

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 163/08  
5105090

BETWEEN

STUART JOPE  
Applicant

AND

HEBBERD MARINE FARM  
SERVICES LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Neville Donaldson, Advocate for Applicant  
No appearance for Respondent

Investigation Meeting: 20 October 2008 at Nelson

Determination: 28 October 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Jope) was employed by the respondent (Hebberd Marine Farm) as a deck hand on a mussel harvester barge.

[2] On 21 June 2007, while working at the wharf at Okiwi Bay Mr Jope caught his left foot in a piece of decking while manoeuvring around Mr Hebberd (the principal of Hebberd Marine Farm) and in doing so dislocated his left knee.

[3] This significant injury resulted in a successful claim to the Accident Compensation Commission (ACC) for earnings related compensation and a period of absence from the employment.

[4] On 14 August 2007, Mr Hebberd telephoned Mr Jope and indicated to him that Hebberd Marine Farm was no longer able to keep Mr Jope's job open.

[5] By letter dated the same day, Mr Jope wrote to Mr Hebbard complaining about the decision and on 12 September 2007 a letter was forwarded to Mr Hebbard raising a personal grievance.

### **Process**

[6] Mr Jope filed his statement of problem in the Authority on 5 November 2007 and Hebbard Marine Farm filed its statement in reply on 6 December 2007. The parties were directed to mediation by the Authority in a telephone conference I presided over at which each party was represented.

[7] Then, Hebbard Marine Farm's counsel wrote to the Authority by letter dated 16 January 2008 refusing to participate in mediation.

[8] There was then a lengthy delay because Hebbard Marine Farm's counsel was recuperating from a significant orthopaedic procedure, but in the meantime, having considered the respondent's counsel's letter of 16 January and the subsequent email traffic between the parties' representatives and the Authority, I issued a Minute dated 2 April 2008 in which I made clear that the direction to mediation stood notwithstanding the untimely objection of Hebbard Marine Farm. Para.2 of the Authority's Minute reads as follows:

*The Authority is not in the habit of negotiating with parties on its directions. The direction to mediation stands.*

[9] Mediation eventually took place on 23 June 2008, fully six months after the Authority had directed it. It was unsuccessful.

[10] A further telephone conference took place on 14 July 2008 to make the arrangements for an investigation meeting which was set down for 13 August 2008.

[11] Then, by email dated 28 July 2008, counsel for Hebbard Marine Farm advised the Authority that he was no longer acting and that Hebbard Marine Farm would be attending to the matter itself through Mr Hebbard personally.

[12] As a consequence of that advice, I reluctantly granted an adjournment of the investigation meeting date and the subsequent attempts by my Support Officer to reschedule the investigation meeting were hampered by Mr Hebbard's failure to respond to the various messages from the Authority. Finally, Mr Hebbard emailed the Authority on 11 August 2008 and indicated that he was not available at all until the

new year. The Authority then ascertained the wishes of Mr Jope, who was understandably concerned about the continuing delay in addressing the matter.

[13] A further telephone conference between the parties and the Authority was called for 3 October 2008 and despite Mr Hebbard receiving notification of that event, he did not participate.

[14] The letter sent to Mr Hebbard drawing his attention to the telephone conference contained the following paragraph:

*Should you decide not to participate the teleconference will proceed in your absence which may result in a date being set and directions made without your input. You are therefore encouraged to participate.*

[15] In the result, when Mr Hebbard was called by the Senior Support Officer at the appointed time, his phone was not answered and simply reverted to voicemail. Given the explicit wording in the letter notifying of the directions conference, I elected to proceed with the telephone conference.

[16] A notice of hearing was forwarded by the Senior Support Officer to Mr Hebbard directly after the telephone conference and it is clear that Mr Hebbard received that notification as he wrote back to the Senior Support Officer by letter dated 16 October 2008 complaining about the hearing proceeding, indicating again that he was not available until next year and suggesting that the Authority should pay his lawyer's costs, amongst other things.

