

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Gary Main (Applicant)  
**AND** SteelServ Ltd (Respondent)  
**REPRESENTATIVES** John Woodhouse, Counsel for Applicant  
Philip Skelton, Counsel for Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 25 October 2005  
**SUBMISSIONS RECEIVED** 1 November 2005, 9 November 2005 and 14 November 2005  
**DATE OF DETERMINATION** 17 February 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

- [1] Mr Main claims that he was unjustifiably dismissed – effective from 5 November 2003. Alternatively, Mr Main claims that he was discriminated against as his employer medically retired him from his employment, because of a medical disability. Mr Main seeks that the Authority finds that he has a personal grievance and award him various remedies, including reinstatement.
- SteelServ (“the Company”) rejects the claims of Mr Main. The Company says that Mr Main was not dismissed. Rather, the cessation of his employment was an early retirement on medical grounds.

**Delayed progress of this matter?**

- [2] While the Authority is not required to assess why this matter has taken so long to get to an investigation meeting, because of the extraordinary time that has lapsed, it seems appropriate to record that the delay that has occurred has been largely in the hands of the Applicant and/or his advocates, albeit it should also be noted that there have been some prior attempts made by the parties to negotiate a settlement.

**Background Facts and Evidence**

- [3] Mr Main had continuous employment with the Company (and New Zealand Steel Limited), since September 1985. Since 1994, up to the time of the termination of his employment, he was employed as a Heavy Machine Operator. It is mutually accepted that Mr Main was a competent and reliable employee.

- [4] SteelServ operates from the Glenbrook steel mill located at Waiuku. The company provides a variety of services to the steel mill, including the transportation of steel products between the various plants at the mill. The products are transported on very large specialist Caterpillar machines that are too large and too heavy to drive on the open road. The operating environment involves transporting substantial amounts of molten metal and slag over a road network crossed by active rail crossings. The most complex of the machines are the hot metal carrier and the slab carrier. The slab carrier carries in excess of 80 tonnes of hot metal slab and the hot metal carrier transports approximately 75 tonnes of molten metal in a large brick lined crucible. As a fully trained driver, Mr Main was trained and qualified to drive a variety of heavy vehicles including the two referred to above, working 12 hour shifts.

### **Health problems for Mr Main**

- [5] In or about July 1998, Mr Main experienced an episode of double vision resulting in his absence from work. The results of an M.R.I. scan at the Auckland Hospital, suggested that Mr Main had multiple sclerosis. Mr Main says that he recovered fully from this episode after about 3 weeks and returned to work. He did not have any health problems again until January 2000.
- [6] Mr Main told the Authority, that in January 2000, the vision problem returned along with some numbness in his face. It was consequently confirmed that Mr Main had multiple sclerosis. The sick leave record of Mr Main shows that in 2000 he had 16 days off with his “eye problem,” in 2001 he had 20.67 days off, and in 2002 he had 10 days off in total - including two days where he was put off work by the Company Doctor. However, the record shows that Mr Main’s health apparently deteriorated in 2003, as from 5 January until 6 September 2003, Mr Main had 38.5 days paid sick leave.
- [7] Due to possible health and safety issues relevant Mr Main’s health, he was required at various times, to demonstrate that he was competent to continue to drive the heavy machinery he was responsible for. Mr David Hick was the Health and Safety Manager on site. The latest memorandums, dated May 10 2001, 24 February 2003 and 3 July 2003, record that Mr Hick had observed Mr Main driving various machines and that Mr Main was able to do so without any problems.
- [8] Before returning to work after a sick leave absence, employees are required to receive a medical clearance from the Doctor on site, Dr Michael Burley. Employees that consult with Dr Burley, while providing information with confidence that is normal between Doctor and patient, can give consent, where appropriate, to have their medical circumstances discussed with Company management.
- [9] In early August 2003, Mr Main was off work on two occasions due to his medical condition. In mid-August 2003, after being on sick leave, Mr Main applied to Dr Burley for a medical clearance to return to work – he apparently produced a medical clearance from his own medical practitioner, Dr Eustace.
- [10] While Mr Main had been absent from work, there had been an accident on site involving a train and a slab moving machine. The evidence of Mr Main is that Dr Burley told him that he was not to drive any machine on site and made reference to this accident, and that if the incident had involved Mr Main, he [Dr Burley], would; “have some explaining to do.” Mr Main says that despite pointing out that it wasn’t him involved in the accident, Dr Burley conveyed that he would be recommending to management that Mr Main should be placed in

alternative employment or take early retirement.

- [11] The evidence of Mr Main is that he was “devastated” at this news. He says that he conveyed to Dr Burley that he was going on a drug trial that kept the multiple sclerosis under control and he also had a medical clearance from his own Doctor. Mr Main says that Dr Burley would not listen to any of this and proceeded to write to the General Manager of SteelServ.

