Employment Court of New Zealand

Judea Tavern Limited v Jesson [2017] NZEmpC 82 (30 June 2017)

Last Updated: 10 July 2017

IN THE EMPLOYMENT COURT AUCKLAND

[2017] NZEmpC 82

EMPC 299/2016

IN THE MATTER OF	challenge to a determination of the Employment Relations Authority
BETWEEN	JUDEA TAVERN LIMITED Plaintiff
AND	PATRICIA JESSON Defendant

Hearing:	14 June 2017 (Heard at Tauranga)
Appearances:	K Single and D Balfour, advocates for plaintiff D Vinnicombe and M Harrison, advocates for defendant
Judgment:	30 June 2017

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] Ms Jesson worked at the Judea Tavern in Tauranga for just under six months. She broke her leg while attending her brother's funeral and was assessed as unfit for work from 1 September 2015. On 21 October 2015 she received a letter from her employer, advising that it considered it had no option but to terminate her agreement. Ms Jesson was given eight days notice of termination. She pursued a grievance in the Employment Relations Authority claiming that she had been unjustifiably

dismissed. The Authority agreed.1 The plaintiff has challenged the Authority's

determination that Ms Jesson was unjustifiably dismissed and the remedies awarded in respect of her dismissal.

[2] The thrust of the case advanced by Mr Single, advocate for Judea Tavern Ltd

(the plaintiff), is that while Ms Jesson's employment with the plaintiff was

1 *Jesson v Judea Tavern Ltd* [2016] NZERA Auckland 351.

terminated, her employment with the broader group of entities operated by Mr and Mrs Wade continued. He said that it followed that the claim of unjustified dismissal was not made out. He also advanced a number of parallel submissions to the effect that the plaintiff had done all it needed to do to engage with Ms Jesson about her injury, that she had failed to take the initiative and proactively propose a meeting to discuss a return to work, that there was a lack of clarity as to when she would be fit for work and that the company was entitled to terminate her employment on medical grounds.

[3] The position advanced on behalf of the plaintiff is at odds with the contemporaneous documentation and reflects a misunderstanding of the correct legal position, including the obligations on employers when dealing with an employee who has been

assessed as unfit for work for medical reasons.

The facts

[4] Mr and Mrs Wade run a number of taverns in Tauranga. The Judea Tavern is one of them. Mr Wade takes care of day-to-day issues relating to the business, including dealing with any staffing matters. Mrs Wade takes care of wages and administration.

[5] Ms Jesson was offered employment as manager/duty manager on 28 April

2015 and signed an employment agreement a day later. The agreement referred to four taverns as the employer, one of which is the plaintiff in these proceedings (Judea Tavern Ltd). I accept Ms Jesson's evidence that she was clearly told by Mr Wade prior to taking up employment that she would be working at the Judea Tavern and that it was Judea Tavern Ltd which was her employer. Her employment proceeded on that basis.

[6] Ms Jesson had been working at the Judea Tavern for around four months at the time she was injured at her brother's funeral. She was medically certified as being unfit for work from 1 to 8 September 2015, inclusive. She received a further medical certificate stating that she was unable to resume any duties at work for five weeks from 7 September 2015. She was subsequently certified as being unable to

return to any work for 14 days from 12 October 2015, but able to return to

"alternative work" on 26 October 2015.

[7] Ms Jesson kept her employer informed as to her condition and how her recovery was progressing. This was done by way of emails dated 9 September 2015,

17 September 2015, 1 October 2015, and 14 October 2015. In evidence Mr Wade described such emails as "chatty" and lacking substantive information. That is a mischaracterisation. It is true that the emails are written in a conversational way, but each of them is clearly designed to update the Wades on her medical condition and did so in some detail.

