

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 26
5560488

BETWEEN PIRIHI KAMIZONA
 Applicant

A N D NORSKE SKOG TASMAN
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Tim Oldfield, Counsel for the Applicant
 Kylie Dunn, Counsel for the Respondent

Investigation Meeting: 15 and 16 December 2015 at Rotorua

Submissions Received: 16 December 2015 from the Applicant and
 from the Respondent

Date of Determination: 22 January 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicant, Mr Pirihi Kamizona, claims that he has been unjustifiably dismissed by the Respondent, Norske Skog Tasman Limited (Norske Skog), on 12 June 2015.

[2] Mr Kamizona also claims that he has been unjustifiably disadvantaged by a precipitous notice of the dismissal and the manner in which it was given.

[3] Norske Skog denies that Mr Kamizona was unjustifiably dismissed and claims that he was justifiably dismissed on health and safety grounds because he is no longer fit to undertake the duties of his position as a Millwide Services Operator (MSO).

Issues

[4] The issues for determination are whether or not Mr Kamizona was:

- unjustifiably dismissed by Norske Skog
- unjustifiably disadvantaged as a result of the way in which he was told his employment would end on 23 April 2015

Background facts

[5] Norske Skog operates a paper mill at Kawerau (the Mill). It is part of the Norske Skog group of companies. Norske Skog's main product is newsprint and apart from shutdowns, the Mill operates 24 hours a day, 7 days a week, 365 days of the year.

[6] Mr Kamizona commenced employment with Norske Skog on 13 January 1977 and had been driving trucks and forklifts at the Mill since 1989. At the time of the termination of his employment on 12 June 2015 he was employed as a Millwide Services Operator (MSO).

Work Profile and Environment

[7] Mr Jason Hughes, Site Services Manager, said that Millwide Services is made up of a team of 3.5 people who service all of the ancillary services that Norske Skog provides across the whole of the Tasman site for Norske Skog and Carter Holt Harvey (now Oji Fibre Solutions (NZ) Limited (Oji)).

[8] The work is carried out 365 days a year, two of the three MSOs in Millwide Services work 12 hour shifts on a 4 days on/4 days off roster, and the remaining MSO works Monday to Friday, 8 hours per day. Norske Skog and Oji also share a Cover Person who works on a 0.5 FTE basis to cover any absences due to annual leave or sickness.

[9] The services provided by the Millwide Services team include:

- (a) Forklift operations: Unloading of hazardous chemicals and non-chemicals/clays required for both Norske Skog and Oji operations. This work would usually only be carried out by Mr Kamizona at weekends as it would normally be covered Monday to Friday by the day role;
- (b) Skip truck operations: This involves the clearing of all the skip bins that are located around the whole site and clearing these to the various waste transfer areas;
- (c) Large dump truck operations: This involves picking up waste from the Norske Skog and Oji sites and taking it to the various landfill locations around the area. A lot of the waste collected from Oji is hazardous waste such as the Grits, Dregs and Lime Mud, the truck also collects Fibre and General Waste;
- (d) Large loader operations: This work involves using the large loader to load the waste onto the large truck as well as the Oji fibre truck. The loader is

used for topping up the lime chip hoppers. It also loads the hazard materials that need to be taken away by the large truck.

[10] MSOs are required to perform all of those tasks and to work across both the Norske Skog and the Oji pulp mill sites. Norske Skog provides services to Oji under a longstanding commercial arrangement. The majority of the work performed by the MSOs occurs on Oji's site.

[11] Given the safety-sensitive duties MSOs are required to carry out, they must hold both Class 2 and Class 4 endorsements on their licences. MSOs also need to have an OSH forklift truck ticket and an HSNO ticket for hazardous substances and new organisms. MSOs can also have an F endorsement for the forklift truck as these are endorsements that allow the driving of trucks and forklifts on a public highway. Mr Hughes said these were the minimum driving licence requirements to work in the role. However, given the hazardous environment, there are enhanced obligations.

[12] The work nearly always occurred in a confined area, with other people and other equipment in the vicinity. On Oji's site, this includes working in confined spaces with dangerous chemicals in the vicinity, in and around the work site. This is an extremely dangerous environment.

[13] Mr Hughes said that WorkSafe had indicated an intention to designate both Norske Skog and Oji as major hazard facilities under the Health and Safety at Work (Major Hazard Facility) Regulations 2015 (the Regulations), Norske Skog is a lower tier site and Oji is an upper tier site. He explained that as drafted, the Regulations will impose more stringent health and safety duties on both Norske Skog and Oji. Under the draft regulations, WorkSafe would be able to conduct a review into the suitability of either Norske Skog or Oji at any time.

[14] The work Mr Kamizona carried out as an MSO tended to increase during a shutdown period when machines are shutdown on either the Norske Skog or Oji sites to allow for repairs and maintenance. MSOs are required to do more over this period as there is more equipment to be moved around the site. Additionally during a shutdown on the Oji site, there can be up to 600 additional contractors onsite and as a result, the risk of health and safety accidents occurring is enhanced.

Collective Agreement

[15] Mr Kamizona is a member of the Pulp and Paper Industry Council of the Manufacturing Construction Workers (PPWU). His work is covered by a collective agreement between Norske Skog Tasman Limited and the PPWU (the Collective Agreement).

[16] The required competencies for Millwide Services employees are outlined at page.28 of the Collective Agreement. These included the holding of the appropriate heavy vehicle and machinery licences including endorsements such as dangerous goods and load restraint.

