New Zealand Employment Relations Authority Decisions

Kim v Thermos Ash Commercial Limited (Auckland) [2011] NZERA 423; [2011] NZERA Auckland 276 (27 June 2011)

Last Updated: 7 July 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 276 5295016

BETWEEN WILSON KIM

Applicant

AND THERMOS ASH

COMMERCIAL LIMITED Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person

Joanne Douglas, counsel for Respondent

Investigation Meeting: 13 and 15 December 2010, 15 April 2011
Determination: 27 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Wilson Kim was employed as a joiner by the respondent Thermosash Commercial Ltd. He commenced in October 2000 working in the factory where the company manufactures aluminium window joinery.

[2] A medical certificate was issued to Mr Kim on 24 October 2007. Lumbar sprain was diagnosed and he was certified as unable to resume duties at work for seven days. A further certificate followed on 30 October, putting him off work for another 14 days. A third certificate on 20 November assessed him as completely unfit for work for another 21 days.

[3] Early in the New Year, on 7 January 2008, Mr Kim produced a medical certificate assessing him unfit for work for 30 days and on 31 January he was certified unfit again for 30 days, except for light duties. By then he had not been able to work for three months, since 24 October 2007.

[4] After receiving his 7 January certificate Thermosash wrote to Mr Kim on 9 January, advising as follows:

Dear Wilson

Thank you for calling into the office on 7th January 2008 and supplying us with your most recent medical certificate, issued that day and indicating a return to work on 7th February 2008. We hope you will be fully recovered and will return to work on this date.

If, however, this is not the case we will have no alternative other than to terminate your employment in order that we may seek the employment of a permanent replacement worker. To date there have been five medical certificate extensions to your injury, namely:

24th October for 7 days

30th October	*for*	*14 days*
20th November	*for*	*21 days*
11th December	*for*	*30 days*
7th January	*for*	*30 days*

As stated in our letter of 3rd December 2007 and verbally with you we cannot continue to keep your position open any longer with these monthly rollovers. We regret to advise you of this decision, however, the business requires a replacement in the factory.

Yours sincerely

Rod Fergusson Finance Director

[5] Thermosash managers met and discussed the situation with Mr Kim. They communicated with ACC and an occupational therapist visited the workplace to assess Mr Kim's fitness for light duties. Thermosash considered that it did not have any light duties he could do and that Mr Kim remained unable to say when he could return to normal work.

[6] Upon receiving from Mr Kim his 31 January 2008 certificate restricting him to light duties part time for four weeks, a decision was made that day by Thermosash to terminate his employment and he was written to with the following advice:

Dear Wilson

Further to discussions on Friday 25th and 31st January 2008 and your latest medical statement of 31st January you are still not able to meet the requirements we set down in our letters of 3rd December 2007 and 9th January 2008.

Your latest medical statement still has medical restrictions and work capacity of only four hours per day. As stated previously we have no light duties to ease you back into the workplace.

With the volume of work we have to complete we require a fully fit person to work more than 40 hours a week on a permanent basis.

We therefore regret to advise that our position as stated in our letter of 9th January 2008 still stands and your position with Thermosash Commercial Ltd will be terminated. It is unfortunate this situation has arisen, however, the company has critical contractual obligations to meet. We wish you well with your recovery.

Yours sincerely

Scott McEwen Factory manager

[7] Mr Kim asked Thermosash to reconsider his termination. That request was met and further discussion took place, but Thermosash concluded that because of production requirements in the factory his job could not be held open any longer.

[8] Mr Kim instructed an advocate to raise a personal grievance of unjustified dismissal and a letter was sent to Thermosash on 12 February 2008. After observing in the letter that a dismissal will be unjustified if carried out in a procedurally unfair manner or if lacking substance, the advocate advised Thermosash:

In this case ... the dismissal lacked fair procedure. The procedure requires that an employer: notify the employee of a dismissal meeting and reason for it; advise them of right to representation; give them a proper chance to explain and then make a decision free ofpre-determination or bias.

In this case that procedure was not followed. No dismissal meeting was called and he was not given a chance to offer the alternative of light duties. He was also not offered representation.

[9] Mr Kim applied to have the Authority investigate his claim and determine it by upholding the grievance and by awarding him the following remedies:

Compensation on 20% loss of income due to this accident, and $50,000 for not providing safe lifting gear causing permanent injury on my back and right side leg and foot.

[10] In its response Thermosash to the claim viewed it as statute barred by s 317(1) of the Injury Prevention Rehabilitation and Compensation Act 2001, which does not allow proceedings to be brought for damages where a claim arises directly or indirectly from personal injury. Thermosash sought to have Mr Kim's claim discontinued by the Authority.