[17] From the point at which the Authority's support staff first engaged with Mr Hebbard (through his counsel), there seemed to be a mindset that by reason of the fact that Mr Hebbard's recollection of significant events was different from that of Mr Jope, the Authority ought to agree with Mr Hebbard without conducting an investigation and simply vacate the whole investigation process.

[18] The statutory purpose of the Authority as set out in s.157 of the Act, is to be an investigative body having the role of resolving employment relationship problems by establishing the facts and making a determination. By s.158, proceedings before the Authority are commenced by the lodging of an application which Mr Jope has done.

[19] The Authority under s.160 has wide powers and in terms of s.173(2A) the Authority may exercise its powers under s.160 in the absence of one of the parties. This is a case where it is necessary for me to consider doing precisely that.

[20] I have reached the conclusion that Mr Hebbard has had every reasonable opportunity to participate in the Authority's investigation and has made a conscious decision not to be involved. My conclusion to that effect is reinforced by the refusal of Hebbard Marine Farm to participate in mediation as directed by the Authority until I had directed mediation the second time, and by the continuing failure of the respondent employer to give the progressing of this matter any genuine priority. The Authority support staff have had significant difficulty in having the respondent engage, in any meaningful way, in the Authority's investigative process. I am satisfied that the root cause of that refusal to engage is the settled conviction that Hebbard Marine Farm seems to have that because it has a different view of the facts from Mr Jope, the Authority should simply ignore its statutory obligations and accept without challenge the views advanced by Hebbard Marine Farm without even putting Hebbard Marine Farm to the trouble of appearing and being examined by the Authority on oath.

[21] That is not an acceptable stance for any employer to take and I have determined to proceed with this matter to a determination without any further participating from Mr Hebbard or Hebbard Marine Farm.

[22] Although the investigative task is made more difficult by the absence of sworn testimony from the respondent, it is not as if there is nothing before me setting out Hebbard Marine Farm's position. A very full statement in reply was filed and served and Mr Hebbard's letter of protest dated 16 October 2008 also reiterates certain aspects of his position.

### **Issues**

[23] It will be useful for the Authority to consider the following questions:

- (a) What actually happened when Mr Jope injured his leg?
- (b) Was there an underlying condition impacting on Mr Jope's injury?
- (c) What were the circumstances of the dismissal?

**What happened when Mr Jope suffered his injury?**

[24] It is common ground that Mr Jope dislocated his left knee on the Okiwi Bay Wharf on 21 June 2007. Mr Jope told me that he did this when he turned to get past Mr Heberd and got his left foot stuck in the gap between two wharf planks. Nothing turns on whether Mr Heberd personally was the cause of the injury or not. Clearly it was a work related accident and was accepted as such by the ACC.

[25] Immediately after the dislocation, Mr Jope told me that he was conveyed to a work vehicle nearby to rest-up while the two other crew members continued with the discharge of the vessel and then put the boat and the barge back on its mooring. Mr Jope's evidence, supported by the evidence of Mr Smythe, who was one of the other deck hands, was that Mr Heberd took no part in the unloading operation and could very well have taken Mr Jope into hospital or to see a doctor. In the result, Mr Jope had to wait for, he thinks, 45 minutes to 1 hour before his two work mates took him away from the site.

[26] Mr Jope said that he managed to *put the joint back myself* but that it was still extraordinarily painful, as one might expect.

[27] The evidence from both parties is that Mr Jope and Mr Heberd had a conversation of sorts while the process of unloading the vessel and mooring her was underway. Mr Heberd maintains that he offered to drive Mr Jope himself, but that view is contested by both Mr Smythe and Mr Jope, and I prefer their recollection of events.

[28] When the mussel harvester had been completely unloaded and moored, Mr Jope was taken initially to his home and thence from there to the hospital. Mr Smythe and the other deck hand provided the transport to Mr Jope's home. Mr Heberd was not involved.