[17] The position descriptions for members of the Millwide Services team including MSOs, Facility Cleaner and Stores Person and the work carried out by the Millwide Services Cover position are set out in Schedule 5 of the Collective Agreement.

[18] Listed in Schedule 5 under *Indicative Qualifications* for the MSOs are vehicle licence (class 4) and OSH forklift licence. Technical competencies included operations skills – operating the heavy equipment associated with Millwide Services' daily tasks.

[19] At the date of the termination of his employment on 12 June 2015, Mr Kamizona said he held the required driving licences to work as an MSO. He had an F endorsement meaning he could drive forklifts, and he also held a Class 4 licence which is a heavy vehicle licence.

Dr Gourlay

[20] Dr Ian Gourlay is the Company Medical Officer at Norske Skog providing medical services to Norske Skog and Oji employees. He is a qualified and experienced medical doctor with expertise in occupational medicine, particularly in relation to transport.

[21] Dr Gourlay in addition to providing medical services at Norske Skog also provides services as a GP at the Tarawera Medical Centre (the Medical Centre), as a Medical Officer at KiwiRail Limited, and as an Approved Medical Practitioner for Maritime New Zealand to examine all categories of seafarer.

[22] Dr Gourlay's responsibilities include providing medical assistance and treatment to Norske Skog employees. Assisting him are approximately 4 nurses and full-time administrators.

[23] Dr Gourlay said it was his responsibility to conduct medical assessments on employees to ensure they were fit for the work they were employed to do.

11 March 2015

[24] On the morning of 11 March 2015, Mr Hughes said he became aware of a near miss incident involving Mr Kamizona. Clay bags had been unloaded into the clay shed and left in an unsafe manner. He had investigated the incident and concluded that the issue was down to driver error.

[25] As Mr Kamizona was the MSO on that day, he spoke to him and Mr Kamizona admitted to stacking the clay bags and agreed to take more care in the future. Prior to this incident, there had been no others incidents to give rise to health and safety concerns in relation to Mr Kamizona.

12 March 2015

[26] Dr Gourlay said he knew Mr Kamizona who was a patient at the Medical Centre and although he was not his usual GP, he had been consulted by Mr Kamizona on occasion. He was aware that Mr Kamizona suffered from diabetes which was well controlled.

[27] He had also seen Mr Kamizona professionally when he had been consulted by him in early 2014 regarding an eye issue Mr Kamizona had at that time. At that time, Dr Gourlay said Mr Kamizona still had vision in both eyes and he had no reason to assume that Mr Kamizona's vision would worsen, or not recover from the eye complaint he had at that time.

[28] On 12 March 2015 Mr Kamizona had consulted him after seeing his GP and his ophthalmologist who had advised him to see Dr Gourlay regarding his fitness to work. By that time Dr Gourlay said that Mr Kamizona's vision issue had become so severe that it was considered monocular – he was blind in one eye. This was a permanent condition.

[29] Dr Gourlay said he advised Mr Kamizona that he could not clear him to drive heavy machinery, and that he would be advising Norske Skog of this.

[30] Dr Gourlay emailed Ms Marge Kingi, Stores Manager, on 12 March 2015 and advised her that a practical assessment for forklift driving would need to be undertaken for Mr Kamizona because he had an eye problem. Dr Gourlay stated in the email that Mr Kamizona's eye problem was:

... going to make him unfit for class 2 and class 4 licence driving on the highway. He is okay for class 1 car driving and this is the minimum for the F endorsement too.

[31] At that stage Dr Gourlay said he had not formed a concluded view as to whether or not Mr Kamizona could drive a forklift onsite, although he subsequently had determined that it was safe for him to do so.

[32] Ms Kingi had responded to Dr Gourlay and asked if the eye problem was permanent or temporary.

[33] Mr Hughes had become aware of the issue and alerted Ms Gail Turpie, HR Manager, by forwarding the email chain between Dr Gourlay and Ms Kingi to her. He had also emailed

Dr Gourlay on 12 March 2015, as he was concerned about the implications for Mr Kamizona's role as MSO, and arranged to speak to him.

[34] Later that morning he emailed Dr Gourlay again, advising that he was concerned about the possibility of an accident occurring given the heavy machinery Mr Kamizona was required to operate in his role and that it might have the potential to cause serious injury or damage, and asked if Dr Gourlay could confirm that Mr Kamizona was fit to carry out his work duties.

[35] Dr Gourlay issued a medical certificate dated 12 March 2015 in respect of Mr Kamizona, which stated that he was unfit for any driving requiring any vocational driver licence class or endorsement on the 12 and 13 March 2015. Mr Hughes liaised with Ms Turpie, and Mr Kamizona was stopped from operating the heavy machinery onsite until they had gathered more information about his condition.

[36] Following receipt of the medical certificate from Dr Gourlay, Mr Hughes said he spoke to Mr Kamizona later that day, 12 March 2015, to discuss it. He told Mr Kamizona that the medical certificate meant he could not drive the truck or the loader.

[37] He did not mention at that time that Mr Kamizona was not allowed to drive the forklift as most of the forklift work was done by the MSO day worker and as Mr Kamizona was going to be on days off over the weekend, he did not think he would be using the forklift. He had also been aware that Mr Kamizona was rostered off on Saturday, 15 March until Tuesday, 17 March so it was unlikely he would need to do forklift truck work before they met.

Events 13 March 2015

[38] Ms Turpie received a letter from Dr Gourlay dated 13 March 2015 in which he confirmed that Mr Kamizona was unfit for vocational driving. Dr Gourlay stated:

Piri has a vision problem which effectively renders him with monocular vision. He is unfit for any vocational driving (Classes 2-5) and for most licence endorsements including forks and clamps.

