

he continued with his role but later, as the full severity of his injury became apparent, he required a period of leave on earnings related compensation.

[6] In March 2008, despite some abatement of his symptoms, a Vocational Independence Report confirmed that he would not be able to return to his former job. However it identified types of work which would not be precluded by his injury. On 13 March 2008 he was notified that he was now considered vocationally independent and given three months notice that his earnings related compensation would cease.

[7] Also from 13 March 2008, as part of a return to work plan, Mr Khan took up light duties, at first part time and eventually building to 35 hours per week. He continued to perform similar temporary duties (on pay) after his earnings related compensation ceased on 13 June 2008. Meanwhile, on 10 September and 25 September the respondent held meetings with Mr Khan to review his status and explore what suitable (permanent) alternative roles might be available for him. By the end of October he had not been placed in a job. A further meeting was held on 30 October and at its conclusion Mr Khan was given four weeks notice of termination.

[8] It is common ground that Mr Khan cannot go back to his original role as a loading foreman. His personal grievance is based on an assertion that the respondent failed to meet its obligations to assist him into alternative work and could have found a suitable role for him....

[9] The respondent says it met all its obligations in this regard.”

Issues

[2] The case was not argued on the basis that there was a breach of duty associated with Mr Kahn's injury or that a failure to provide a safe workplace caused him foreseeable harm. Nor is there any dispute that it was impossible for him to return to his job as a loading foreman. It is asserted, though, that his injury (being work related) is a relevant circumstance in terms of the test in section 103A of the Employment Relations Act. That section provides:

“the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.”

[3] It is argued that in the particular circumstances of this case Air New Zealand bears a greater than usual responsibility to help Mr Kahn find another job, a responsibility which it failed to meet. Specifically, as the determination on the interim application records, it is Mr Khan’s argument that:

“Air New Zealand failed in its duty to:

- i. “advise him, in a timely fashion, of the need to start looking for an alternative job;*
- ii. review Mr Khan’s rehabilitation plan and consider what alternative roles might be suitable;*
- iii. assess what jobs were available and what Mr Khan could do;*
- iv. provide vocational training to equip him for alternative work, and*
- v. consider both internal and external jobs.”*

[4] Although Mr Khan was declared vocationally independent in March 2008, the range of jobs he could do was restricted because of on-going health issues identified in his vocational medical assessment (conducted early the same month.) Ms Hartdegen argues on Mr Khan’s behalf that this assessment was potentially out of date by the time Mr Khan’s dismissal was in contemplation in September. She says that the airline should have sought a further assessment in case there had been a change in the range of jobs Mr Khan was medically capable of.

[5] Air New Zealand’s response to these assertions (as set out in Mr France’s submissions) is essentially two-fold. First it says that there is no applicable legal

principle which imposes an obligation on Air New Zealand to continue to employ an employee who is no longer capable of performing the duties for which he was employed (and the fact that his injury occurred at work does not change that.) Secondly it says that Air New Zealand did help Mr Khan in his search for alternative work within the company and thereby met any remaining obligations it may have had towards him. It also says that the vocational independence report gave no indication that there would ever be a change in the restrictions on what he could do.

[6] Mr France also counters certain assertions made on Mr Kahn's behalf in relation to points (ii) and (iv) (above) by saying that they relate to his dealings with ACC and the rehabilitation process and so fall outside the Authority's jurisdiction.

[7] As well as the matters identified above, Mr Kahn's statement of problem alleges a breach of clause 12.6 of his collective employment agreement, which provides:

"Positions within Bands 2 and 3 (as specified in Schedule 1) shall be advertised internally first when such positions become vacant. The company undertakes to provide the opportunity for interviews for employees who apply."

[8] However, the respondent's uncontested evidence is that none of the positions for which Mr Khan applied fell within the relevant bands as set out in Schedule 1 of the CEA. I conclude therefore that there has been no breach of clause 12.6 of the contract.

