

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 477/10  
5281065

BETWEEN                      HUGHEY MORGAN  
Applicant

AND                              WAIOTAHU CONTRACTORS  
LIMITED  
Respondent

Member of Authority:      Vicki Campbell

Representatives:            Jake McCleary for Applicant  
Kim Stretton for Respondent

Investigation Meeting:     30 August 2010 at Whakatane

Additional Information  
Received:                      6 September 2010

Submissions Received:     3 September 2010 from Applicant  
6 September 2010 from Respondent

Determination:              10 November 2010

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**DETERMINATION OF THE AUTHORITY**

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[1] Mr Hughey Morgan was employed as a driver/operator by Waiotahi Contractors Limited (WCL) in November 2004. Mr Morgan's employment was subject to a written employment agreement which he signed on 30 April 2007.

[2] On or about 18 August 2008 Mr Morgan suffered from an injury to his ankle while working. He continued to work as normal. By 9 September 2008 Mr Morgan was concerned that his ankle was making no improvement so he consulted a doctor. Mr Morgan was put off work for a period of 14 days and referred to an orthopaedic surgeon. Despite being put off Mr Morgan returned to work on 17 September 2008. On 24 September 2008 Mr Morgan was cleared to return to work to undertake light duties only.

[3] Mr Morgan saw his orthopaedic surgeon on 15 October at which time he ordered an MRI scan. He then saw him a second time on 19 November 2008. It was agreed that Mr Morgan needed to have surgery on his ankle. At that stage the surgery was planned for sometime February 2009. The surgeon noted that Mr Morgan would return to full normal duties approximately 8 weeks after the surgery.

[4] On 21 November 2008 Mr Morgan attended his doctor who noted that Mr Morgan was awaiting surgery and cleared him to work on light duties only for the next 90 days. This certificate was followed by another on 5 December 2008 which confirmed that Mr Morgan was cleared for light duties only.

[5] WCL was generally kept informed at every stage as to the prognosis of Mr Morgan's injury and outcome. On 11 December 2008 and unbeknown to Mr Morgan, Mr Graeme Mills, a director of WCL, met with Mr Morgan's ACC Case Manager. During that meeting the two discussed concerns by WCL that it was running out of light duties and that WCL needed to have a driver working on the truck normally driven by Mr Morgan. The ACC Case Manager confirmed to Mr Mills that if there were no light duties available to Mr Morgan then ACC would take care of him.

[6] On 18 December 2008 Mr Morgan met with Mr Mills and the two discussed Mr Morgan's injury. Mr Mills told Mr Morgan that WCL was struggling to find light duties for him. Mr Mills told Mr Morgan they would discuss the matter in January 2009.

[7] On 9 January 2009 Mr Mills wrote to Mr Morgan confirming their discussion on 18 December. Mr Mills wrote:

As you are aware, for the past four months, since 17 September 2008 through to now – we have organised work taking into consideration your restrictions due to your injury. However, the availability of work is decreasing and we therefore advise that Waitotahi Contractors Ltd. will be undertaking a review of the situation and your on-going employment early in 2009.

Before making decisions regarding your future we will meet with you again. This is scheduled for 27<sup>th</sup> January 2009 at 4pm. Please bring any updated medical information in regard to your injury. You are entitled to bring a support person to this meeting.

[8] Before the meeting took place, Mr Mills wrote a second letter to Mr Morgan in which he states (verbatim):

For some time now we have been struggling to find work for you which fits in with the restrictions you current have. We are therefore unfortunately no longer in a position to offer light duties to you.

I confirm our meeting time scheduled for 27th January 2009 at 4.00pm. As you are aware this meeting is to discuss your future employment with Waiotahi Contractors as we have reached a point where we need to give consideration to a replacement to ensure the operational requirements of the business are being met. Therefore an outcome of the meeting could result in the employment relationship coming to an end.