[29] Mr Jope was examined at hospital and Heberd Marine Farm received a letter dated the day after the accident wherein the ACC notified it that Mr Jope's claim for cover for a work related injury accident, was accepted. Mr Jope was initially given a medical certificate absencing him from work for a period of three weeks. Mr Jope's evidence is that he then made sure that Mr Heberd received all the information that Mr Jope had about his medical prognosis. In particular Mr Jope says he provided Mr Heberd with copies of the various medical certificates that issued during the

treatment to rehabilitate his knee injury. Mr Jope is adamant that he was never contacted by Mr Heberd seeking to know how he was or asking him for further and better medical particulars. Mr Jope says that he initiated all of the contact between the two of them by calling Mr Heberd and either talking with him or leaving messages on Mr Heberd's voicemail, or by providing copies of medical certificates.

**Was there an underlying injury?**

[30] Mr Jope was quite straightforward in his evidence before the Authority that he had hurt his left knee at about the age of 12 and that it had been subject to this dislocation phenomena ever since. However, he indicated that the last time that it had *gone out* was 7 or 8 years before the accident on the Okiwi Bay Wharf.

[31] Mr Jope also told me in his evidence that he had never been asked by Mr Heberd when he was hired if he had any medical conditions that might affect his ability to do the job and had he been asked, he would have readily referred to the knee problem.

[32] Mr Jope also told me that he is currently performing a very similar function to his previous role at Heberd Marine Farm. In his present role, he was asked before engagement whether he had any physical problems that might affect his ability to do the job and he told his employer about his knee problem.

[33] Mr Jope also confirmed to me that he had told Mr Heberd about the weakness in his left knee immediately after the accident; Mr Jope appeared to accept that Mr Heberd would not have known about the knee problem before then. Mr Jope also agreed that he had been wearing a knee bandage until 2 or 3 days before the accident, but he denied Mr Heberd's contention that he had been limping prior to the accident or that his work rate was reducing because of his physical weakness in that leg.

[34] It seems clear that Mr Heberd did not ask about any physical limitations Mr Jope might have had when Mr Jope was engaged. Had Mr Heberd asked that question, I would have expected him to make that claim in the statement in reply and he did not do so. Further, Mr Jope (who I thought was a credible and believable young man) was very clear that he was not asked that question when he was hired. The legal position is clear. Mr Jope is under no obligation to disclose that information in the absence of being asked about it. It is doubtful anyway that the weakness in that limb

(if that does not overstate the position) is relevant anyway. Mr Jope's evidence, which I accept, was that there had been no previous dislocation for 7 or 8 years and clearly his new employer was untroubled by this disclosure prior to engagement.

[35] Furthermore, Mr Jope showed me photographs of him working in his present role (which is similar to the role he performed for Hebbard Marine Farm) and on the face of it, some of the photographs I observed disclose some considerable weight being placed on the left knee.

[36] It follows from the foregoing, that I am not persuaded that Mr Jope's injury to his left knee constitutes a factor which would make it unrealistic of him to continue working in this industry. Indeed, I note that he is now doing precisely the same job for a competitor of Hebbard Marine Farm. Mr Hebbard makes the claim that working for his company is more physically onerous than the work Mr Jope is engaged with for his new employer. I do not accept that claim at all. I heard Mr Jope's evidence on that point, I reviewed the photographs he had had taken of the sort of work he is doing now and I have compared that to the list of duties which Mr Hebbard says are required of a deck hand for Hebbard Marine Farm. I am satisfied that the positions are, to a greater or lesser extent, comparable.

#### **What were the circumstances of the dismissal?**

[37] It is common ground that Mr Hebbard rang Mr Jope on 14 August 2007 to advise the latter that he was no longer willing to hold the job open and that Mr Jope was accordingly terminated forthwith. According to Mr Hebbard's statement in reply, the trigger for reaching this conclusion was *a medical certificate dated 9 August 2007 signed by the ACC provider and by Mr Jope ... indicating ... that Mr Jope would be unable to resume any duties at work for 21 days from 12 August 2007.*

[38] As such, this certificate was simply one in a long line of certificates issued by the examining physician on the appropriate ACC form to monitor the progress of Mr Jope's rehabilitation. It provides no more information than any earlier certificate of the same class or indeed any later certificate of the same class. Plainly though, from Mr Hebbard's statement in reply, it is clear that this certificate was the tipping point which encouraged him to telephone Mr Jope and dismiss him. The words used in the statement in reply make it clear that it was the further extension of Mr Jope's

absence from the workplace which was the significant factor impelling Mr Hebbard to take the action that he did.