[9] Finally the statement of problem also alleges a series of disadvantage grievances based on the same issues which have been identified as going to the question of whether the dismissal was justified. The respondent has argued that these matters were not raised until 2 February 2009 (outside the 90 day period.)

[10] The disadvantage grievances were not addressed in the applicant's submissions at all. I conclude that they were not raised within 90 days and cannot be addressed as stand alone claims, although I note that the factual matters involved are traversed in this determination as part of scrutiny of the circumstances leading to the dismissal.

[11] The issues for determination (in the order in which they will be addressed here) are therefore:

- i. whether the Authority has jurisdiction to investigate issues which relate to Mr Kahn's dealings with ACC and the rehabilitation process;
- ii. what obligations the airline owed Mr Kahn once it was established that he could not return to his former role, and
- iii. whether it met any such obligations.

(i) Jurisdiction

[12] Air New Zealand is an Accredited Employer in the ACC Partnership Programme and runs its own Injury Management Programme under contract to ACC. This programme is set up to deliver the entitlements available to injured employees pursuant to the Injury Prevention and Rehabilitation Act 2001. External providers may be subcontracted to deliver certain services but the overall responsibility for operating the programme rests with the accredited employer.

[13] Staff involved in the programme are Air New Zealand employees however as a requirement of accreditation, the programme operates separately from the rest of the organisation, with strict confidentiality requirements preventing exchange of information between programme managers and others in the company, except with the consent of the affected staff member.

[14] Prior to the completion of his Vocational Independence report, Mr Khan had been off work on earnings related compensation and his case was managed under the work injury programme. During that time, Air New Zealand staff employed on the programme made decisions about Mr Khan's entitlements under the Injury Prevention and Rehabilitation Act 2001 (including the decision to cease earnings related compensation) but they did so in the exercise of powers delegated pursuant to that Act. Those decisions are not, therefore, subject to the jurisdiction of the Employment

Relations Authority. Any issues Mr Khan might take with the way his case was handled while he was covered by the programme must be pursued in a different forum.

[15] The relevant period for consideration of issues which fall within the Authority's jurisdiction is therefore from March 2008, when ACC declared Mr Khan to be vocationally independent, and gave notice that his earnings related compensation would cease.

(ii) Air New Zealand's obligations to Mr Kahn

[16] There is a significant body of case law on the issue of dismissal for incapacity and both Ms Hartdegen and Mr France have referred me to authorities in the area. For Mr Khan Ms Hartdegen argued that in situations of workplace injury an employer has a limited ability to dismiss and bears an increased responsibility to redeploy. Mr France resisted this submission arguing that it is contrary to the "no fault" philosophy which underpins the personal injury regime in this country. In support of her argument, Ms Hartdegen referred me to *Canterbury Clerical Workers IUOW v Printing & Packaging Corp Ltd* [1988] NZILR 1213 and *Auckland & Tomoana Freezing Works etc IUOW v Wilson Foods Ltd* [1990] 3 NZILR 939. However, neither decision dealt expressly with this point.

[17] I consider that Air New Zealand's obligations can best be summed up by reference to first principles. An employer is not obliged to hold a job open indefinitely where injury prevents an employee from returning to work, and there is no dispute here that Mr Khan was prevented from returning to his former duties. However (as with any dismissal) an employer in these circumstances must follow fair procedure in coming to a decision to dismiss. Where dismissal for incapacity is in contemplation the requirement to treat employees fairly imposes upon the employer the usual duties to:

- i. inquire into all relevant matters;
- ii. provide reasonable opportunity for the employee to be heard, and give his or her input into the decision, and to

iii. consider alternatives to dismissal.

[18] With the exception of the matters outside my jurisdiction, the concerns Ms Hartdegen has raised on Mr Khan's behalf can all be considered under these sub headings. The matter therefore falls to be determined on whether Air New Zealand met its obligations in these three areas.

