IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 492/10
5117249

	BETWEEN	HELEN MILNER
	AND	FONTERRA COOPERATIVE LIMITED

Member of Authority:	Yvonne Oldfield
Representatives:	David Hayes for applicant Sally Beard for respondent
Investigation Meeting:	20 and 21 May 2010
Further Information Received	16 June 2010 from Respondent
Determination:	23 November 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent (Fonterra) employed Ms Milner as a forklift driver from 14 August 2003 until 29 June 2007 when she was dismissed with two weeks pay in lieu of notice. At the time of her dismissal she had been absent from work for several months due to ongoing health problems associated with the repeated collapsing of her lung. The letter confirming the termination of her employment noted that in circumstances where:

> "*neither you or your representative nor your medical advisors, could give us a return to work date or even a likely return to work date… the Company can no longer keep your position open indefinitely."*

[2] Ms Milner says that her dismissal was unjustified.

[3] Her employment relationship problem has already been the subject of a preliminary determination in which leave was granted for the personal grievance to be raised outside the 90 day period set by section 114 of the Employment Relations Act 2000. In that determination the key events leading to the dismissal are summarised as follows:

> *"[2] Ms Milner was employed by the respondent in 2003 and in late 2006 held the position of forklift driver. On 5 December 2006 she was involved in an accident on the forklift. On 10 December she was admitted to hospital for four days with a collapsed lung. Ms Milner had a further pneumothorax in February 2007 and again in August 2007. By August 2007 she had received hospital treatment (including surgery) on six separate occasions. These included three admissions (on 21 February-7 March, 26 March-4 April, and 10-22 August.) She continues to suffer severe chronic pain as a result of the complications and has not returned to any sort of paid work.*
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> [3] *On 20 April 2007 Fonterra's private accident compensation provider, "Work Aon", determined that in terms of the Injury Prevention, Rehabilitation and Compensation Act 2001 Ms Milner's problems were not a result of her work accident or indeed of an accident at all. This was despite that fact that as early as February 2007 her medical advisers had noted that there seemed to be a relationship between the collapsed lung and the jolt to the chest she suffered in the forklift accident. On 1 May 2007 a Health Waikato cardiothoracic surgeon had confirmed this in writing, noting:*
>
> "it is my opinion that this pneumothorax is traumatic in aetiology rather than spontaneous."
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> [4] *The process which led to the termination of Ms Milner's employment began on 16 May 2007 when the Respondent wrote to her raising concerns about an alleged failure to communicate regarding her medical condition and return to work plans. On 28 May Matt Laming, (Fonterra's West Waikato Warehousing Manager) met with Ms Milner at her home and told her that he would have to let her go given the lack of information about her health and return to work prospects …Ms Milner told me in her evidence that:*

"he kept referring to me having an illness. I told him I would be disputing Work Aon's decision that this was not a work accident but he appeared disinterested..."

[5] *However, because Ms Milner was challenging the assessment that she was not covered by the Injury Prevention Rehabilitation and Compensation Act 2001 Mr Laming agreed to "give her a weeks grace" while she pursued this.*

[6] Three weeks went by and the respondent heard nothing more from Ms Milner. It therefore proceeded to dismiss her...

[7] On 30 July Ms Milner learnt that her application for review of Work Aon's determination had been successful and that the pneumothorax had been re-classified as a work related injury. Ms Milner had been in receipt of discretionary paid sick leave … but subsequent to the review she was placed on earnings related accident compensation. She continues in receipt of this today."

[4] Not recorded in these extracts, but acknowledged by Fonterra, is the fact that at or shortly after the meeting of 28 May Ms Milner provided Mr Laming with the letter from her cardiothoracic surgeon along with another from her anaesthetist which also expressed the opinion that her on-going health problems were a result of the work incident on 5 December 2010.

[5] Mr Laming agrees that Ms Milner told him that she was challenging Work Aon's decision about the cause of her problems. He also agrees that he gave her another week to pursue this. Nonetheless Fonterra says that whether Ms Milner's health problems arose as a result of a work related accident, or from some other cause, is not relevant. Either way, it says, the situation had reached the point where it could "fairly cry halt."