[39] It is clear from both protagonists that Mr Hebbard dismissed Mr Jope over the phone. Mr Jope says that Mr Hebbard at no stage sought further and better medical particulars from him, nor indicated to him that he had a particular timeframe in mind in which Mr Jope would need to be able to return to duty, nor put Mr Jope on notice that dismissal was in his mind. The evidence I heard from Mr Jope makes it clear that the telephone call from Mr Hebbard was absolutely unexpected and the call *came as a complete shock* to him.

[40] It is clear law that the illness of an employee may, in certain circumstances, justify their dismissal. But the law requires that the treatment of an employee affected by ill health must be informed by a fair and just process in precisely the same way as any other dismissal must be effected. In truth, the test required by statute at s.103A of the Act applies to dismissals on the grounds of medical or physical incapacity, just as it applies to other classes of dismissal.

[41] The question then must be whether Hebbard Marine Farm, having followed a proper process of investigation, is justified in dismissing Mr Jope because of his continuing ill health. If a fair and reasonable employer would have dismissed Mr Jope in the factual circumstances which existed at the time Hebbard Marine Farm dismissed, then the dismissal can stand, but not otherwise.

[42] I am satisfied on the balance of probabilities that the dismissal effected on Mr Jope by Mr Hebbard was not a dismissal that a fair and reasonable employer would have made, and accordingly the dismissal is unsafe and must be set aside.

[43] I reach this conclusion for a number of reasons. First, and perhaps most fundamentally, it is clear from all of the particulars available to the Authority, the evidence of Mr Jope, the statement in reply filed on Mr Hebbard's behalf and Mr Hebbard's subsequent correspondence, that there was no investigation whatever, so there was no inquiry about how long Mr Jope would be away from work nor any intimation to Mr Jope that Mr Hebbard had, as it were, come to the end of his tether. Mr Hebbard made no request whatever for Mr Jope to provide further and better particulars about his medical prognosis. That would be an obvious step to take when assembling information about the ability or otherwise of the employee to return to the

workplace. No such request was ever made and Mr Jope was unaware that the receipt of the ACC provider form dated 9 August 2007 would effectively trigger his dismissal.

[44] In the absence of any proper inquiry as to the likely prognosis, there is no ability to balance the needs of the employee against the reasonable needs of the employer: *Barnett v. Northern Regional Trust Board of the Order of St John* [2003] 2 ERNZ 730 (Colgan J) applied.

[45] Again, in *Barry v. Wilson Parking New Zealand (1992) Ltd* [1998] 1 ERNZ 545, Chief Judge Goddard identified that the employer first had to wait a reasonable time to give the injured employee an opportunity to recover, then inquire about the employee's reasonable prospects of returning to the workplace, and in the process of making that inquiry, make clear to the employee that the information sought is for the purposes of making a decision about the possibility of bringing the employment relationship to an end.

[46] In the present case, absolutely none of those elements were present and I accept the submission made on Mr Jope's behalf that in the absence of a proper process, a decision to dismiss for incapacity must be unjustified as failing the fundamental test provided by s.103A of the Act.

[47] Mr Heberd says that a consequence of Mr Jope's injury was that he had to engage *two new barge hands* to replace Mr Jope. The difficulty with that claim is that Mr Smythe was employed on the same barge harvester had Mr Jope had been and Mr Smythe gave evidence at my investigation meeting that he had been instrumental in obtaining a single temporary replacement for Mr Jope. There were, he says, never *two new barge hands* as Mr Heberd contends. Mr Smythe was adamant that the replacement worker only wanted to work temporarily and would cease working as soon as Mr Jope was ready to return. As a matter of fact, Mr Smythe indicates that the temporary employee finished his employment with Mr Heberd's firm at the end of September 2007. That is six weeks after the dismissal. However, it is equally plain that at the time of the dismissal, the temporary worker was working and Mr Smythe's very clear evidence was that as soon as Mr Jope was ready to return, the temporary worker would leave the workplace.