(iii) Whether Air New Zealand met its obligations to Mr Kahn

[19] On 13 March (following completion of a vocational occupational assessment and a separate vocational medical assessment) Mr Khan met with his ACC case manager and was advised that he was now considered vocationally independent. This meant that while he could not return to his former role for medical reasons, he was considered capable (in terms both of his health and of his existing skills) of moving into certain alternative roles. The vocational independence assessment decision was recorded in writing in a letter also dated 13 March and copied to Mr Khan's manager, Mr Hooke.

[20] Specifically, Mr Khan was told that he would be unable to undertake work of greater than sedentary to light physical demand or which involved frequent or constant sitting, standing or bending. From this it was clear that he could not go back to loading work. However, having identified that he had experience in clerical and administrative roles in Fiji between 1987 and 1991 it had been decided that he could now move into such roles again, provided of course they did not involve frequent or constant sitting, standing or bending.

[21] Being classified as "vocationally independent" means having the skills to go directly into work without further training. If a vocational occupational report identifies training that could bring someone up to a state of vocational independence, it is the case manager's task to follow up on arranging it. Otherwise, unless an employee specifically asks for it, no action is taken on training under the work injury programme. Mr Khan's vocational occupational report identified clerical and administrative work as being suitable for him but somewhat surprisingly (given the 18

years which had elapsed since he had done that work) made no reference for any need for him to bring his IT or other skills up to date.

[22] Mr Khan was advised that because he was vocationally independent his earnings related compensation would end in three month's time. He was told that he should begin actively searching for a new permanent role of the type identified as suitable for him.

[23] Meanwhile, as part of his rehabilitation, he was to return to work on light duties. This meant work of the type identified as suitable, in a location where he could avoid frequent sitting, standing or bending, and with his hours gradually building up to full time as work was available. Suitable work was located at Auckland International Airport (rather than the domestic terminal where he had originally worked.) It involved data collation and entry associated with a project to clear a backlog in recording leave applications.

[24] The person responsible for running the accredited employer work injury programme (Ruth James) told me that at the point where the vocational independence decision is delivered, it is normal practice for the case manager to advise the employee to make contact with Human Resources in order to progress their job search. Mr Kahn's case manager recorded in successive return to work plans that he had been spoken to about this. I was also told that it is customary at this point for the case manager to notify Human Resources that the individual's earnings related compensation is coming to an end and that they will need assistance with their job search. However, Ms James told me:

"It is not our role to identify or advise an employee of any vacant positions that come up (nor would this be the role of ACC, as an external provider)..."

[25] Her expectation was that the notice period would serve as a transition stage, with the case manager monitoring light duties as necessary while job search commenced. When earnings related compensation ceased there would be a final handover from the injury management team to Human Resources. She also told me:

“To be clear, nor is it the role of Human Resources to find a new job for an employee who cannot return to their current role due to medical reasons. Again, their role is to assist the employee with job search.”

[26] Richard Oliphant of Air New Zealand’s Human Resources team had first become aware of Mr Khan’s case in September 2007. Given Mr Khan’s age (late fifties) and the nature of his injury (a prolapsed disc) there were early indications that he was unlikely to be able to return to his old role. Mr Oliphant told me that at that stage he:

“telephoned Mr Khan and advised him that he should start exploring Air New Zealand’s Korunet¹ system, to familiarise himself with what jobs were being advertised internally. I advised Mr Khan that I would be in touch with him at a later date, after we had received notification of his Vocational Independence.”

[27] In February 2008 two jobs that Mr Khan believed he could do were advertised internally. He applied for both but was not successful. In about mid March Mr Oliphant was formally notified (consistent with what Ms James told me was standard policy) that Mr Khan had gained vocational independence and that his earnings related compensation was coming to an end. However it was not until June 2008 that he (or anyone from Human Resources) made further contact with Mr Khan and Mr Khan did not make any attempt to initiate contact from his side.