He is also unfit for any duties where normal binocular or 3D vision is required. This includes any crane operation or working where he has to have spatial and distance awareness. Working on or around moving machinery can also be a hazard.

This is not a condition which is amenable to treatment and the restrictions will have to be regarded as permanent.

[39] Upon receipt of the letter, from which Ms Turpie understood that Dr Gourlay was confirming that Mr Kamizona had a permanent vision problem which meant he was not safe

to work around equipment, she emailed Mr Tane Phillips, Secretary of the PPWU, regarding Mr Kamizona, attaching a copy of Dr Gourlay's letter of 13 March 2015.

[40] Dr Gourlay also issued a medical certificate dated 13 March 2015 certifying that Mr Kamizona was unfit until 23 March 2015 for all vocational driving, classes 2 to 5, and was also unfit for any work: "*which involves normal binocular [3D] vision including crane operation*".

Meeting held on 18 March 2015

[41] Ms Turpie and Mr Phillips arranged a meeting to be held on 18 March 2015. The purpose of the meeting was to:

- (a) Discuss Mr Kamizona's medical condition and Dr Gourlay's advice that Mr Kamizona could not be given medical clearance to undertake the duties of an MSO;
- (b) Discuss the fact that Mr Kamizona's ongoing employment was in jeopardy in light of the fact he was unable to fulfil the duties required of an MSO;
- (c) Discuss other opportunities at the Mill that might have been available for Mr Kamizona; and
- (d) Provide Mr Kamizona with an opportunity to provide feedback in relation to what had happened to date and anything further he would like Norske Skog to consider.

[42] The meeting on 18 March 2015 was attended by Ms Turpie and Mr Hughes with Mr Kamizona, Mr Phillips and Mr Bob McKeown, PPWU's senior site delegate. Mr Hughes took notes of the meeting.

[43] Mr Phillips said that he wanted to clarify at the meeting what exactly Mr Kamizona was not allowed to do as a result of the medical certificates. He said the F endorsement is the endorsement on a normal driver's licence and there are different vision requirements for heavy vehicle licences so he wanted to be clear about whether or not Mr Kamizona could drive a forklift. Mr Kamizona had been driving the forklift the day of the meeting.

[44] Mr Hughes said he had been surprised to learn that Mr Kamizona had been driving a forklift as without confirmation from Dr Gourlay, he did not believe it to be safe. He told Mr Kamizona that he was not to do it again without obtaining medical clearance from Dr Gourlay.

[45] Ms Turpie said the meeting proceeded on the basis that Mr Kamizona was not fit for the MSO role. She said Mr Phillips had initially asked for a payment for Mr Kamizona who was not eligible for redundancy payment or for a total permanent disability payment following termination. She had told Mr Phillips this was not possible as it would set a precedent.

[46] There had been a discussion about what other roles could be available as a result of a 'job swap' with another employee as it was sometimes possible to get employees to do job swaps. Mr Kamizona had previously worked as a cleaner and in the warehouse and if it transpired that Mr Kamizona could not do the MSO driving role, it was possible he could swap roles with somebody who could undertake his driving duties.

[47] Mr Phillips said he also wanted to get a second medical opinion which was a normal request because Dr Gourlay was the Company Medical Officer.

Events following the 18 March 2015 Meeting

[48] Following the meeting on 18 March 2015, Ms Turpie said she emailed Dr Gourlay on 19 March 2015 asking for what positions Mr Kamizona could be considered on the site. In the email, Ms Turpie referred to the roles of:

- Facility Cleaner;
- Storeman;
- Machine Utility Operator;
- PDS Operator;
- Finishing & Dispatch Operator.

[49] Ms Turpie also stated that a transfer medical would be required for any new role.

[50] Dr Gourlay replied on 20 March 2015 and advised that Mr Kamizona would be passed as fit to undertake a Facility Cleaner position but not for the position of Storeman where there was a need to operate forklifts and sidewinder forklifts; and that he would only be prepared to pass someone as fit for such duties who had full binocular vision.

[51] In regard to the Machine Utility Operator position, Dr Gourlay advised that it would not be suitable for Mr Kamizona on the basis that there would be a need to operate in and around operating machinery where it was important to have binocular vision to assess distances. In regards to the PDS operator position, full 3D binocular vision would be required

and this was also the case in respect of the Finishing and Despatch Operator position. Dr Gourlay concluded:

Sadly in view of his vision loss the possibilities on a site such as this one are very limited.

[52] Mr Hughes subsequently advised Ms Turpie that he had approached Ms Tina Lloyd, and another Facility Cleaner, and the Storeman to find if they were interested in a job swap with Mr Kamizona.

[53] Ms Lloyd had been the only employee interested in a job swap. Mr Hughes said he had been aware of the concerns expressed by Mr Garry Thrupp from Master Drive Services Limited, when he had terminated Ms Lloyd's training on a previous occasion as she could not complete the training safely.

[54] In the email advising Ms Turpie of Ms Lloyd's interest in a job swap with Mr Kamizona dated 25 March 2015, Mr Hughes had written that: "*Tina is adamant that she would like to swap even after I discussed with her what the doctor and Gary Thrupp had mentioned to us about her not being suitable*".

[55] Ms Turpie explained that Ms Lloyd was not qualified to work as an MSO and had not previously been able to complete the training for that role. She emailed Dr Gourlay on 31 March 2015 inquiring as to whether, based on his recent medical reviews of Ms Lloyd; he would clear her to undertake an MSO role.