[8] It is notable that Ms Jesson's emails of 9 and 17 September 2015 concluded with an invitation for the Wades to contact her if they needed any further information. They did not. Rather, they responded to the first email as follows:

Hi Pat Thank you for the update. Hope your leg is not too painful. Have filled in all the ACC information they requested and sent it back just now. Regards

[9] The Wades did not take up the opportunity to ask for further information, or raise any concerns, nor did they respond in writing to any of Ms Jesson's follow-up emails.

[10] Shortly after she had sent the 1 October email updating the Wades on her condition, Ms Jesson popped into the Judea Tavern to catch up with patrons and staff. She met Mrs Wade during the course of this visit. The two exchanged pleasantries. No concerns or issues from the Wades' perspective were raised.

[11] Ms Jesson rang Mr Wade on 12 October 2015 and had a conversation with him, the contents of which are in dispute. In evidence-in-chief Mr Wade said that he tried to impress on Ms Jesson that her job at the Judea Tavern could not be kept open, that it was imperative that they meet to discuss the situation and that he would be writing to her setting out the position. In answer to questions from the Court however, it became apparent that during the course of the conversation Ms Jesson had advised Mr Wade as best she could about her condition but had been unable to give a firm indication of when she would be able to return to work. The pivotal

point is that Mr Wade made it plain that he was content to leave it on this basis. In this regard he gave evidence that:

Q. So what was she saying during this telephone conversation on

12 October? Can you recall?

A. Um she was reporting how she was getting on. She was understandably evasive as to when she could come back to work but I fully understood that because she couldn't get a – she told me she couldn't get an answer from her doctor as to when she could come back. So I accepted that.

Q. All right. On what basis was the conversation finished then? A. How did we finish the conversation?

Q. Well you know, on what basis was it left on 12 October? A. Oh just keep in touch.

[12] This evidence as to the nature and tenor of the 12 October conversation is broadly consistent with Ms Jesson's recollection. I am satisfied that it unfolded in this way, that Mr Wade did not make it clear that the position was untenable from the company's perspective, or that they must meet to discuss how Ms Jesson's medical condition was to be dealt with, and the ongoing impact of it on her employment, as a matter of priority.

[13] On 14 October 2015 Ms Jesson returned from recuperating in Whakatane with her daughter. Her daughter dropped her most recent medical certificate (dated

12 October) into the Judea Tavern for her.

[14] Despite the indication on 12 October 2015 that Mr Wade understood the position Ms Jesson was in and that they would "keep in touch", events took a turn for the worse eight days later. Contrary to the basis on which the 12 October conversation had concluded, a letter was drafted. Mr Wade, who signed the letter, said that it had been prepared by Mr Single. Mrs Wade was unsure. What is clear is that both reviewed the letter before it was delivered to Ms Jesson.

[15] The letter, and what it was intended to convey, became the focus of a great deal of attention at hearing. I make the obvious point that it was Ms Jesson who was the recipient of the letter and what she says she gleaned from it (namely that her employment agreement had been terminated) is consistent with what a reasonable person in her shoes would have taken from it.

[16] It is convenient to set the 20 October letter out in full:

This letter is to clarify our position with regard to your employment at Judea

Tavern.

I draw your attention to Clause 12.6.1 of your employment Agreement, under this clause we must terminate this Agreement due to your injury which has made it impossible to carry out your duties at the Tavern. We therefor[e] give you eight days notice of termination from the above date.

As you have stated it may still be some time before you can carry out those duties and we regret that we cannot hold the position open for you. You have been incapacitated for over seven weeks so far.

However, we value you very much as an employee and regret very much having to take this course of action.

If, when you are able to return to work you would like to contact me, I would certainly consider some either part time or full time work, depending upon how long you can stand on your injured leg.

The Management position will not be available at Judea Tavern but work as a Duty Manager may be an acceptable arrangement for you, either at Judea Tavern or one of our other establishments.