### **Medical Retirement?**

- [12] In a memorandum dated 14 August 2003, Dr Burley wrote to Mr Robert Hunter, the General Manager of SteelServ at the time, regarding Mr Main:

“This man’s ongoing medical condition is becoming incompatible with safety factors involving driving Heavy Vehicles on Site – he needs to be looking at a more appropriate job, or requesting an early pension on medical grounds.

I have given him the details to contact Linda Bell, Pension Fund Manager. She will visit him at home with all her details & options, if he wishes.”

- [13] The evidence of Mr Main is that he personally delivered this memorandum to Mr Hunter. When he arrived at Mr Hunter’s office, he found that the Process Manager, Mr Peter Shepherd (and possibly Mr Hick) were also present. Mr Main says that it was conveyed to him that the managers agreed with the assessment of Dr Burley and that there was no other work available for him. However, given the evidence of Mr Hunter and Mr Shepherd, while it is most probable that on the 14<sup>th</sup> of February 2003 Mr Main was made aware that on the medical advice of Dr Burley, he could no longer be employed as a driver, the decision was not conveyed to him as brutally as he portrays. Mr Main was granted special leave and there is acceptable evidence that there were other meetings with Mr Main. Other employment options within SteelServ and New Zealand Steel Limited were explored but nothing suitable was found.
- [14] Arrangements were subsequently made for Mr Main to apply to have his pension entitlements paid out on medical grounds and this duly occurred, albeit Mr Main says (and I accept), that he did this reluctantly on the grounds that he saw no other option in order to survive financially.
- [15] On 29 October 2003 Mr Hunter wrote to Mr Main confirming the termination of Mr Main’s employment:

“Since the 28<sup>th</sup> of December 2002 you have been away from work for various lengths of time due to your illness. You returned for a six month period between February and August of this year. Currently you have been away from work from the 2nd of August 2003.

On the 14 of August 2003 you were advised by the company medical advisor that your medical condition was such that you needed to look for a more appropriate job or to request an early pension from the Pension Fund on medical grounds.

Except for the six month time frame, as indicated above when you returned to work, you had not been able to be at work in your full time position from the 28th of December 2002.

You have indicated that you have applied for an early pension and given the advice from the company Medical Advisor, SteelServ has no alternative but to release you from its employ.

Your employment with SteelServ will cease as of the 5th of November 2003.”

- [16] The termination of Mr Mains employment was confirmed in a further letter from Mr Hunter

dated 5 November 2003.

## Analysis and Conclusions

### Was Mr Main dismissed?

- [17] The primary matter that falls to be determined is whether Mr Main was dismissed from his employment as he claims or whether the termination of his employment was an agreed early retirement on medical grounds.
- [18] Following an analysis of the overall evidence, it is my conclusion that the termination of Mr Main's employment was a dismissal on medical grounds. While it is true that Mr Main took appropriate steps to present the necessary medical criteria that allowed him access his pension entitlements, I do not accept that the termination of Mr Main's employment was an agreed early retirement on medical grounds. It is clear that Mr Main was a most reluctant participant in the process that led to him retiring on medical grounds.
- [19] I conclude that following the opinion presented by Dr Burley on 14 February 2003, Mr Main was presented with a *fait accompli* – that is, he was no longer permitted to drive any vehicles and as there was no alternative employment available to him, his only source of economic survival was to reluctantly retire from SteelServ on medical grounds. Furthermore, Mr Hunter's letters of 29 October 2003 and 5 November 2003, while couched in seemingly innocuous terms, make it quite clear that SteelServ was terminating Mr Main's employment on the advice of Dr Burley. There is no mention of any understanding being reached between SteelServ and Mr Main that his employment would cease on mutually agreed terms.

### Was the dismissal unjustified?

- [20] Where an employer decides to terminate the employment of an employee due to medical factors, the test to be applied is the same one that applies to any dismissal. That is: Whether the decision to dismiss was a fair and reasonable one in the circumstances, and based on a genuine belief honestly formed, on the basis of the evidence that the employer had available to it, following a fair, adequate and honest inquiry.<sup>1</sup>
- [22] The obligations upon an employer faced with the circumstances similar to those that applied to Mr Main, were set out by the Employment Court in *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585 at 592:

“However, if the employer chooses to dismiss, its action must be justified at the time in accordance with the jurisprudence set down by the Employment Court, its predecessors, and the Court of Appeal. That is, the employer must have substantive reasons for the dismissal, and must show that the procedure it followed in carrying out the dismissal was fair. This ensures the employee is not dismissed without the opportunity to provide information such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated.”