[6] Ms Milner's position is that it was crucial whether or not she was suffering from the effects of a work related accident. At the time of her dismissal Ms Milner's employment was covered by the Fonterra Dairy Workers Collective Agreement 2006-

2007. Clause 6.6 of that agreement is relied on as a specific basis for the assertion that it mattered whether Ms Milner was suffering from a work related injury. It provides as follows:

> ***6.6 Accident Leave***
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> *When a worker suffers an accident at work which prevents that worker from attending normal duties, the Company will:*
>
> *6.6.1 top up the compensation the worker receives from the Company's insurer to 100% of the worker's ordinary salary;*
>
> *6.6.2 preserve the worker's position until the worker is cleared by his/her doctor to return to work (and it required by the Company this is confirmed by an agreed specialist nominated and paid for by the Company). If the absence is likely to be longer than 48 hours then the Company may, provided the Union is notified in writing, employ a temporary worker in addition to the limits as defined in the temporary worker's clause to cover the absence of that worker.*
>
> *6.6.3 if at any time after a worker is injured at work they are declared by their doctor as permanently unfit to return to their original position as a result of that accident (and if required by the Company this is confirmed by an agreed specialist nominated and paid for by the Company) and another suitable position cannot be offered, then the Company may terminate the workers employment and pay to the worker a severance package calculated using the redundancy formula as detailed in clause 10.4.3 of this agreement."*

[7] Mr Hayes submits that the effect of this provision is that in circumstances where an employee has suffered a work accident which prevents the employee from returning to his or her duties the employer has only two alternatives: keep the job open or end the employment pursuant to clause 6.6.3. In this case, there is no dispute that the respondent was on notice that Ms Milner intended to challenge Work Aon's decision. There is also no dispute that Fonterra was provided with the doctors' letters which showed that there was at least an arguable basis for that challenge. Mr Hayes

submits that in these circumstances it was not reasonable for the respondent to proceed as though clause 6.6 did not apply to Ms Milner. It says that a fair and reasonable employer would have deferred the decision whether to dismiss until the outcome of the challenge was known (which in this case turned out to be one month after Ms Milner was dismissed.)

[8] Fonterra says that in all the circumstances at the time Ms Milner's dismissal was justified. It says it based its decision on the information to hand, which included Work Aon's finding that Ms Milner's condition was not caused by a workplace accident, the medical certificate dated 22 May (which provided for 60 days sick leave) and the doctors' letters presented on or after 28 May. It points out that none of these documents gave any indication of Ms Milner's prognosis, and that Ms Milner had at no stage provided any information about when she might be able to return to work.

Issues

[9] Section 103A of the Employment Relations Act 2000 provides that the question whether a dismissal is justified must be determined, on an objective basis, by considering whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances. In situations where illness or injury is keeping an employee off work, the employer is not necessarily bound to keep the job open indefinitely. Fairness to the employee must be balanced against the needs of the business.[1] The employee must be given an opportunity to provide relevant information, such as medical reports, and the employer must give due consideration to all relevant factors.

[10] The terms of the contract (including, in this case, clause 6.6) are amongst the factors that may be relevant in determining when an employer is justified in dismissing someone who is prevented from working due to illness or injury. Also relevant are the nature and duration of the problem that is keeping the employee off work [2] and factors such as the worker's length of service, the nature and prospective

[1] *Lang v Eagle Airways Ltd* [1996] 1 ERNZ 574 (CA).
[2] *Marshall v Harland & Wolff Ltd* [1972] 1 WLR 899; [1972] 2 All ER 715 (NIRC)

future of the employment, and whether the employer was at fault in causing the incapacity.[3]

[11] The issue for determination here is therefore whether, taking all relevant factors into consideration, the employer was entitled to dismiss, and if not what remedies are appropriate.

(i) Was the employer entitled to dismiss?

[12] Mr Laming first heard that Ms Milner was ill on 19 February via a message from a third party. The fact that she had been hospitalized (on 21 February) was confirmed on or about 26 February when a medical certificate was presented.

[13] At that time Ms Milner was already on paid leave pending an investigation into a complaint that she had breached safety protocols. This complaint related to conduct alleged to have occurred during a 21 day period on restricted (light) duties which marked her return to work after the original December incident. Because of Ms Milner's intervening ill health that investigation has never been concluded.

[14] The respondent says this background is relevant in one respect. When Ms Milner was put on paid leave in relation to the complaint, Mr Laming required her to contact him, by phone or otherwise, by midday each Monday. Mr Laming asserted that Ms Milner did not comply fully with this directive in the months before she was dismissed.