[56] In an email dated 9 April 2015, Dr Gourlay advised that he could not give a definitive answer without a full examination but the nature of the job was heavy, with much climbing, stretching and bending. He concluded that he would have concerns that Ms Lloyd would be at risk of injury in such a job.

[57] Mr Hughes said as a result, Ms Lloyd was not a viable job swap option.

[58] Mr Phillips said there had been a meeting with Norske Skog on 21 April 2015 during which Ms Turpie had advised that the job swap with Ms Lloyd was not an option, although Mr Phillips said it appeared that Dr Gourlay had not undertaken a formal assessment of Ms Lloyd's ability.

[59] Mr Kamizona said during this time he drove a van to Auckland whilst he was carrying out alternative duties. Mr Hughes said he had not been aware at the time that this had occurred and would not have allowed him to do so.

Meeting with Dr Gourlay on 23 March 2015

[60] Mr McKeown said he accompanied Mr Kamizona to a meeting with Dr Gourlay on 23 March 2015. During that meeting he had asked Dr Gourlay if a practical test was available for Mr Kamizona. Dr Gourlay had said that he had no objection to this and he would put through a report to the transport department.

[61] On 23 March 2015 Dr Gourlay prepared a further medical certificate stating that Mr Kamizona was unfit for vocational working or work where 3D vision was required until 30 March 2015. There was a further medical certificate with the same restrictions until 13 April 2015. During this period Mr Kamizona was at work but carrying out alternative duties and not doing any forklift driving or class 4 driving.

Incident in Photocopying Room

[62] On 23 April 2015 Mr Kamizona said that he was taking a delivery of photocopy paper to the photocopy room when Ms Turpie had approached him and said she was telling him verbally that his employment would be terminated on 24 April 2015, the following day.

[63] The photocopy room is a public room with employees were entering and leaving it throughout the day and at the time Ms Turpie spoke to him on 23 April 2015 Mr Kamizona said he had been aware of other employees in the vicinity. Whilst he did not know if they had overheard what Ms Turpie was saying to him, he had, nonetheless, been embarrassed.

[64] Mr Kamizona said he understood that his employment was being terminated, and that Ms Turpie would not change her decision. He had been very upset by what had occurred with Ms Turpie and he rang up Mr Phillips and informed him of the occurrence. However he had not told his wife as he did not want to worry her.

[65] Ms Turpie said that when she had approached Mr Kamizona in the photocopy room on 23 April 2015, she had been careful to ensure that she and Mr Kamizona were alone and no others were in the vicinity.

[66] She had told Mr Kamizona that she wanted to have a meeting with him the next day and explained that in light of his medical results and given the possibility of job swaps being unsuccessful, Norske Skog was considering him notice of termination of employment. She said she had also told Mr Kamizona that it could be discussed further when they met.

[67] Ms Turpie denied that she had dismissed Mr Kamizona during the discussion or told him that he would be dismissed. She had invited him to attend a meeting with his representative and had explained that the outcome at that meeting might be dismissal. She

said she had thought it important to ensure Mr Kamizona understood the nature of the meeting he was being invited to attend.

[68] Following his conversation with Mr Kamizona, Mr Phillips contacted Ms Turpie and said that any meeting needed to wait until the outcome of Mr Kamizona's forklift driving assessment which had been arranged for 24 April 2015.

Draft letter raising a personal grievance

[69] Sometime following the incident in the photocopy room, Mr Kamizona drafted a letter dated 15 May 2015 with the assistance of his wife, Mrs Cecilia Kamizona, which was addressed to Ms Turpie and advised that he was raising a personal grievance against her for unprofessional conduct resulting in unnecessary stress. The content of the letter referred to Ms Turpie's unprofessional conduct in approaching him in a public area on 23 April 2015. However, the letter was not sent and Ms Turpie said she did not receive it.

Events after 23 April 2015

[70] Ms Turpie said she drafted a letter of termination prior to the meeting which had been scheduled for 28 April 2015. She had not at that stage made a decision to dismiss Mr Kamizona because she intended to hear any further comments from him and the PPWU before making a decision.

[71] She said at that point she had considered termination of Mr Kamizona's employment to be a likely outcome of the meeting, given that the points raised by Mr Kamizona in March had already been addressed. That was the reason why she drafted the letter in advance of the meeting. However, Ms Turpie did not give Mr Kamizona the letter at this time or in fact terminate his employment.

[72] The meeting scheduled for 28 April 2015 was postponed in order to allow Mr Kamizona and Mr Phillips to gather further information. Mr Phillips said that it had been arranged that Mr Kamizona would undertake a practical forklift test with Mr Thrupp and to see a specialist at Tauranga Hospital.

[73] He also told Ms Turpie that Mr Kamizona wanted to obtain a second opinion about whether his eyesight might improve after a stand-down period and that he was speaking to NZTA about his licences and endorsements. Ms Turpie said she agreed to postpone the meeting following her discussion with Mr Phillips.

[74] Mr Thrupp conducted a visual assessment of Mr Kamizona's ability to operate a forklift truck on 24 April 2015. The purpose of the assessment was to ascertain exactly what Mr Kamizona could do safely when driving a forklift.

[75] The report from Mr Thrupp stated that during the assessment Mr Kamizona had demonstrated his ability to operate a power industrial forklift in a well-lit area. His recommendation therefore was that there was no reason why he could not operate a forklift in a well-lit area. However, Mr Thrupp commented that dark shaded areas which were also covered were a possible area of concern as with the loss of sight in Mr Kamizona's left eye this might put situations at risk, for example not being able to focus enough to determine possible dangers and/or at distances.