- [23] Following the *Motor Machinists* case, the first question that arises is: Did SteelServ have substantive reasons for the dismissal?  
In arriving at an answer to that question, I am conscious of the danger of the Authority being seen to place itself in the shoes of the employer and/or usurping the decision made. Nonetheless, there are two particular factors in this case that make it somewhat unique.

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<sup>1</sup> *Lang v Eagle Airways Limited* [1996] 1 ERNZ 57 (CA).

Firstly, there is the nature of the work environment and the requirement for a higher standard of responsibility and caution in regard to health and safety factors than would be found in most work places. The evidence available to the Authority shows clearly that the work site where Mr Main was employed has considerable potential for serious consequences in the event of an accident caused by inattention or a medically induced mishap. Consequently, the management of SteelServ are bound to ensure that all potential problems are closely monitored and preventative actions implemented. It follows that the necessary vigilance must apply not only to plant and equipment, but also to the ability of employees to carry out their duties in a safe manner for up to 12 hours each shift.

- [24] I note also that the applicable collective employment agreement provides a requirement that employees that are absent for two or more days due to sickness, must report to the site Medical Centre to obtain a clearance to resume work again.
- [25] The second factor that exists in this case is that Mr Main had a medical history pertaining to the symptoms and effects of multiple sclerosis from as far back as the year 1998 albeit the affects did not become more pronounced until 2000 and more so again in 2003. As witnessed by the medical notes provided to the Authority, Dr Burley was very familiar with Mr Main's medical background and was clearly in a position to provide an opinion to SteelServ management. Given also that Dr Burley is experienced in his field and has a substantial knowledge of the New Zealand Steel site and its operations, I find that SteelServ were entitled to rely upon the opinion provided by him regarding the medical condition of Mr Main.
- [26] Taking all of the above into account, I find that the decision of SteelServ to dismiss Mr Main was a fair and reasonable one in the circumstances and that the decision was based on a genuine belief on the part of Mr Hunter following the receipt of the opinion of Dr Burley. Mr Hunter was also familiar with Mr Main's health background and the reasons for past absences. I have no doubts that Mr Hunter did not find it easy to reach his decision about the continued employment of Mr Main as it is apparent that Mr Main was held in high regard both in regard to his work practices and his honesty as to his medical condition.
- [27] Turning to the procedural aspects of Mr Main's dismissal – Was the procedure followed fair? The finding above has dealt with the information that was available to SteelServ in making the decision to dismiss Mr Main. However, questions have been raised by him about the availability of specialist advice from Dr Willoughby, the Neurologist that had been examining Mr Main on a regular basis. The Authority has been provided with a letter from Dr Willoughby dated 7 October 2003. Dr Willoughby writes:
- “Mr Main is taking part in a trial of new treatment for multiple sclerosis. I understand there has been concern about his ability to continue in his present job which involves driving. The course of his neurologic disorder has been one of relapses with a temporary increase in symptoms and good recovery. At present he does not have significant residual physical disability and I would expect that he should be able to continue his usual work commitments.”
- [28] The evidence of Mr Hunter is that he was not made aware of this letter until he saw it during the preparation for the investigation meeting. I accept that evidence. I also find it odd that Mr Main did not see fit to produce this letter at any time prior to the termination of his employment. There is also other evidence from Dr Willoughby that gives a more optimistic view of Mr Main's condition and his ability to continue his work at SteelServ, but all of this has been produced after the termination of Mr Main's employment and was not made available for consideration whilst he remained employed.

- [29] I have found and continue to hold that Mr Hunter was entitled to rely on the information that was available to him at the time the decision was made to terminate the employment of Mr Main. Mr Main did not see fit to provide any alternative view at that time and such information cannot now be used to revisit the decision that was made on the best information available to him at the time that Mr Hunter made his decision. In any event, the final decision still rested with Mr Main's employer as to whether the company was prepared to take the risk of leaving Mr Main to drive in the environment that existed. Given that Dr Burley was familiar with both Mr Main's condition and the site, it seems to me that SteelServ would have still have been entitled to place more weight on Dr Burley's opinion as an experienced industrial practitioner.
- [30] While ideally, it may have prudent for SteelServ to have obtained another prognosis as to Mr Main's condition before making the decision to terminate his employment, I do not find that there was anything unfair in the process that was undertaken to arrive at that decision.
- [31] [In regard to the alternative argument of discrimination of forced retirement on the grounds of a disability, given that I have found that Mr Main was dismissed, it has not been necessary to address that proposition.]

### **Determination**

- [32] For the reasons given above, I find that the termination of Mr Main's employment at SteelServ was a dismissal. I also find that the dismissal was justified on medical grounds.

### **Costs**

- [33] Mr Main is in receipt of legal aid. Mr Skelton has submitted for SteelServ that should his client's position be upheld a costs award is not sought. Costs are to lie where they fall.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**