have been. The medical certificates enabled him to take time off and included a reference to job

rotation and light duties upon returning to work. Mr Izett applied for ACC coverage. Initially ACC accepted coverage and the company paid the first week of earnings to Mr Izett under ACC.

[18] Mr Izett returned to work on 12 December 2005 under what Mr Hayes says the company considered was a full clearance to resume work. Mr Izett says that under the medical certificate issued he should have been given light duties or job rotation but instead his supervisor expected him to work normally when he reported to work. Mr Izett says he still had a sore back and raised it with the health and safety officer. The company decided that in Mr Izett's best interests, to avoid exacerbating any injury, it could not agree to job rotation and there were no light duties.

[19] On 16 December 2005 Mr Izett returned to the doctor. He was given a further 3 days' leave.

[20] Also, on 16 December Mr Izett wrote out a resignation letter for health and personal reasons. He went to work and had a discussion there with Mr Hayes. The parties' recollection of that meeting differs. Mr Hayes says the discussion involved Mr Izett's personal reasons for deciding to resign and that Mr Izett accepted the inevitability of his situation. Mr Izett says he definitely put forward his reasons for resigning being that he had no choice if the company was not willing to rotate his work or provide him with light duties. This he says is what upset him and he considered the company's decision unreasonable. He says in the background was his relationship with the shift supervisor and the decision not to permit him to work on the night shift.

[21] Mr Hayes accepted Mr Izett's resignation because Mr Izett had made up his mind. Mr Izett's final pay was prepared and his holiday pay paid out. He has no issue with this.

[22] ACC has subsequently changed its mind on accepting coverage for the injury. Its decision was reviewed and upheld.

[23] Mr Izett says his only choice was to carry on with his normal work contrary to medical advice that he work light duties or on job rotation. He says his employer failed to adhere to OSH standards, he was not allowed to transfer and that he was pressured to continue his duties.

Determination

[24] Mr Izett I know will be very disappointed in this determination, but I must decline his claim. He has not established that he was constructively dismissed when he resigned. He has not established any discrimination. I will deal with the latter matter first.

[25] Mr Izett readily conceded that he used the term “discrimination” to try and explain how he felt he had been treated. This evidence falls short of establishing any actual discrimination against him in the work place.

[26] Turning to the constructive dismissal claim Mr Izett’s resignation was voluntary. He had decided to resign before the meeting with Mr Hayes on 16 December without any prior notice. This might not have been fatal to his claim, but considering he had 3 days to go off work on a medical certificate and had ACC coverage, I conclude that his resignation was premature. He certainly had limited choice with the company’s decision that he could not rotate jobs and that there were no light duties available. He faced a difficult situation and I understand his concerns about his financial situation with losing his pay but at the time he had been accepted for ACC coverage and the company met what it considered was its obligation to pay him any remaining sick leave and his first week’s earnings while he was injured under ACC.

[27] On the matter of job rotation, without an assessment for rehabilitation, the company was within its right to manage and exercise its discretion, and it did so, without breaching any terms of Mr Izett’s employment, when it was not compelled to offer him a rotation. Indeed Mr Hayes’ evidence supported the company making a decision to avoid exacerbating the injury. As for light duties, the company’s policy and the reasons for it were not clearly communicated, but I am satisfied Mr Izett was told, and his disagreement is over the decision not to give him light duties, as opposed to the policy requiring employees to advise doctors of it. I accept what Mr Hayes says that that has more to do with no light duties being available. Any defects in this regard would not constitute a sufficiently serious breach of the employer’s responsibilities in Mr Izett’s employment for him to resign.

[28] As an aside another matter involves whether or not the company could have done more at the time to assess Mr Izett’s situation? He returned to work and has claimed that his supervisor put pressure on him to work when he should have been carrying out light duties. I am satisfied that the light duties and job rotation referred to in the medical certificate were recommendations from the

doctor. Axiam understood that in accordance with its expectation of receiving a full clearance of fitness to return to work that Mr Izett was able to carry out normal duties. The doctor referred in the medical certificate to Mr Izett's return to work as a work trial. There seems to be an absence of any reporting back to work policy at Axiam following an injury which in some circumstances a policy might be desirable. I find that Mr Izett returned to work and it was believed he had a full clearance. Mr Izett understood there were no light duties available. Mr Izett has referred to his financial pressure. The latter is a more likely explanation why he decided to try and resume normal duties and reported back to his supervisor. The company's position is mitigated by Mr Izett obtaining medical certificates, Mr Izett being off work under a medical certificate when he resigned and that he was covered by ACC and Axiam met its obligation to pay Mr Izett's first week's earnings under ACC. The company perhaps should have involved its health and safety officer earlier in an assessment of the situation upon Mr Izett's return to work on 12 December. But because Mr Izett was covered by ACC at the time I find that any defects in that process would not have given Mr Izett a reason to resign over that when he could have taken the matter up earlier with the health and safety officer instead of reporting to his supervisor to work. He also had an opportunity to obtain a work place assessment (which was done after he had resigned) before resigning given he was on ACC and on leave under a medical certificate.

[29] I am not satisfied there is any causal link between Mr Izett's decision to resign and the employer's decision to decline his request to move shifts and his supervisor requiring him to work his normal duties before taking further time off due to his injury. The fact that the former occurred in October and was investigated by the employer supports my conclusion. The fact that I have found it was more likely Mr Izett returned to try and work because of his financial pressures, there were no light duties and he had been accepted for ACC and was off work under a medical certificate for another 3 days, means in regard to the latter, that Mr Izett has not established a reason for a breach by the employer to resign.

[30] Both parties were given an opportunity to bring along witnesses to the Authority's investigation meeting. Mr Izett was also given details about summoning any witnesses. They decided not to do so. Therefore I have decided that given the evidence before me Mr Izett has not been able to establish that he was forced to work with his injury except that his employer genuinely believed he had a clearance upon reporting to his supervisor, until he went back to the doctor again. Indeed I find that it is probably more than likely Mr Izett was prepared to give the situation his best before realising his back was too sore and he went to see the health and safety officer, who referred him back to the doctor.

[31] Mr Izett has not been able to support his claim that the company did not meet its OSH obligations. He could not refer me to any relevant detail.

[32] Mr Hayes gave a commitment to check to see if a certificate of service had been sent to Mr Izett who says he did not receive one and would really appreciate getting a certificate recording his periods of service and duties. Whether or not it had been sent Mr Hayes undertook to send Mr Izett a certificate as required under the collective employment agreement.

Orders

[33] Mr Izett's claims are dismissed.

[34] There can be no issue on costs. Costs are to lie where they fall since the parties were not represented.

P R Stapp
Member of the Authority