[76] Dr Gourlay wrote to the NZTA on 5 May 2015 and asked for clarification on whether Mr Kamizona could be considered for a Class 2 or 4 licence: "*and whether he voluntarily agrees not to drive such classes or whether his licence will be revoked or altered.*"

[77] On 11 May 2015 Dr Gourlay received a letter from a specialist at Tauranga Hospital regarding Mr Kamizona. The letter stated:

At his last assessment on the 5th March this year his visual acuities were 6/6 right and only 2/60 left unaided and not improvable.

He is within legal limits to drive an ordinary car. The higher class driving licences require at least 6/9 vision in each eye.

[78] The letter concluded that Mr Kamizona was within the legal limits to drive an ordinary car, however the higher licences required at least 6/9 vision in each eye.

[79] Dr Gourlay emailed Ms Turpie on 12 May 2015 and advised that he would not approve Mr Kamizona driving heavy machinery on the Norske Skog site. In the email Dr Gourlay explained that he had spoken to the ophthalmology registrar at Tauranga Hospital, and to the NZTA Chief Medical Adviser's department. He stated:

We are still awaiting the definitive opinion from NZTA on Mr Kamizona's vocational driving licence status but with his medical history and now his eyesight problem it is unlikely they will approve him. However they made it clear that that even if they give an exemption to hold a class 2 or 4 licence as Company MO it is my responsibility to decide on his fitness to drive vocational driving licence class vehicles on this site and for NST.

His eye condition has shown deterioration since he first attended Park Street and he is now effectively monocular and any improvement is extremely unlikely. He also has been advised verbally by the ophthalmologist that he will not meet the standards for these licence classes. Adding these factors to his existing medical history increases the potential risk of accidents when driving.

... I therefore feel that even if NZTA gives him a dispensation to keep classes 2 and 4 I would not be happy to approve him to drive vocationally on this site. The attendant risks of pipework carrying hazardous substances, other moving traffic, complex movements (e.g. loading containers) sharp contrast between light and dark, narrow roadways with multiple collision hazards and the need to have full spatial awareness and binocular vision for safe distance judgement contribute to this opinion

[80] Ms Turpie said she emailed Mr Phillips on 13 May to follow-up the additional information he had wanted to gather as this had been the reason for the 28 April 2015 meeting being postponed. In the email she advised that Dr Gourlay had heard from Mr Kamizona's specialist who had advised that the damage to Mr Kamizona's eye was permanent, and that Norske Skog intended to give Mr Kamizona notice of the termination of his employment that day.

[81] In response Mr Oldfield emailed Ms Turpie on behalf of the PPWU and stated that it considered the decision to be precipitous and Norske Skog should await the outcome of Mr Kamizona's application to the NZTA.

[82] Mr Phillips said that on 14 May 2015 he provided Ms Turpie with the specialist's opinion which said that Mr Kamizona would not necessarily be prevented from holding his class 2 and 4 licences with his condition. The specialist's opinion stated that Mr Kamizona could hold his normal driver's licence which was the one he needed for the forklift endorsement. He said he had also spoken to an ophthalmologist who had said that it was possible to get relevant licences with one eye.

[83] Ms Turpie responded in an email dated that same day, 14 May 2015, advising that:

1. *I acknowledge that you and Kami are applying to NZTA today to retain his higher class licences;*

2. *I advise Dr Gourlay has also applied to NZTA for clarification from the Company Medical Doctor perspective;*
3. *We agree to hold off on our decision pending a timely response from NZTA;*
4. *For the purposes of clarity, I need to remind you that regardless of whether Kami holds his class 2 and Class 4 licences, it is still remains the responsibility of the company and Company Doctor to determine if Kami can safely operate these vehicles on Norske Skog/Carter Holt Harvey sites.*
5. *In the meantime it is agreed that Kami can continue on alternative duties.*

[84] Mr Phillips said he telephoned the NZTA who said that the advice he was given was that one-eyed drivers could still hold heavy vehicle licences if they received a dispensation. On that basis he believed that Norske Skog should wait to see if the NZTA would continue to allow Mr Kamizona to hold the licences.

[85] Ms Turpie said she agreed to wait for a response provided this was received in a timely manner.

[86] Dr Gourlay emailed Ms Turpie on 22 May 2015 and advised that he had met with Mr Kamizona and Mr Phillips that morning. He wrote that he had explained that from a medical point of view Mr Kamizona was unfit to drive vehicles requiring vocational licence classes for NST. He explained that Mr Phillips had apparently been discussing it with the NZTA who had raised the issue of mirrors on vehicle plus a practical driving test. He said they would be asking NZTA to arrange the test. He stated:

If the test is carried out I would like to see the tester prior to the test to ensure that strict requirements are followed.

However, my medical opinion is that he is unfit for such driving.

[87] On 25 May 2015 Mr Phillips emailed Ms Turpie and enquired what progress had been made regarding Mr Kamizona and whether or not the company had agreed with Dr Gourlay that Mr Kamizona should be given a practical test regarding his Class 2 and Class 4 licences.

[88] Ms Turpie said that prior to the start of collective agreement negotiations on 28 May 2015 Mr Phillips had asked her about the situation regarding Mr Kamizona and another practical driving test. She had understood the purpose of this to be for Mr Kamizona to get some form of clearance from the NZTA.