[17] Mr Single mounted a difficult argument that the letter did not give notice of termination of employment; rather it made it clear that while Ms Jesson's employment at the Judea Tavern must come to an end, her employment otherwise continued. This, he submitted, emerged from the fact that the original letter of offer, and the employment agreement, referred to three other establishments together with the Judea Tavern. The door, he said, had been left open for work at some later date at one of the other establishments and accordingly Ms Jesson's employment continued on foot. He went so far as submitting that it was possible that she remained employed with the other three entities as at the date of trial. There are obvious, insurmountable, difficulties with Mr Single's submissions.

[18] First, the plaintiff is Judea Tavern Ltd. There is no dispute that Ms Jesson's

employment with the plaintiff entity was terminated.

[19] Second, the 20 October letter makes express reference to termination of Ms Jesson's "Agreement". Plainly that is a reference to her employment agreement, as the reference to the medical termination clause (cl 12.6.1) makes clear. Indeed Mr Wade accepted in cross-examination that the reference to the "Agreement" in the

letter was to the employment agreement. It does not sensibly bear any other meaning.

[20] Third, the letter says nothing about an ongoing employment relationship. Quite the contrary – it makes it clear that the relationship "must" be terminated and refers to the possibility of future employment at some later date either at Judea Tavern or at one of the other three establishments.

[21] Fourth, a follow-up letter from Mr Single dated 29 October is at odds with the submission now being advanced. There he noted that:2

... [the 20 October letter] very clearly sets out the grounds for your client[']s termination and specifically drew your clients attention to clause 12.6.1 of her IEA...

Therefore as it was clearly established that your client was and is unable to perform the proper and ongoing duties that she was employed to do, *our client had no option but to terminate her employment*.

[22] Fifth, Mr Wade clarified what he had earlier said in evidence-in-chief in answer to a question from the Court as to what he had intended in sending the letter. He confirmed that the letter was designed to advise Ms Jesson that her employment was ending but he would look at re-employing her once she was medically fit.

[23] I do not consider that there is any scope for argument that Ms Jesson's employment with the plaintiff was not terminated on medical grounds by way of letter dated 20 October 2015, and I reject Mr Single's submissions to the contrary.

Was the dismissal justified?

[24] Having reached the view that Ms Jesson was dismissed, the question becomes whether her dismissal was justified. The approach to dismissal for medical incapacity has recently been summarised as follows.3

[30] It is well established that an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work. An employer will be justified in dismissing an employee for long term absence

2 Emphasis added.

3 *Lal v The Warehouse* [2017] NZEmpC 66 (footnotes omitted).

where it can be shown that the decision was substantively and procedurally justified.

[31] Section 103A of the Employment Relations Act 2000 (the Act) provides the test for justification of any dismissal. The test requires the Court to determine whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred.

[32] Section 103A(3) sets out a number of factors which the Court must consider when assessing the justifiability threshold. Those factors do not sit altogether comfortably with a no-fault-based dismissal, such as dismissal for redundancy or medical incapacity. I approach the issue of termination for medical incapacity within the following broad framework.

[33] The employer must give the employee a reasonable opportunity to recover. The terms of the employment agreement, any relevant policy, the nature of the position held by the employee and the length of time they have been employed with the employer are factors which are likely to inform an assessment of what is reasonable in the particular circumstances.

[34] The employer must undertake a fair and reasonable inquiry into the prognosis for a return to work, engaging appropriately with the employee. This will likely involve seeking and considering relevant medical information. It will also involve explaining the reasons for the inquiry, the possible outcome of it, and providing the employee with an opportunity for input and comment.

[35] The employer must fairly consider what the employee has to say before terminating their employment. An employer is entitled to have regard to its business needs in deciding an appropriate response to the situation and any applicable time-frames. An employer is not obliged to keep a job open indefinitely, no matter how long an employee has been employed or how large the organisation is. For their part, an employee is obliged to be responsive and communicative.

[36] In cases of medical incapacity, and a reduced ability to undertake certain tasks, a level of engagement with attempts to facilitate a return to work may reasonably be expected. Fairness cuts both ways, consistently with the mutual obligations which exist in employment relationships. ...