[48] That evidence, taken in its totality, entitles me to doubt Mr Heberd's claim both that he had to employ two extra workers and that he had to dismiss Mr Jope because he could not manage the absence appropriately.

[49] Furthermore, if Mr Heberd had taken the entirely reasonable step of seeking a proper medical assessment from Mr Jope, he would have established that Mr Jope would be fit to return to duty very soon. In fact, the evidence discloses that Mr Jope was cleared to return to full duties from 10 September 2007, in effect only one week beyond the medical certificate on which Mr Heberd relied to dismiss Mr Jope. That medical certificate, it will be recalled, put Mr Jope off work for three weeks from 12 August which would have taken it out to 2 September 2007. Mr Jope was cleared to return to full duties effective 10 September 2007.

[50] Mr Heberd relies on his various kindnesses to Mr Jope during the employment as a basis for deflecting Mr Jope's claim. I am satisfied that Mr Heberd treated Mr Jope fairly during the employment and that Mr Heberd lent Mr Jope money, for instance, but none of that material justifies the wrong Mr Heberd did to Mr Jope in the way in which he dismissed Mr Jope.

[51] I do accept that Mr Heberd is incensed about the comment Mr Jope made in a letter he wrote to his employer immediately after having been dismissed. Immediately after the dismissal, Mr Jope wrote to Mr Heberd complaining about the dismissal in effect and concluding with the following phrase: *I hope this has not offended you, it is just a way of venting what has happened to me without assaulting you.* Mr Jope called on Mr Heberd and delivered this letter personally. Mr Heberd claims that Mr Jope repeated the threat of physical injury when he delivered the letter but Mr Jope vehemently denies that and I accept Mr Jope's recollection of events as truthful.

[52] Mr Jope quite properly apologises in his brief of evidence for the reference I have just quoted. He is right to apologise; the use of that kind of language is a lapse of taste and does him no credit. Mr Heberd is right to be concerned about such language, but again reliance on Mr Jope's failures does not justify Mr Heberd's behaviour either.

**Determination**

[53] I am absolutely satisfied that Mr Jope has been unjustifiably dismissed from his employment and in consequence, he has a personal grievance for which he is entitled to the consideration of remedies.

[54] In my view, Mr Jope's behaviour has not contributed to the circumstances giving rise to his dismissal although, as I mentioned above, his ill considered comment in his letter immediately after the dismissal was in poor taste and he was right to apologise for it. However, that episode had no bearing on the decision to dismiss which by the time the letter was received, had already been made and communicated.

[55] Mr Jope seeks compensation of \$20,000 but there is no basis on which an award of that magnitude could be made. The Court of Appeal has made clear that compensation levels at the upper end of the range (which the \$20,000 figure is) could only be awarded in exceptional cases and this is not one of those. I consider that a proper award in this case is a figure of \$5,000.

[56] Mr Jope also seeks a contribution to wages that he has lost as a consequence of the dismissal. While he was able to gain employment again as soon as he was fit after his accident, there was a difference in the hourly rate that he was paid in his new position and a difference in some of the benefits of the job. Mr Jope is entitled to expect some redress from Hebbard Marine Farm in relation to that difference. I consider that a figure of \$2,000 gross as a contribution to lost wages would be appropriate.

[57] Accordingly, I direct that Hebbard Marine Farm Services Limited is to pay to Mr Jope the following amounts:

- (a) compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$5,000; and
- (b) a contribution to wages lost as a consequence of the unjustified dismissal in the sum of \$2,000 gross.

**Costs**

[58] I propose to fix costs at this point. Mr Jope seeks costs of \$6,000. That figure is out of step with costs awards in the Authority. This was a matter that was dealt with in not much more than an hour's hearing time and on that basis a contribution to costs using the commonly applied daily tariff approach, would be in the order of \$1,000.

[59] Nothing that is before me would suggest that there is any basis for a greater award than that, and accordingly I fix costs at that figure of \$1,000. Heberd Marine Farm Services Limited is to pay to Mr Jope \$1,000 as a contribution to his representation costs.

James Crichton  
Member of the Employment Relations Authority