[89] She had reiterated that Dr Gourlay had not cleared Mr Kamizona as fit to return to his normal duties. When Mr Phillips asked if Dr Gourlay had tested Mr Kamizona's ability to drive, she had commented that the concerns were not about Mr Kamizona's ability to drive, but the environment in which he had to drive, and drive safely, on the Norske Skog and Oji sites, especially given the Worksite view that Norske Skog's assessment was as a Major Hazard Facility.

[90] On 26 May Dr Gourlay contacted Mr Chris Walls, a specialist ophthalmologist, requesting a second opinion. In the covering email to Mr Walls, Dr Gourlay explained that the situation regarding Mr Kamizona was complicated by the fact that he was a type 2 diabetic and on insulin. Consequently he was under review by NZTA for his diabetes. He explained that although his diabetes has been reasonably good since being on insulin, recent blood tests had shown a significant deterioration in renal function and that his GP had referred to him a renal physician.

[91] Dr Gourlay explained that he had approached NZTA for their decision on Mr Kamizona's licence classes and said that although they had not given written confirmation, they were likely to pass him with some conditions. Dr Gourlay said

I am advising the company that on this site with the attendant hazards and the mix of vision and medical issues that I am not happy to pass him for such driving duties.

The man is disputing this and so is his Union. His Union representative is understandably keen to support him but he is also realistic and fair and will not support someone being in a role which puts other people at risk.

[92] Ms Turpie said she asked Mr Phillips about the NZTA application to which he replied 'what application' or words to that effect. Mr Phillips said that Mr Kamizona had the endorsements which had not been removed, so he did not have to apply for anything. Ms Turpie said at that point it was clear to her that Mr Kamizona had not in fact made an application to NZTA.

[93] Following that discussion, Ms Turpie said she reflected on the situation of Mr Kamizona. Her view was that all outstanding matters that had been raised by Mr Kamizona and the PPWU had been resolved. Dr Gourlay had determined that Mr Kamizona was not medically fit to carry out the role of MSO and that his view would not change even if Mr Kamizona retained his licence endorsements. In any event, Mr Kamizona had not made an application to NZTA. Norske Skog had also declined to do another skills test.

[94] Ms Turpie's conclusion, therefore, was that no options were feasible and that Mr Kamizona's employment would be terminated. She therefore arranged a meeting with Mr Kamizona for 4 June 2015.

[95] On 29 May 2015 Dr Gourlay emailed Ms Turpie and said

I have contacted an independent Occupational Medicine Specialist regarding Pirihi's situation. I outlined the nature of his duties and medical conditions and he has agreed with me that he should be considered unfit for his normal driving duties, based on the information provided. I have now requested a formal case review from him and sent the information he will need to perform this review.

[96] Mr Phillips said that he did not know that Dr Gourlay had written to the specialist or what the specialist report had been. Nor were they aware of a formal case review outcome.

[97] Ms Turpie said that Mr Phillips told her that he would not accept the specialist Dr Gourlay had chosen to obtain a second opinion from and that the PPWU wished to obtain its own second opinion. In that situation she advised Dr Gourlay not to proceed with obtaining a second opinion, and he cancelled the request.

Meeting 4 June 2015

[98] The meeting on 4 June 2015 was attended by Ms Turpie, Mr Haslam, Mr Kamizona, Mrs Kamizona and Mr Phillips. Ms Turpie advised Mr Kamizona that as he did not have medical clearance and Dr Gourlay had indicated that he would not obtain it given the nature of his condition, Norske Skog was going to terminate his employment. She also discussed the efforts made by Norske Skog to redeploy Mr Kamizona.

[99] Mr Kamizona was provided with a letter of termination dated 3 June 2015 which stated:

Notice of termination of employment

On 13 March 2015 the Company medical practitioner, Dr Ian Gourlay, advised the Company that due to your vision problem he declared you unfit to undertake your normal duties as a Millwide Services Operator indefinitely. He advised your condition is not amenable to treatment and the restrictions will have to be regarded as permanent. As part of this decision process, Dr Gourlay consulted your Eye Specialist who confirmed his prognosis.

Whilst attempts were made to seek redeployment opportunities to another position within the Mill, these efforts were not successful. The principal reasons were

- 1. Your medical condition relating to your eyesight precluded you from being considered for many roles on site;*

2. *Redeployment required a job swap with another willing employee, and that employee also had to be deemed suitable for your role.*

Dr Gourlay also consulted an independent medical specialist and on 29 May 2015 Dr Gourlay again confirmed to the Company that based on your vision problem, coupled with complexities of other medical issues you currently have and the risks associated with them, he cannot clear you medically fit to safely undertake your duties as a Millwide Services Operator where your primary role is to operate large vehicles on the Norske Skog Tasman and Carter Holt Harvey sites.

Due to privacy/patient confidentiality, Dr Gourlay cannot give the Company all the details upon which he has based his decision. However, I have made an appointment for you to meet with Dr Gourlay so that he can explain this to you. ...

On this basis, for the reasons set out above, I regret to advise your employment with Norske Skog Tasman Limited will be terminated at the end of your roster day on Friday 12 June 2015. As you are undertaking alternative duties, you will not be required to work out this notice period.

[100] Mr Kamizona said whilst the letter referred to consultation with an ‘independent medical specialist’ he did not know to whom that referred or what he or she had advised Dr Gourlay. Nor had he given permission for Dr Gourlay to talk to that person.

[101] Mr Phillips said that he and Mr Kamizona had been expecting Norske Skog to discuss with them how it could accommodate any of Mr Kamizona’s medical restrictions (e.g. mirrors, extra lighting).

[102] A statement of problem was filed with the Authority on 7 July 2015 by Mr Kamizona. The parties subsequently attended mediation, however, this did not resolve the problem.