[15] As we have seen, contact was made on Monday 19 February and Monday 26 February. The next Monday, 5 March, Mr Laming did not hear from Ms Milner and rang her. She told him she was still in hospital. On 7 March she was discharged and arranged for presentation of a further medical certificate (on 8 March.) She did not call in on 12 March. Mr Laming telephoned and reminded her that he still required her to stay in weekly contact with him. This was confirmed in a letter of 16 March. On 19 March Ms Milner called Mr Laming as instructed and told him that she was not making a good recovery. On 26 March she was readmitted to hospital. She failed to

[3] *Canterbury Clerical Workers IUOW v Printing & Packaging Corp Ltd* [1988] NZILR 1213; *Auckland & Tomoana Freezing Works etc IUOW v Wilson Foods Ltd* [1990] 3 NZILR 939.

call in that day, but on 29 March a further medical certificate was supplied to the respondent.

[16] Over the next seven weeks Ms Milner made contact with Fonterra at least six more times, either by provision of medical certificates or by phone calls. When Work Aon decided, in April, that Ms Milner's injury was not classified as work related Mr Laming was informed through the respondent's OSH nurse. This was before Ms Milner had been told herself.

[17] On Monday 14 May Ms Milner rang in as required. Two days later Mr Laming wrote to her, setting out the key events that had occurred since Ms Milner's injury in December 2006 and then going on:

> *"We still do not have a return date or likely return date for you.*
>
> *We must know a return to work date from you as we may not be able to hold your position open for much longer.*
>
> *We will require a full medical clearance and a psychological assessment, the cost of which will be paid by Fonterra. We will arrange this for you, as agreed, before your return to normal work.*
>
> *We require your full cooperation in this."*

[18] The letter concluded by setting out the arrangements for the meeting of 28 May.

[19] In his witness statement Mr Laming told the Authority that:

> "*The medical and psychological assessment did not occur because Helen declined to cooperate or to provide any information from her own doctor confirming her prognosis and in particular her likely return to work date."*

[20] After hearing further from Mr Laming and Ms Milner at the investigation meeting I was unable to accept that there was any basis at all for this assertion. There

is no evidence that any steps were taken to arrange the proposed assessments or even that they were ever mentioned again after the 16 May. Nor is there any evidence that it was ever suggested to Ms Milner that she should arrange the medical assessment herself.

[21] On Tuesday 22 May, having received the letter of 16 May, Ms Milner saw her doctor and obtained a further medical certificate which she supplied to Mr Laming the same day. This was to be Ms Milner's final medical certificate. It provided for a period of 60 days leave. Mr Laming pointed out to the Authority that this meant that Ms Milner would be off until at least mid July, with no certainty that she would be back even then. In the meantime, her absence was being managed by other staff working overtime but he did not find this satisfactory. The warehouse had a complement of ten full time permanent staff assisted, at times of peak activity, by four temporary staff on fixed term agreements. On any given shift Mr Laming preferred a ratio of two permanent staff for every temporary worker. He wanted time to train a replacement for Ms Milner before the busiest period for the warehouse (in late September.)

[22] For these reasons, as Mr Laming told the Authority:

> *"On 28 May we met with Helen at her home and advised her that we had reached the decision to dismiss her because without any information about her return to work we could no longer hold her position open for her."*

[23] The only additional information provided to him after that was what was contained in the letters from the cardiothoracic surgeon and the anaesthetist. Mr Laming told the Authority:

> *"Helen has claimed that we were unreasonable for not considering medical information she provided at that meeting in relation to her claim that the pneumothorax was work related. Aside from the fact that the issue of whether it was reasonable to hold her job open is entirely different to whether or not she was entitled to cover under the Injury Prevention Rehabilitation and Compensation Act 2001, I am not a medical specialist. Fonterra engages specialist advice and case management services from Work Aon to assess*

claims for work related injuries. It was on this basis that we agreed to give her time to challenge a decision relating to her claim."

[24] Mr Laming told the Authority that he accepted that the specialists' letters indicated that the injury could have been work related. He also said he knew work related injuries were treated differently and that Fonterra provided support to those who had such injuries through Work Aon. Nonetheless, whether or not her challenge was successful, he still did not think it feasible to keep her job open. He said he was not aware of what the collective agreement provided for.

[25] There is no evidence that Mr Laming provided any follow up after the meeting. Nor did Ms Milner take the initiative to contact him. He did however defer the dismissal for three more weeks, until 29 June.

[26] As well as clause 6.6, other relevant provisions of the employment agreement include:

"6.5.1 Accumulating Sick Leave

A permanent full time worker is entitled to paid Accumulating Sick Leave of up to 10 days per year for each year of service ..."