[28] On 4 June Mr Oliphant met with Mr Khan and told him that the light duties at the international terminal were running out and he would be transferred back to the domestic terminal to perform similar light work there. By continuing on light duties he could continue to be paid when his earnings related compensation ceased on 13 June. Although the “light duties” were not for the purpose of rehabilitation in the strict sense of the word (because vocational independence had already been achieved) it was felt that keeping employees in work was preferable to other alternatives such as leave without pay. It helped maintain morale and facilitated job search by virtue of the fact that the employee was “on the spot.”

¹ The respondent’s intranet job listing site.

[29] Mr Kahn told the Authority that from what Mr Oliphant told him about the move he understood that the work at the domestic terminal was expected to turn into a permanent administrative role. He says this perception was reinforced by the fact that he understood that he had performed well at the international terminal, and because Mr Oliphant had indicated that further training would be given to enable him to do the full range of work required on the database in question. Mr Oliphant does recall mentioning to Mr Khan that he might need some additional training but says it was always in relation to temporary work. As it turned out, because some of the work in question was sensitive in nature, it was restricted to team managers and was not available to Mr Khan.

[30] Mr Oliphant told me that although it was not clear at the outset just how much light work was available at the domestic terminal there was never any suggestion that it would turn into a permanent job. Many of the staff engaged on the project with Mr Kahn were on secondment from other roles (to which they eventually returned) and no vacancies arose amongst the permanent staff who worked in the area. He told me:

“I made it clear to Mr Kahn... that the light duties were temporary, and that there was an immediate need for him to find a suitable permanent position

[31] I accept that Mr Khan was mistaken in his perception that a permanent job would eventuate out of the data entry project work he was engaged in at the domestic terminal. On the strength of this perception, he believed it was unnecessary to continue with job search, and in the immediate period after he transferred back to the domestic terminal, he was no longer actively looking for work. It would not appear, however, that he missed any suitable jobs in that time.

[32] The transfer back to the Air New Zealand Domestic terminal took place on 7 July. From then until the termination of his employment Mr Khan reported to his original manager, Alastair Hooke (Manager, Ramp Services) although because there were no suitable light duties at Ramp Services, his day to day supervision came from Operations Contractor, “Giff” Goldsmith, who was tasked with finding suitable light duties to keep Mr Khan occupied. At all times from 13 June until the termination of his employment he was paid as he had been as a loading foreman.

[33] In August, Mr Oliphant spoke briefly with Mr Khan again to let him know that he, Mr Goldsmith and Mr Hooke proposed to meet with him to review how his job search was going. Mr Oliphant and Mr Hooke drafted a letter to Mr Khan which they gave to Mr Goldsmith on 20 August, asking him to pass it on to Mr Khan and to schedule a suitable meeting with him for the following week.

[34] However, before this could happen the plan was pre-empted by Mr Khan himself. On 25 August he wrote to Mr Goldsmith advising that he was not happy in his temporary light duties and wished to be placed in a permanent role. In his evidence he told me that “*gradually the work I was given to do was decreased and I was left sitting there each day doing almost nothing.*”

[35] The draft that Mr Hooke and Mr Oliphant had originally prepared was updated and sent to Mr Khan (over Mr Goldsmith’s signature) on 4 September. It called Mr Khan to a meeting on 10 September for the purpose of reviewing Mr Khan’s progress in job search and assessing whether he required any further resources to assist him with looking for positions (whether internally or externally.) The letter also noted that if a suitable alternative job could not be found for Mr Khan, the airline would need to consider terminating his employment. Mr Khan told me that upon receiving this letter he realised for the first time that he could lose his job. He said this came as a terrible shock.

[36] As well as Mr Hooke, Mr Goldsmith, Mr Oliphant and Mr Khan, EPMU organiser Ms Mendis was also in attendance at the meeting as Mr Khan’s support person. Mr Hooke told Mr Khan that the light duties in which he was engaged were not sustainable. Mr Oliphant told Mr Khan that if he wished, help with interviewing skills and with updating his CV was available from a recruitment specialist. He was also offered internet access (so that he could check external job opportunities) and further training, if he wanted it, on the use of Korunet.