However no decision in regard to your employment will be made without obtaining updated medical information and giving you an opportunity to have input into the decision. Please bring updated medical information to the meeting. You are welcome to bring a support person if you wish.

[9] Mr Morgan attended the meeting on 27 January 2009. He took with him a copy of a Specialist Assessment Report and Treatment Plan he had received from his surgeon which showed that Mr Morgan was due to have surgery on 30 January and would return to unrestricted duties within 8 weeks. Mr Morgan was dismissed and given one week's notice. Mr Morgan says his dismissal was unjustified and seeks remedies. WCL denies the dismissal was unjustified.

[10] The issue for determination is whether the dismissal was justified or unjustified and if it was unjustified, what (if any) remedies should be awarded.

### **The dismissal**

[11] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer<sup>1</sup>.

[12] Although the Authority does not have unbridled licence to substitute its decision for that of the employer<sup>2</sup> it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred<sup>3</sup>.

[13] There is a well established body of case law governing terminations for incapacity. An employer must wait a reasonable time to give the injured employee an opportunity to recover.<sup>4</sup> When coming to a conclusion to dismiss an employee for incapacity an employer is required to balance the fairness to the employee with the reasonable dictates of the business requirements.<sup>5</sup>

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<sup>1</sup> *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

<sup>2</sup> *X v Auckland District Health Board* [2007] 1 ERNZ 66.

<sup>3</sup> *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

<sup>4</sup> *Motor Machinists Ltd v Craig* [1996] 2 ERNZ.

<sup>5</sup> *Barry v Wilson Parking* [1998] 1 ERNZ 545.

[14] I find that the dismissal of Mr Morgan was not justified. There are a number of reasons for this which I have set out below.

[15] At the time Mr Morgan's employment was terminated he was 3 days away from having his ankle operated on. The medical information available to WCL at the time the decision to dismiss was made, was that Mr Morgan would be back at work on unrestricted duties within 8 weeks. As events transpired, Mr Morgan in fact, secured alternative employment and commenced on full duties 6 weeks after his operation.

[16] Mr Mills, in his oral evidence, told the Authority that he was "hosed off" that Mr Morgan could be away for a further 10 weeks. At the investigation meeting Mr Mills took pains to explain to the Authority how long it took to employ a new employee and the costs associated with that. Mr Mills says all new employees are required to undergo drug screening before offers of employment are made to them. This process takes time and is costly. The estimated time to recruit a new employee from the time they indicate their interest in a job is, according to Mr Mills, 3 weeks.

[17] As at the date of dismissal, Mr Morgan had some accumulated annual leave available to him. Mr Mills says he was not satisfied Mr Morgan would be back in 8 weeks and he did not consider putting Mr Morgan on leave. Mr Mills did not seek any independent medical advice to support his belief about how long Mr Morgan would be absent.

[18] Mr Morgan had been a relatively long standing employee having been employed for 4 years. Mr Morgan had suffered from a work related accident. He had been given light duties and was performing these light duties without complaint from WCL.

[19] WCL had contractual obligations to fulfil. The evidence from WCL is that its busy period is during the summer. Mr Mills says he indicated to Mr Morgan as early as 18 December that the light duties was running out and that his employment situation would be reviewed in January the following year.

[20] During the four months September to December 2008 the truck Mr Morgan was employed to drive had been utilised as a substitute truck while other vehicles were off the road for maintenance. However, coming into the summer months it was important for WCL to have all its trucks working to full capacity.

[21] On 9 January 2009 it was clear that WCL was contemplating a review of Mr Morgan's ongoing employment. However, that letter does not say that dismissal was being contemplated at that time.

[22] On 22 January 2009 however, that situation had changed and Mr Mills wrote to Mr Morgan advising him that dismissal was now on the cards. However, Mr Mills also advised Mr Morgan that no decision would be made without Mr Morgan's input.

[23] At the 27 January 2009 meeting Mr Mills had the information in front of him that indicated he would have to keep Mr Morgan's job open for a further 2 months. The Authority accepts that this was at a time when WCL was at its busiest and needed all of its trucks to be on the road.