*"**6.5.2 Special Sick Leave***

A worker whose entitlement to Accumulating Sick Leave has been exhausted may apply to the company for Special Sick Leave of up to 6 months on full pay. Special Sick Leave is not just an extension of Accumulating Sick Leave. Applications for Special Sick Leave will be considered on a case-by-case basis and the following will be taken into account:

- *The worker is genuinely sick and requires time off work because they are unable to perform normal work or rehabilitative duties as a result of their illness or injury.*

- *The worker's record of using the Accumulating Sick Leave.*

Final decisions as to whether the company will grant or continue Special Sick Leave or not are made by the appropriate manager…"

[27] Mr Laming told me that to the best of his knowledge, Ms Milner went on to special sick leave on 1 March (at the respondent's discretion) without the need for a formal request. At that stage, Work Aon had not made a decision as to whether the injury was work related. Because of the April decision that it was not, Ms Milner stayed on special sick leave until her employment ended (in total, approximately four months.) Although they did not have direct knowledge of this, Ms Beard and Mr Laming told me they understood that when the injury was reclassified Ms Milner was retrospectively placed on earnings related compensation. This meant that in the end only the 20% "top-up" was met directly by Fonterra, rather than sick pay at 100% of her normal wage.

[28] Ms Beard told the Authority that she could confirm that there had been previous occasions where the company had paid employees up to six months special sick leave and that the company had kept open the jobs of other work injury victims for periods of well over four months.

[29] In closing, Ms Beard emphasised that the reason for the dismissal was that Ms Milner had not provided the respondent with the information it needed regarding her prognosis and likely return date. She said that the onus was on the applicant to supply such information and there is no obligation on an employer to seek it out. Ms Beard also noted that the .respondent had not acted without compassion for Ms Milner, having given her two weeks pay in lieu of notice and having written off a approximately $1,000.00 she owed Fonterra (arising out of the fact that her hours had been annualised.)

Determination

[30] I am satisfied that Ms Milner supplied Fonterra with all the relevant medical information that she had to hand at the time of her dismissal. I am also satisfied that in the circumstances no blame can attach to the fact that she missed a couple of weekly

calls to Mr Laming. Given her poor state of health the respondent's request for weekly reporting was, in my view, overly stringent.

[31] The specialists' letters Ms Milner provided at or shortly after the meeting of 28 May did not provide a return to work date. In his letter of 16 May Mr Laming had made it clear that the respondent needed this. In the same letter however he had indicated that the respondent would arrange and pay for medical and psychological assessments. I consider it a reasonable inference that these were for the purpose of providing the information the respondent needed. If that was not Mr Laming's intended meaning, and in fact he expected Ms Milner to arrange her own full medical assessment, this was not clear on the face of the letter. At the very least, the letter of 16 May served to create confusion about what Fonterra would do, and what it required of Ms Milner.

[32] What the letter of 16 May does indicate is that the respondent wanted Ms Milner's co-operation with the assessments. There is no evidence that she failed to give this co-operation. Instead, upon receiving the certificate of 22 May Mr Laming made up his mind to dismiss her. Although the dismissal was deferred for a period, nothing more was said or done about assessments.

[33] Against this background Ms Milner's failure to supply information about her prognosis cannot be enough on its own to justify her dismissal.

[34] Most of the other relevant factual circumstances are not in dispute. They include the following:

i. Ms Milner was suffering from a very painful condition which made normal functioning difficult;

ii. she advised her intention to challenge Work Aon's decision;

iii. she provided information to show that her challenge had a reasonable basis;

iv. there is no evidence to suggest that Fonterra could have expected it to take Work Aon any longer than it in fact did (until 30 July) to reconsider its decision;

v. the collective agreement provided for up to six months special sick leave, two more than Ms Milner had had at the date of dismissal;

vi. Fonterra never followed through with its suggestion that she see an agreed specialist, at the company's expense;

vii. the respondent is a large employer and has on other occasions kept jobs open for periods as long or longer than would have been required here;

viii. At the time of the dismissal (29 June) there was still two months to go until the busy period in the warehouse, and

ix. Ms Milner's employment was covered by the collective agreement, including clause 6.6.

[35] Mr Hayes had made broad submissions about the effect of clause 6.6. A personal grievance claim is not the appropriate context for general findings on the effect of a provision in a collective agreement. At the very least, before any such findings were made, the Authority would need to hear from the union party to that agreement. What I have to say here is therefore limited in its application to Ms Milner's case, which is determined on its own facts, as any future personal grievance involving clause 6.6 should also be.