[25] I agree with the overarching conclusion reached by the Employment Relations Authority in this case that the plaintiff fell woefully short of meeting the minimum procedural standards. No other conclusion is reasonably available, having regard to the chronology of events.

[26] Ms Jesson had been off work for some time (seven weeks) by 20 October

2015. The plaintiff was not obliged to keep her role open for her indefinitely. However a key difficulty for it lies in the way in which it leapt to a dismissal and failed to adequately engage with her.

[27] Ms Jesson kept her employer apprised of her recovery, and the timeframes for a return to work as best she could. As I have said, the 12 October conversation would have done nothing to alert Ms Jesson to the possibility that consideration was being given to termination. I do not accept that it was made clear to Ms Jesson that the situation was becoming impossible from Mr Wade's perspective and that her job could not be held open for her any longer. Nor do I accept, based on the evidence before the Court, that the situation was as difficult as now asserted. As Mr Wade made clear, Ms Jesson's absence was able to be covered by drawing in resources from elsewhere.

[28] While Mr Wade gave evidence that he told Ms Jesson during the course of the 12 October telephone conversation that he would be writing to her outlining the situation from the company's perspective, no letter (other than the letter terminating her employment) followed. Notably as at that date (20 October) the plaintiff had two medical reports available to it, the most recent one putting Ms Jesson off work until

26 October, so six days hence, when she would be able to return on an alternative duties basis. No exploration of what this may or may not involve, or how a return to work might be facilitated, was ever undertaken.

[29] I record that a number of complaints were made during the course of the hearing, about an alleged failure by Ms Jesson to provide medical information. However, if this had been a genuine concern at the time, the plaintiff should have raised it. Indeed under the employment agreement there is express provision to request medical information in the context of consideration being given to termination on medical grounds. It is revealing that the plaintiff never took this step.

[30] The plaintiff failed to draw Ms Jesson's attention to the seriousness of the situation, and the possibility of termination. That meant that she was given no opportunity for input and comment before the decision was made, and the plaintiff robbed itself of the opportunity to have regard to her perspective. It is no answer to say, as was submitted on behalf of the plaintiff, that Ms Jesson should have gone on the front foot and suggested a meeting. An employer cannot abdicate or shift its responsibilities in this way.

[31] While the plaintiff was entitled to have regard to the impact of Ms Jesson's continued absence from work on the business, it is clear that the plaintiff had been able to juggle resources effectively on a short-term basis. I do not accept that there was a pressing need as at 20 October 2015 to bring the employment relationship to an end, particularly in light of the information the employer had available to

it at that time (namely a medical report advising that Ms Jesson had been placed off work until 26 October).

[32] As I have said, no steps were taken by the plaintiff to discuss a return to work programme, including on a managed basis. Rather it is apparent that it formed the view that Ms Jesson was not immediately able to return to work on a full-time basis and accordingly her employment ought to be terminated on eight days notice.

[33] The defendant's advocate wrote to the plaintiff on 21 October asking that the termination be rescinded and that the plaintiff engage with "the suggested return to work programme". The plaintiff replied stating that there was no return to work programme and, because Ms Jesson was not medically fit to return to work, the termination would not be lifted. The plaintiff, through Mr Single, did not take the opportunity to clarify that Ms Jesson's employment with the other establishments remained on foot (as is now alleged); nor was any clarification sought about what return to work programme was being referred to. A request advanced on Ms Jesson's behalf that the plaintiff attend mediation in an attempt to resolve matters was met with the response that as she was unfit to attend work, mediation would serve no useful purpose.