[11] In submissions on this point Thermosash did not accept that Mr Kim's injury had resulted from a work related accident. The company contended that even if it had, compensation could only be sought under the Accident Compensation Act 2001 and there was no other cause of action available to Mr Kim.

[12] After considering the application to discontinue the investigation the Authority directed it should proceed, ruling that Mr Kim was entitled to a determination as to whether he had a personal grievance although it was possible the outcome would be that the remedies of compensation and lost wages were unavailable to Mr Kim because of the ACC payments he was entitled to and the ACC legislation providing for that.

[13] The parties attended mediation but were not able to resolve the personal grievance.

[14] At the investigation meeting the Authority took evidence from eight witnesses including Mr Kim. Thermosash managers gave evidence, as did employees who had worked alongside Mr Kim on 23 October 2007, the day he claimed to have been injured at work while lifting aluminium joinery.

[15] In reviewing the evidence and reaching findings the Authority has kept in mind the point at which liability in any personal grievance claim arises. It is when a dismissal or an action is not justifiable, the test of which is provided by s 103A of the Employment Relations Act 2000:

. the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employers 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.

[16] Mr Kim alleged that the accident which left him unfit for work and unable to resume full duties occurred in the workplace on 23 October 2007. He alleged it was caused by Thermosash failing to take all practicable steps to ensure the workplace was safe. He claimed in particular that Thermosash had not provided gear or equipment he could use to help lift the aluminium window frames he was working on.

[17] Thermosash did not accept Mr Kim's account of how he became injured, because of two facts which are undisputed. First, Mr Kim did not report any workplace accident on 23 October or the day after, as he had been required to do if suffering injury at work. Second, when Mr Kim attended his doctor on 24 October for examination and treatment the doctor recorded the following diagnosis on the medical certificate:

. during the basketball game, ran into another player and twisted his lower back.

[18] The same diagnosis appeared on the medical certificate issued by the doctor six days later on 30 October putting Mr Kim off work for 14 days. Thermosash knew that several weeks earlier, at the end of August 2007, Mr Kim had suffered a back injury while playing basketball with other company employees. Thermosash also knew there had been earlier back injuries or problems Mr Kim had suffered.

[19] A different account of how Mr Kim became injured on 23 October 2007 was given in an ACC claim form signed by him on 12 November 2007. The cause of the accident was given as follows:

... when loading heavy doors/windows, lost his grip and in order to grasp the falling window .

[20] I find from the evidence that whatever happened on 23 October 2007 while Mr Kim was moving window frames in the course of his work, he did not suffer disadvantage in his employment as a result of any unjustifiable action of Thermosash. The company had reasonably considered that the window frames on that particular job were light enough in weight to be managed by one person, but that if there was difficulty doing that Mr Kim, as he acknowledged, was expected to seek help from others working with him. He confirmed in his evidence that he had seen signage put up in the factory by Thermosash about the correct way to lift. He also said that it was not the weight of the window but his loss of balance that had led to the accident he alleged.

[21] There were no witnesses to the accident although others had been working nearby to Mr Kim, including Mr Kepa Masters who gave evidence. He could not recall Mr Kim suffering an accident. Mr Kim's explanations for not reporting his injury immediately or at any time during the following day were regarded as implausible by Thermosash, particularly considering that he was an employee known to speak out about problems he thought existed in the workplace. He had been assertive enough on one occasion in 2006 to issue his employer with a "final warning" for its conduct towards him, so it would have been in character for him to complain to management if he had been prevented from reporting an accident he believed the company was responsible for.

[22] Mr Kim's explanations about this were for the employer to consider at the time while he remained employed. Mr Kim's subsequent statement to the Authority that he had not reported his accident because at the time he thought his injury was minor does little for his credibility, when earlier he had insisted the reason was because the accident register had been locked away in the factory manager's office. If that had been true it might be expected he would have told the factory manager about the accident next day, when he rang him to say he would be away from work that day. I accept that if he had been told this the Factory Manager Mr Scott McEwen would have recorded it in the accident register himself.