Determination

Was Mr Kamizona unjustifiably dismissed by Norske Skog?

[103] Mr Kamizona was dismissed from his position as MSO at the meeting held on 4 June 2015. The test of justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

- ii. *The test is 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 the dismissal or action occurred.*

[104] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. Norske Skog must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[105] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*¹. The Employment Court stated:²

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[106] Mr Kamizona has permanent medical issues which it is alleged impinge upon his ability to safely carry out his driving duties. Whilst his medical issues may not have restricted him from driving a motor car in normal driving conditions, Mr Kamizona was required to drive heavy machinery in a constricted space working environment in which there were chemicals, some of which were dangerous, and other employees and contractors working in the immediate vicinity.

[107] Dr Gourlay is Norske Skog's Medical Officer, and in that position he has responsibility for assessing employees and ensuring that they are medically fit for the work they are employed to do.

[108] Dr Gourlay advised Ms Turpie on 12 May 2015 that: "*even if NZTA gives him a dispensation to keep classes 2 and 4 I would not be happy to approve him to drive vocationally on this site*", and on 22 May 2015 he confirmed that in his medical opinion Mr Kamizona was not medically fit for driving on the Norske Skog site.

[109] Presented with this information Ms Turpie terminated Mr Kamizona's employment in reliance on the Norske Skog Medical Officer's confirmation that he would not clear Mr Kamizona as medically fit to undertake his duties as an MSO.

¹ [2011] NZEmpC 160

² *Angus at para [23]*

[110] Ms Turpie is not medically qualified and I find her reliance on the medical expertise and written opinion of Dr Gourlay to have been reasonable in such circumstances. The working environment in which Mr Kamizona was required to drive heavy machinery involved confined areas, other equipment and pipes carrying chemicals, a spillage of which as a result of damage to a pipeline could have serious consequences for the driver, other employees and the wider community.

[111] I find that dismissal was a conclusion that a fair and reasonable employer could have reached in all the circumstances at the relevant time.

Procedural Justification

[112] It is incumbent on the employer to act reasonably in all the circumstances at the relevant time the dismissal occurred. In this case the circumstances were such that Mr Kamizona was a very long-serving employee and the situation in which he found himself was not of his own making.

[113] In accordance with s 103A (3) of the Act, Norske Skog was required to carry out a fair investigation and follow a fair procedure. I find that it did not do so in a number of respects.

(i) The Job Swap Proposal

[114] At the meeting held on 18 March 2015, the possibility of the redeployment of Mr Kamizona was discussed, and Mr Hughes and Ms Turpie agreed they would consider the suggestion, in particular a job swap with a Facility Cleaner.

[115] Mr Hughes subsequently approached Norske Skog's Facility Cleaners, one of whom, Ms Tina Lloyd, had indicated she was interested in the job swap possibility. Dr Gourlay confirmed on 20 March 2015 that he anticipated Mr Kamizona would be passed fit for such duties.

[116] Ms Lloyd had expressed keen interest in the job swap proposal, however as a result of comments made by Mr Hughes; Ms Turpie had some concerns about the fork lift training Ms Lloyd had previously undertaken, and her unspecified medical issues. Dr Gourlay was consulted and had advised that he could not give a definitive answer as to whether or not Ms Lloyd was medically fit to carry out the duties of an MSO without carrying out a full examination.

[117] Without carrying out any detailed investigation into the job swap option it was decided by Norske Skog not to progress the job swap proposal.

[118] In that situation I consider that a fair and reasonable employer could have had a full medical examination carried out and a report obtained from Mr Thrupp relating to Ms Lloyd's suitability for fork lift training before determining that she was not a suitable candidate for the position of MSO – the job swap.

(ii) *Ms Turpie's meeting with Mr Kamizona on 23 April 2015*

[119] Ms Turpie's meeting with Mr Kamizona on 23 April 2015 took place in a public area, she saw Mr Kamizona in the photocopying room and: "*took the opportunity to talk to him*". I accept that there may have been no employees within hearing distance, however it was Mr Kamizona's perception that a matter that concern his continued employment might be overheard by another employee, and that gave him anxiety and concern.

[120] I also accept that whilst Ms Turpie did not tell Mr Kamizona directly that a decision had been made to terminate his employment, she stated that she explained to him that Norske Skog was considering giving him notice of termination of employment, and that he could be dismissed at a meeting yet to be arranged.

[121] It was inappropriate for Ms Turpie to advise Mr Kamizona of the potential for termination in such an informal manner and in such a public place. Ms Turpie acknowledged at the Investigation Meeting that her action, however sincerely meant, was in hindsight unwise

[122] I find speaking informally with Mr Kamizona on 23 April 2015 about the possibility of the termination of his employment at a meeting yet to be arranged and in the absence of a support person, was not part of a reasonable disciplinary process.

(iii) *Second medical opinion*

[123] On 26 May 2015 Dr Gourlay decided that a second medical opinion was needed and wrote to Dr Chris Walls stating, "*I feel that we need an external second opinion on his fitness and I wondered if youwould be able to do this?*"

[124] Dr Walls replied that he could do a review and offer an opinion, adding that seeing and examining Mr Kamizona was unlikely to add to the information already provided, and the main purpose would be to discuss the opinions.

[125] On 29 May 2015 Dr Gourlay wrote to Ms Turpie and stated that he had sought a formal review of Mr Kamizona's case by Dr Walls. Ms Turpie said that she told Dr Gourlay to cancel that request on the basis that Mr Phillips had previously informed her that the PPWU wanted to obtain a second medical opinion which was independent of Dr Gourlay.