[34] I pause to observe that this is precisely the sort of case in which early attendance at mediation would very likely have assisted. Mr Wade's evidence was that he valued Ms Jesson as an employee and wanted to see her return; Ms Jesson's evidence was that she valued her employment and wanted to return. Both Mr and Mrs Wade effectively accepted that the 20 October letter was not well crafted. Mediation could have facilitated constructive discussion and dialogue to address any confusion that had arisen as to what lay behind the steps the plaintiff had taken and how matters might be resolved. Despite the provisions of the parties' employment agreement highlighting the desirability of alternative dispute resolution to resolve

employment relationship problems (which had plainly arisen in this case) the plaintiff declined two offers to attend mediation. That was a regrettable approach, and one which was not consistent with the obligations of good faith contained within the agreement.

[35] The procedural errors made by the plaintiff were basic, fundamental, and significantly prejudiced the defendant. Nor is there a basis for concluding that Ms Jesson's dismissal would otherwise have been substantively justified, based on the evidence before the Court.

Remedies

[36] The defendant seeks the remedies awarded in her favour by the Authority, namely compensation of $5,000 under s 123(1)(c)(i) of the Employment Relations Act and lost wages.

[37] I agree with Mr Vinnicombe's characterisation of the compensatory award as modest. However, I adopt the position advanced on behalf of the defendant. Ms Jesson's evidence as to the significant impact of the dismissal on her, the undermining of her confidence and the detrimental effect it had on her physical recovery, was not seriously challenged and I accept it. The plaintiff is ordered to pay the defendant the sum of $5,000 pursuant to s 123(1)(c)(i). Such payment must be made within 10 working days of the date of this judgment.

[38] Mr Single submitted that Ms Jesson had not made out her claim for lost wages. He submitted that receipt of accident compensation payments during the period up to the time she found alternative work meant that she was not entitled to any payment by way of lost wages. It was also submitted that Ms Jesson was unfit to return to work during this period, as medical reports before the Court reflected, and accordingly she did not sustain any lost wages.

[39] I accept Ms Jesson's evidence that she would have been ready and able to attend work as at 26 October but for her unjustified dismissal on 20 October. The way in which the plaintiff dealt with her termination had a significant negative

impact on her health and rendered her unfit for work for an additional period. I do not consider it appropriate to deny any reimbursement of lost wages in the particular circumstances.

[40] While I agree that any award under s 123(1)(b) raises the spectre of duplication of payments for lost wages Ms Jesson received accident compensation payments for, previous cases have held that the liability to pay wages, or compensation for wages, rests with the employer and that the payment of, for example, social security payments or accident compensation does not displace this liability. Rather any question of reimbursement of such payments falls on the

particular organisation and the individual concerned.4 Applying this approach in this

case means that any question of repayment in respect of ACC payments Ms Jesson received falls on the Corporation and Ms Jesson, and can be put to one side in terms of the Court's assessment of an appropriate award under s 123(1)(b).

[41] I did not otherwise understand the plaintiff to be taking issue with the lost remuneration award made by the Authority. The plaintiff is accordingly ordered to pay the defendant the sum of $5,985 by way of lost remuneration under s 123(1)(b) of the Act. Such sum is to be paid to the defendant within 10 working days of the date of this judgment.

Costs

[42] This proceeding was categorised as category 1B for costs purposes. During the course of closing submissions Mr Vinnicombe indicated that a claim for increased costs, based on what he characterised as the hopeless, frivolous and vexatious nature of the challenge, would be sought.

[43] The parties are encouraged to agree costs. If costs cannot be agreed, I will receive memoranda, with the defendant filing and serving within 15 working days of

4 See for example, *Scissor Platforms (1997) Ltd v Brien* [1999] NZEmpC 235; [1999] 2 ERNZ 672 at 681-682; *Davidson* v *Christchurch City Council* [1995] NZEmpC 80; [1995] 1 ERNZ 172 at 204. (This decision was reversed in part on appeal, but not on this point: *Christchurch City Council v Davidson* [1996] 2 ERNZ 1, [1997] 1 NZLR 275 (CA)).

the date of this judgment; the plaintiff within a further 10 working days and anything strictly in reply within five working days thereafter.

Christina Inglis

Judge

Judgment signed at 3.45 pm on 30 June 2017