[24] During the course of the investigation meeting and in answer to questions from the Authority, it was ascertained that in the early part of January a qualified driver approached Mr Mills enquiring about employment opportunities. Mr Mills told the Authority he made an offer of employment to this driver on 2 February 2009 as Mr Morgan's replacement. He confirmed to the Authority that the new driver had undergone some work trials during mid to late January. Based on Mr Mills evidence as to how long it takes before he is able to make any offers of employment to new employees I have concluded that the new driver must have approached WCL at least during the week commencing 12 January 2009.

[25] I believe Mr Mills saw an opportunity to rid himself of a burden and get his truck back on the road. He took this opportunity, and this accounts for the reason why the 22 January 2009 letter was explicit that Mr Morgan's employment was to be terminated. I have concluded on the balance of probabilities that Mr Mills had decided already, when he wrote the letter on 22 January 2009, that Mr Morgan would be dismissed irrespective of the information he provided on 27 January 2009.

[26] Standing back and considering the facts objectively, Mr Mills did not act as a fair and reasonable employer would have acted in all the circumstances. Mr Mills could have put Mr Morgan on leave or simply allowed ACC to take care of him for the next 8 weeks. He had a driver waiting in the wings who could have been employed on the basis of a temporary employment agreement to cover the eight weeks. Mr Mills was satisfied with the work of the driver as he had had him

undertake work trials for him. The evidence suggests Mr Mills did not give any consideration to these alternatives.

[27] I find Mr Morgan was unjustifiably dismissed and is entitled to remedies.

### **Remedies**

#### *Lost wages*

[28] Mr Morgan was, at the time of his dismissal, on light duties and the availability of light duties was running out. Mr Mills was struggling to find work for him that he could do. It was common ground that at the time of his dismissal Mr Morgan was painting the store room. The evidence from the Respondent was that Mr Morgan had painted what he could given his injury but that the rest of the work would require him to climb and paint the higher areas, which he could not do.

[29] I am satisfied the respondent had no further light duties available for Mr Morgan. It follows that Mr Morgan would revert back to his ACC payments, which he did at the time of his dismissal. Mr Morgan did not lose any wages for the first six weeks after his dismissal and was employed in a new position at the end of that six week period.

[30] Mr Morgan gave evidence that he took a drop in his pay rate and had to travel to Edgecumbe for his new job. He says that as a result, his new job was costing him on average \$400.00 per week. I have not accepted that evidence as being entirely correct. Based on the wages information provided to the Authority and the additional information received from his new employer I have calculated Mr Morgan's actual loss of wages to be in the vicinity of \$100 per week plus the travel costs of \$70 per week.

[31] These losses are attributable to the fact of Mr Morgan's dismissal, in other words if he had not been dismissed he would not have had a drop in pay, nor would he have had to travel to Edgecumbe for his work. He is entitled to be reimbursed for these losses.

**Waiotahi Contractors Limited is ordered to pay to Mr Morgan the equivalent of 6 weeks at the rate of \$170.00 per week being \$1,020.00 gross pursuant to s 123(1)(b) within 28 days of the date of this determination.**

*Compensation*

[32] Mr Morgan has not quantified his expectations regarding compensation for hurt and humiliation and there is little evidence to support a high award. Mr Morgan obtained alternative employment very quickly. Effectively he was never out of a job as he commenced working for his new employer as soon as he was rehabilitated from his surgery and was able to work. For this reason I have concluded that an award at the lower end of the scale is appropriate in the circumstances of this case.

**Waiotahi Contractors Limited is ordered to pay to Mr Morgan \$3,000 pursuant to s 123(1)(c)(i) within 28 days of the date of this determination.**

**Costs**

[33] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Morgan may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Any submissions in reply must be lodged within 14 days of receipt. I will not consider any application outside that timeframe without the prior leave of the Authority.

Vicki Campbell  
Member of Employment Relations Authority