[126] Even if the circumstances existed in which the PPWU was advising that it preferred to obtain its own second medical opinion, I consider that Norske Skog should have obtained the second opinion based upon Dr Gourlay's advice not only that he had deemed an external second opinion was necessary, but that he had already commissioned such an opinion, prior to Norske Skog making the decision to dismiss Mr Kamizona

[127] It was incumbent on Norske Skog to take all appropriate and possible steps in the situation involving Mr Kamizona, an extremely long-serving employee with a clean disciplinary record and not at all at fault in the situation which had arisen, and especially considering Ms Turpie's reliance on the medical expertise of Dr Gourlay.

(iv) *Practical Driving Test*

[128] On 22 May 2015 Dr Gourlay emailed Ms Turpie advising her that he had met with Mr Kamizona and Mr Phillips that morning. He stated that Mr Phillips had been discussing Mr Kamizona's situation with the NZTA who had raised the issue of the vehicles being fitted with mirrors and a practical driving test being held which Norske Skog would be asked to arrange. Dr Gourlay stated in the email: "*If the test is carried out I would like to see the tester prior to the test to ensure that strict requirements are followed*".

[129] I observe that the NZTA publication '*Medical aspects of fitness to drive*' states under the heading:

Medical Standards for individuals applying for or renewing a class 2,3,4 or the Agency may allow exceptions.... A supporting opinion from an optometrist or ophthalmologist, including an assessment of the health of the good eye, should accompany any requests....

The Agency is likely to impose a licence condition that any vehicle the individual drives should be fitted with external rear view mirrors on both sides

Because adaptation to loss of vision in one eye can vary between individuals, where doubt exists, a practical driving test should be carried out before allowing an individual to return to driving.

[130] Ms Turpie was aware of the practical driving test request, but no practical test, other than the forklift test performed by Mr Thrupp was offered to Mr Kamizona by Norske Skog.

[131] I find that Norske Skog should have offered Mr Kamizona a practical driving test prior to making the decision to terminate his employment.

[132] Having considered all the circumstances, I find that Norske Skog did not act in a procedurally fair manner and that the defects in the process were not minor in nature.

[133] I determine that Mr Kamizona was unjustifiably dismissed by Norske Skog.

Was Mr Kamizona unjustifiably disadvantaged as a result of the way in which he was told his employment would end on 23 April 2015?

[134] I have considered the disadvantage claim as forming part of the dismissal process rather than as a separate claim and have addressed it accordingly in the preceding paragraphs.

Remedies

[135] Mr Kamizona has been unjustifiably dismissed and he is entitled to remedies.

Reinstatement

[136] Mr Kamizona is seeking reinstatement. Whilst reinstatement is no longer the primary remedy, it may be awarded pursuant to s.125 of the Act if it is reasonable and practicable to do so.

[137] I am mindful of the fact that Norske Skog terminated Mr Kamizona's employment as a MSO due to its reasonable safety concerns about his operating heavy machinery given the opinion of Norske Skog's Medical Officer and working in an environment which was clearly one in which there were major hazards.

[138] In that situation I accept that Norske Skog acted, albeit procedurally unfairly, to terminate Mr Kamizona's employment on the basis of its understandable concerns to ensure

his safety, and that of the other employees and contractors on site, in addition to that of the wider community.

[139] Given those concerns and the fact that during the Investigation Meeting Dr Gourlay stated that there was a possibility that if a practical driving test was done to strict standards he could reconsider his decision, and the noted comment included as part of the letter dated 30 June 2015 and attachments which Dr Gourlay sent to Mr Oldfield that: *“I will still have to declare him as medically unfit to drive for NST within those licence classes, if NZTA approves him. If a practical driving test done to strict standards is done reconsideration will be possible.”*, I am ordering reinstatement subject to the following conditions and on the basis that these conditions are both satisfactorily completed:

1. Mr Kamizona is to undertake a practical driving test conducted to strict requirements and in his normal working environment with Dr Gourlay’s input to the tester prior to the test to ensure that strict requirements are followed. I consider that the NZTA may be able to either conduct such a test, or make a recommendation as to an appropriate organisation with the expertise to carry out such a test. The written results of the practical driving test must also include the NZTA requirements of any licence conditions imposed relating to any vehicle Mr Kamizona is allowed to drive.

In the event that Mr Kamizona’s Class 4 and/or Forklift OSH licences are not validated, Mr Kamizona cannot meet the required competencies of an MSO pursuant to the Collective Agreement and cannot therefore be reinstated.

2. A second medical opinion on Mr Kamizona’s fitness to carry out his duties as an MSO at his current place of work is to be obtained from an independent medical specialist with expertise in the particular circumstances of Mr Kamizona’s medical problems. The medical specialist is to be provided with full details of Mr Kamizona’s normal working environment, and afforded a site visit if he or she considers this to be necessary prior to formulating an opinion. The opinion should also include any comment relating to the results of the practical driving test.

I note that Mr Chris Walls had been approached by Dr Gourlay and asked if he could either provide a second opinion himself, or recommend a suitable alternative specialist. Mr Walls may be suitably qualified to give such an opinion, or may be able to assist with a recommendation acceptable to both Norske Skog and Mr Kamizona.

[140] Any other remedies will be determined once it is determined whether or not Mr Kamizona can be reinstated to the position of MSO.

Costs

[141] Costs are reserved pending the final determination of this matter.

Eleanor Robinson
Member of the Employment Relations Authority