[36] Mr Hayes argued for Ms Milner that in the event that her inability to work was due to a work accident, Fonterra was obliged to preserve her position until she was cleared to work. He submitted therefore that the company should have deferred a decision about whether to dismiss at least until the outcome of the challenge was known. He says it was premature, and unreasonable, for the respondent to dismiss Ms Milner in the circumstances.

[37] The respondent says that clause 6.6 does not apply here because at the time of dismissal it did not know that Ms Milner was suffering from a work accident. It is also a matter of disagreement what the employer's obligations would have been if Work Aon had got its decision right the first time. The respondent disagrees with the submission that there were only two possible choices for Fonterra under the collective agreement.

[38] I conclude that at the very least the employer would have been obliged to consider clause 6.6 and its application to Ms Milner's situation. Mr Laming was personally ignorant of the provisions of the collective agreement but that does not absolve Fonterra as the employer from complying with all its obligations under that document.

[39] I unreservedly accept that in all the circumstances, it was unreasonable and premature for the respondent to proceed to dismiss when it did. Indeed for the respondent to dismiss before the outcome of Ms Milner's challenge was known, was bordering on a breach of good faith.

[40] Ms Milner's dismissal was therefore unjustified.

(ii) Remedies

[41] Shortly before the investigation meeting Mr Hayes clarified that Ms Milner's claimed the following remedies:

i. reinstatement;

ii. lost earnings being the 20% "top up" to Ms Milner's earnings related compensation (($206.60 per week from 14 July 2007 onwards);

iii. 17 weeks wages as termination payment pursuant to clause 6.6.3 ($17,560.00), and

iv. $15,000.00 compensation for hurt and humiliation.

[42] At the investigation meeting Mr Hayes conceded that claims (i) and (iii) are mutually exclusive (even if the latter were made pursuant to section 123 (c) (ii) of the Employment Relations Act) because the Authority could not order reinstatement while at the same time ordering a termination payment under clause 6.6.3. [4]

[43] Ms Milner has continued in very poor health. At the time of the Authority's investigation meeting she had never returned to any sort of paid work and was still in receipt of earnings related compensation. She suffers chronic severe pain (apparently due to nerve damage sustained during treatment of the collapsed lung) and has spent most of the last three years in a wheelchair. Even sitting through an Authority investigation meeting was extremely hard for her. So, while she has never been declared permanently unfit to return to her original position, I am satisfied that an order for reinstatement would be futile. Reinstatement is declined.

[44] It follows that if Ms Milner had not been dismissed as she was, her employment, and receipt of the "top up" would have continued for a period pursuant to clause 6.6.2. Thereafter it would have been open to her (as it would have been to Fonterra) to seek to take advantage of the provisions of clause 6.6.3. I am satisfied that Ms Milner should be reimbursed for lost wages for a reasonable period and also that she should receive compensation (pursuant to section 123 (c) (ii)) for loss of opportunity to pursue the benefit set out in clause 6.6.3.

[45] Turning to compensation pursuant to section 123 (c) (i), I note the need to distinguish between hurt and humiliation arising out of the dismissal and the suffering Ms Milner has endured as a result of her injury. Although I accept that the employment relationship problem has compounded Ms Milner's difficulties, I also conclude that most of these arise out of the injury and not as a result of the dismissal.

[4] At the investigation meeting Mr Hayes also conceded that a claim by Ms Milner in respect of disability insurance would lie against the insurer rather than against Fonterra. He withdrew that claim.

[46] Finally I record that that there can be no question of contributory conduct given my finding that Ms Milner gave the respondent all the information she had and was asked to provide.

[47] Taking all of these factors into consideration I therefore make the following orders in respect of remedies:

i. Pursuant to s 128 (2) of the Employment Relations Act the respondent is ordered to pay to Ms Milner the sum of three months lost earnings ($2,685.80 in total being the "top up" of $206. 60 per week for thirteen weeks.)

ii. Pursuant to s 123 (c) (i) the respondent is ordered to pay to Ms Milner the sum of $5,000.00 compensation for hurt and humiliation, and

iii. Pursuant to s 123 (c) (ii) the respondent is ordered to pay to Ms Milner the sum of $17, 560.00 compensation for loss of the benefit in clause 6.6.3 of the collective employment agreement.

Costs

[48] The question of costs is reserved. Any claim for costs should be supported by submissions and should be made within 28 days of the date of this determination. Any submissions in response should be made within a further 14 days of receipt of those submissions.

Yvonne Oldfield
Member of the Employment Relations Authority