[23] Although Mr Kim was not fully fit to work Thermosash continued to employ him for some three months after he had presented the 24 October medical certificate. In principle an employer acting fairly and reasonably is able ultimately to make

a decision whether to terminate employment as a response to persistent incapacity on the part of a worker to resume normal duties. Before doing so the employer should properly inform itself of all relevant matters. It should consider the nature of the injuries and prognosis for recovery, and it may also consider its operational requirements to have work done within any time period or to have production maintained at any particular rate and whether there are alternatives to full time work, such as light duties. Another consideration may be whether a replacement can be temporarily employed until the injured worker is fit. The employee and his or her medical advisers will usually need to be consulted about these matters, but after fully enquiring into the situation it is for the employer to finally decide on any action to be taken.

[24] I find from the evidence that the actions of the employer leading up to its decision to terminate Mr Kim's employment were those of a fair and reasonable employer. When the diagnosis of the injuries was changed in the 12 November medical certificate, Thermosash management responded by investigating the possibility that Mr Kim had been injured while lifting windows at work but could find no one in the factory who had witnessed that.

[25] Early in the New Year in the absence of any clear prognosis indicating a likely return to work date Thermosash reviewed Mr Kim's employment. As a result he was written to on 7 January and advised that if he was unable to return within a further month, by 7 February, his employment would be terminated. Near the end of January Mr Kim and his ACC case officer attended at Thermosash for a report to be made on whether there were any light duties Mr Kim could do. While he was cleared for light duties Thermosash considered it had no work of that nature available. Thermosash reasonably considered it would not have been safe for Mr Kim to resume full duties while he remained unfit to perform those, given that his work as a joiner required heavy lifting at times.

[26] Thermosash responded to a request by Mr Kim to review the decision and it met with him on 4 February for that purpose. Thermosash considered that production requirements for meeting customers' orders needed a certain level of staff to achieve deadlines and that the company could not continue to work around Mr Kim's absence. The decision to dismiss was confirmed to him.

[27] The complaints raised in the grievance letter written by Mr Kim's advocate letter failed to take into account the ground for termination in this case. This was not a case of dismissal for misconduct or poor performance. It is a case where after a significant period has been allowed for an employee to recover he has remained unable to resume full performance of the job. The employer also had to weigh up its production requirements and need for a position to be filled by a fully fit employee to meet those.

[28] I find there was no lack of justification in this case arising from Thermosash advising of an intention to dismiss in advance of the event that Mr Kim could not fully recover and be able to return to work by a certain date in the future. When Thermosash gave that conditional notice on 9 January it was meeting its good faith obligation toward Mr Kim under s 4(1A) of the Employment Relations Act. He was given the opportunity to comment on the conditional proposal made on 9 January, and with his ACC case manager he was able to explore with Thermosash alternatives to termination before 31 January, when he was medically assessed as fit only for defined light duties for a further four weeks until early March. Mr Kim had been consulted about the unavailability of any light duties positions in the Thermosash factory.

[29] Mr Kim has presented a fanciful explanation for the termination of employment that I find followed from his prolonged incapacity to return to normal work. He has accused Thermosash of taking an advantage of an opportunity arising from his continuing state of unfitness for work. Although he claimed his termination was part of a calculated purging process to get rid of him, I saw no evidence that Thermosash had such an agenda.

[30] It became clear from the way Mr Kim presented his case that it had become a crusade about safety in the factory of Thermosash, but one without any foundation. In his letter on 15 July 2009 to the company he again attributed his injury to "lifting heavy windows all by myself and tripped over the air-line." He also claimed that before his accident he had asked the factory manager Mr McEwen "numerous times" "that the doors and windows I was lifting downstairs were far too heavy for one person to lift and I told him to get another person to assist me". He said in his letter "because of the heavy weight of the windows and doors I continuously asked Scott to get another person to assist me, he refused saying that he did not have spare staff members to assist me". But in the same message Mr Kim went on to say "I do not hold responsibility of accident to Scott or Thermosash Commercial Limited. I was senior staff member and I should be more careful for what I was doing and should refused working under bad circumstances. Because I had to meet the deadline at the time I need to push myself to get these works out and meet the schedules."

Determination

[31] For the above reasons the Authority concludes that Mr Kim does not have a personal grievance of any kind arising out of the termination of his employment or the way he was treated by Thermosash before then until being certified as unable to resume duties or resume full duties. The actions of Thermosash and how Thermosash acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal and action occurred.

[32] As there is no basis for making any orders for remedies against Thermosash it is unnecessary to consider whether Mr Kim would in any event have been disentitled to monetary remedies because of compensation received from ACC for his

injuries.

Costs

[33] Costs are reserved. Thermosash may apply in writing for an order against Mr Kim within 14 days of the date of this determination. Any reply on behalf of Mr Kim is to be made within a further 14 day period after that.

A Dumbleton

Member of the Employment Relations Authority