[37] Mr Khan told me that he did not see many jobs on the Korunet (or externally for that matter) that appeared suitable for him, given the constraints on the type of work he could do. He applied for three Air New Zealand positions during September 2008, but withdrew one application after finding out that the job (cargo clerk) involved lifting. He was unsuccessful with the other two applications.

[38] Recruitment manager Mr Pomeroy told me that during 2008 the airline had 5-10 clerical/administrative vacancies in the Auckland area. Most were unsuitable for Mr Khan because they involved long periods of sitting. He noted also that Mr Khan had the skills necessary for customer service roles however these were unsuitable because they involved lifting.

[39] On 25 September there was a further meeting to review progress, with the same individuals in attendance except for Ms Mendis who was replaced by Ms Barrett-Hamilton, also from the EPMU. Mr Khan reported that he had found the CV, internet and Korunet training useful and informed the meeting of the jobs he had applied for. Mr Hooke told Mr Khan that he would be able to provide one more month of light duties before the situation would be reviewed again. He and Mr Goldsmith were also available as referees. However, if he found nothing suitable within that time, Mr Khan's job was in jeopardy.

[40] Mr Oliphant took notes of the meeting and says that they record that Mr Hooke specifically asked Mr Khan if there was any further training or up-skilling he could think of and Mr Khan could not. Mr Khan cannot recall this exchange at all.

[41] On 21 October Mr Oliphant and Mr Hooke met with Ruth James to discuss what they had done in relation to Mr Khan's case. After hearing her feedback (which was essentially that nothing further was required of them) they proceeded to the final follow up meeting with Mr Khan on 30 October 2008.

[42] The meeting lasted approximately four hours with several adjournments. Mr Khan was again supported by a different EPMU organiser: Mr Phil Townsend. Mr Townsend raised questions about the jobs Mr Khan had applied for and why he had not got them. Mr Oliphant explained that the company would not create a job for Mr Khan, and that when he applied for jobs within the company, he had to compete with other internal applicants. Mr Townsend also queried whether Mr Khan's light duties could be extended but Mr Oliphant confirmed that it was proving difficult finding suitable light duties for Mr Khan to do.

[43] After a further adjournment, and after considering the points Mr Townsend had raised, the meeting reconvened and Mr Hooke advised Mr Khan that he was being given notice of termination. Mr Townsend then suggested that the company should allow Mr Khan to take “technical redundancy.” After taking an adjournment to consider the proposal, Mr Oliphant returned to advise that this was not an option because this was not a redundancy situation. As a final point, it was confirmed that Mr Khan could continue to apply for internal vacancies during his notice period, and could take time off to apply for outside jobs if he needed to.

[44] Mr Khan did not apply for any further internal jobs in that period. In total, he had followed through with applications for four vacancies within Air New Zealand. All were appropriate in terms of what had been identified as suitable work for him, but he reached interview stage for only one and was not successful with that. I was told that his skills were considered rusty (given that his most recent relevant experience was in 1991) especially in comparison to those with whom he was competing. Air New Zealand recruitment manager Simon Pomeroy told me that:

“all corporate and commercial roles within the company require the ability to use IT software, including Microsoft Outlook, Word and Excel, and required previous experience in the particular field of expertise.”

[45] Mr Khan’s employment was terminated on 28 November 2008.

[46] Ms James recalled that over the seven years prior to the ending of Mr Khan’s employment (the period of which she had personal knowledge) seven or eight individuals had been declared vocationally independent despite being unable to return to their old jobs. Those who did not find work before their earnings related compensation stopped had returned to their old department (on whatever suitable duties could be found) until they did.

[47] Respondent witnesses were not able to tell me how long any of these other employees had been kept on after their earnings related compensation ceased, but believed none had been kept on longer than Mr Kahn. Those who had not found a position internally had found work outside the organisation and resigned. None were dismissed. I was told that if there had been a question of dismissal, it would have

rested with the line manager (here, Mr Hooke) but in consultation with both Human Resources and with the work injury programme.

Determination

[48] The first sub heading to be addressed here is whether the airline inquired into all relevant matters before deciding to dismiss. As explained above, it is argued for the applicant that a further medical report should have been sought before termination. As part of his evidence Mr Khan provided me with a more recent medical report which indicated that he had made some progress.

[49] I do not accept this submission. Mr Khan' vocational independence was notified to the employer, in writing, in clear terms which carried no suggestion that his current state of fitness was likely to change. The latest medical report was prepared on the basis of an examination quite some time after the dismissal and indicated only modest improvement. It does not change my conclusion on this point.

[50] I note also the following submission from Mr France:

“Air New Zealand as an employer did not have the same access to information about Mr Khan’s rehabilitation and vocational independence, as was available to the Injury Management Team and to Mr Khan himself...”

While Mr Hooke was given a list of the particular roles that Mr Khan was cleared to perform, and his specific medical restrictions, he did not receive a copy of the full report...”

[51] The fact that Mr Khan was in possession of additional information that the respondent did not have leads me to the next question: whether Mr Khan was given sufficient opportunity to be heard and to have input before a decision was made to dismiss him. Again, I am satisfied that he was. The respondent met with him several times and he was represented on each of those occasions. His representatives raised points which were considered and responded to in a reasonable way. I am satisfied that Mr Khan had adequate opportunity to raise any matters he or his representatives

considered relevant, and to provide information from his injury management file if he chose to do so.

[52] The third sub heading (whether the airline adequately considered alternatives to dismissal) is of course the principle issue in this case.

[53] It is clear from respondent witnesses quoted above that it was not seen as the role of Human Resources to review what jobs might suit Mr Khan or to make suggestions to him about what he might apply for. They adopted a largely “hands off” approach; offering limited support if it was asked for but otherwise leaving it to him to consider what other positions might provide an alternative to dismissal. I consider it at least arguable that this practice fell short of what is required in a fairly conducted dismissal.

[54] Nonetheless, I have not been satisfied that any shortcomings in this aspect of the airline’s conduct are sufficient to render the dismissal unjustified. The underlying problem for Mr Khan is that there were in fact no alternatives to consider.

[55] Mr Khan was medically fit for only a narrow range of jobs and for those he was competing against other internal applicants with up to date skills and recent experience. In reality, the only type of job suitable for him was a clerical or administrative role which involved no lifting and at most, infrequent standing, sitting or bending, and for which current skills were no advantage over skills acquired in 1991. It would be a rare job indeed that fitted fit this peculiarly narrow set of specifications. Whatever the human resources team did it would not have changed the fact that no suitable jobs existed.

[56] I did not have the benefit of hearing from Mr Khan’s case manager in relation to how she reached the conclusion that he was vocationally independent but I must record my surprise that the vocational independence assessment was not at least qualified by an undertaking that Mr Khan be provided with further training to update his clerical and administrative skills.

[57] It remains, of course, that any appraisal of the reasonableness of the case manager’s decision is outside my jurisdiction. The assessment of Mr Khan’s

vocational independence and consideration of what further training might be required to achieve such independence were matters for the injury management programme, and are not subject to the scrutiny of the Employment Relations Authority.

[58] As I indicated in my determination on the application for interim relief, I accept unreservedly that this matter has been a great tragedy for Mr Khan. Through no fault of his own, at the age of almost 60, he finds himself effectively unemployable and without an income with which to support himself. His situation seems to be exactly what the no-fault accident compensation scheme was designed to prevent. However, any redress for which he might be entitled lies in a different forum. I can do nothing more to assist him.

Costs

[59] The issue of costs is reserved. Any application for costs should be made within 28 days of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority