

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 195/09
5146477

BETWEEN EDWIN NIGHTINGALE
Applicant

AND BP OIL NEW ZEALAND
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Edwin Nightingale in person and Trevor O'Connor,
support person
Alan Price and Alan Osborne for Respondent

Investigation Meeting: 9 December 2009 at Wellington

Submissions received: 9 December 2009

Determination: 11 December 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Edwin Nightingale has lost his job due to sickness. He has complained that he has not been kept on by BP Oil New Zealand Limited in a role when he had been cleared to work 20 hours per week. Mr Nightingale has been on unpaid leave from his job and is on an invalid's benefit

[2] BP acknowledged that Mr Nightingale's employment was terminated on medical grounds. It claimed that despite considering other options and alternatives Mr Nightingale's medical condition prevented it offering him light duties.

[3] The parties attended mediation services provided by the Department of Labour. It now rests with the Authority to make a determination on the employment relationship problem.

The issues

[4] As a result of the investigation meeting I have revised my issues in the matter that can be summarised as follows:

- Was Mr Nightingale cleared to work for 20 hours per week?
- Was BP under any obligation to offer Mr Nightingale light work?
- How should the employment relationship problem be resolved?

The facts

[5] Mr Nightingale was employed by BP Oil New Zealand Limited. The parties had an employment agreement providing the terms and conditions of Mr Nightingale's employment in the position of Café Team Leader at Connect Otaki.

[6] On 5 January 2008 Mr Nightingale suffered a stroke and needed to be hospitalised.

[7] On 7 March 2008 Mr Nightingale was properly advised in writing that due to the length of time that he would be off work BP would be required to fill his role with a temporary café team leader and that an appointment would be made for 3 months because it was busy at work. There is no issue with this given the amount of time that Mr Nightingale had off work and his medical condition.

[8] BP's human resources section communicated in July with the company's doctor, Dr David Waite, requesting details on Mr Nightingales' ability to resume full time duties. Dr Waite confirmed that in reality Mr Nightingale could not fulfil his role on a permanent basis and that some tasks would no longer be suitable.

[9] Mr Nightingale went to see Dr Waite. Mr Nightingale believed that Dr Waite cleared him to work on light duties for 20 hours per week. Dr Waite's position is that he did have a discussion with Mr Nightingale but required him to get more information on his medical condition, which was to be provided by the hospital. Dr

Waite says that that communication may have led to a misunderstanding with Mr Nightingale about his capability to work. Dr Waite's position is supported by:

- Email dated 23 July when Dr Waite agreed with BP's human resources section to get all hospital reports.
- At Dr Waite's first meeting with Mr Nightingale Dr Waite required more information about Mr Nightingale's medical condition and arrangements were made to get the information.
- A record of a meeting held on 16 October 2008, which I will come back to shortly, supports the position that Dr Waite was to confirm his view in writing. I am not at all clear what happened at the time between Mr Alan Price, the area manager, Dr Waite and the human resources section because emails produced by Mr Price were dated July 2008, and a letter prepared by Dr Waite and tabled during the Authority's investigation meeting was dated 4 March 2009. That letter referred to Dr Waite's review of Mr Nightingale in 2008. It seems that that letter represents the formal report and specific details that BP's human resources section asked for when it referred to obtaining a more formal report and specific details "*to go to him with that would also stand up in a court of law if it got to that stage*". I find that the July 2008 emails were not provided at the time to Mr Nightingale. Mr Nightingale was entitled to see the July 2008 emails at the time because that information pertained to him and would have an impact on his employment. The 4 March 2009 letter is a retrospective record provided to cover a lapse that occurred in completing the documents at the time when BP should have had something to put to Mr Nightingale.

[10] On 25 September 2008 Mr Nightingale was advised his rehabilitation time was due to expire. He had been in hospital for 5 months and was not able to return to full time duties. The company wrote to him in the following terms:

"...We have been concerned about your welfare and have continued to gain medical reports from your doctors as well as the company doctor, Dr David Waite over this period. During this time we have been advised that you have been medically unfit to fully perform your duties. On Tuesday 23rd September 2008 you went to see Dr Waite who advised you in his medical opinion you

would be unfit to work on the forecourt as there would be a real risk of slip, trip or fall with possibly a resultant injury.

We are naturally concerned about your health and safety and would like to hold a formal meeting to discuss your on-going ability to perform your role. This will be a formal meeting which may result in your employment being in jeopardy therefore I would encourage you to bring a support person or representative.

...

We may also require you to attend further meetings if not all issues are addressed at this meeting.

[11] This meant that BP had obtained medical information and was aware that Mr Nightingale was medically unfit for certain work where there was the possibility of injury. It was entitled to form those views given Dr Waite's information and BP's responsibilities for health and safety to Mr Nightingale, other employees and the public.

[12] Mr Nightingale relied on what he considered was the information from Dr Waite that he had been cleared to work light duties for 20 hours per week. However, BP did not have a full clearance for him to return to work to carry out all the tasks of a customer service representative.

[13] Mr Price told Mr Nightingale that BP was going to terminate his employment because he was medically unfit to work in all the tasks required. Mr Nightingale and Mr Trevor O'Connor, his support person, understood that this meant he was being dismissed. Mr Nightingale requested that information in writing. The written confirmation dated 20 October confirmed that, I hold.

[14] At the Authority's investigation meeting Mr Nightingale claimed that Mr Price had it in for him, which Mr Price denied. Mr Nightingale relied on one incident some time ago and that Mr Price did not engage with all the employees when he visited the store. These claims can not be supported given that the example used by Mr Nightingale happened some time ago. The claim that it was linked to BP's decision is very improbable given the medical evidence it has relied on. I also accept that if Mr

Price did not always talk to all the employees when he visited the store that that was a matter of style, and is not enough to say that he had it in for Mr Nightingale.

[15] For completeness Mr Nightingale claimed that he has been treated differently to other people who were given light jobs; when one of them had a broken leg, another had a hurt back and yet another was pregnant. I accept that BP assesses each case on its own merits and that these situations were different to Mr Nightingale's case. His case was a more long term situation and the other examples were for a short duration in each case. BP does not have roles where only partial duties are undertaken for a customer service representative.

[16] BP's conclusion was reached despite the high regard BP had for Mr Nightingale's work ethic, contribution and hours he worked. Dr Waite confirmed Mr Nightingale's commendable response to get back to work and his determination to work again.

Determination

[17] I am satisfied that BP has acted within its rights to terminate Mr Nightingale's employment because of his medical condition. My reasons are:

- Mr Nightingale had a stroke.
- His continuing medical condition did not involve him being cleared to undertake his full time role.
- BP had medical advice from the company doctor based on Mr Nightingale's doctors' information.
- BP considered options and alternatives to assist Mr Nightingale when he was not able to return to his full time role. There were no other options and alternatives because of the long term nature of Mr Nightingale's medical circumstances. Examples were provided such as baking and forecourt but they were ruled out for genuine safety reasons, I hold.
- I accept that there is an expectation that is embodied in the roles that all tasks have to be able to be performed and that there were tasks that Mr Nightingale would not be able to achieve even if only for safety reasons.

- The parties' employment agreement that makes provision for termination on medical grounds.

[18] Although Mr Nightingale could do some duties he would not be able to do all the duties required in the customer service representative positions BP had available. He was not able to return to his full time position. This was confirmed by Dr Waite, and led to the process of BP meeting with Mr Nightingale on his future with the company, and Mr Nightingale met with Dr Waite. I find that although Mr Nightingale considered he had been cleared to work for 20 hours per week, he still had a long term medical condition affecting his ability to carry out all the duties required and that this remained a factor. Dr Waite was only providing the company with his medical advice and was not involved in the employment decisions.

[19] BP used medical information from Dr Waite to assess Mr Nightingale's capability to fill a role and it decided that he would not be able to do that in the foreseeable future. BP has established it had medical grounds to justifiably rely on to terminate Mr Nightingale's employment.

[20] I accept that BP's position that Mr Nightingale was informed of the need to meet to enable him to comment and make suggestions in the knowledge that his employment was in jeopardy. He was informed of his right to be supported or to obtain representation. However there are problems with the process that BP has used which do not accord with best practice and fail to meet legal requirements. These are:

- The decision had been made by 16 October 2008 to terminate Mr Nightingale's employment and he did not therefore have the benefit to offer any comment on a tentative decision.
- The July 2008 emails involving Dr Waite's assessment on the medical grounds relied upon were not given to Mr Nightingale. He should have been given them, provided with a more formal report and specific details as had been requested by the human resources section in July 2008. This was especially so when there appears to have been a communication issue about a clearance for Mr Nightingale to work hours that was discussed between Dr Waite and Mr Nightingale and which became a central point for Mr Nightingale on 16 October with Mr Price.

- The dismissal letter dated 20 October provided no notice when BP terminated his employment. There is termination for medical retirement in the agreement and that requires not less than 2 weeks notice or 2 weeks base pay in lieu. There was also no notice as required under the employment agreement to terminate his employment.
- Mr Nightingale was denied access to the decision maker. I am satisfied he did not know that the decision maker was someone else, although Mr Price took responsibility for conveying the decision, which was made by someone else up the line. Mr Nightingale was informed by Mr Price in the dismissal letter that he could contact a person in human resources, but I hold that that was not sufficient for BP to meet its obligations to Mr Nightingale. In my investigation it emerged that Mr Price communicated the decision and that he did not have the delegated authority to terminate Mr Nightingale's employment. Mr Price did not seem to know who the decision maker was and relied on advice from the human resources section. It emerged during my investigation that it would have been a general manager, retail, who made the decision, according to Mr Osborne. It is a fundamental right that an employee is entitled to have access to the decision maker and BP did not do enough to support Mr Nightingale in that respect. I have no doubt however that the outcome would not have been any different if he had access to the decision maker because of his medical condition, the medical information available, BP's configuration of the job roles and that all tasks included in the customer services role had to be able to be undertaken as he should had.

Resolving the employment relationship problem

[21] Mr Nightingale has not met the legal requirements of raising a personal grievance and putting the employer on notice of the remedies being claimed. The first notice to BP was made in a statement of problem lodged in the Authority where he requested that that he would like the problem resolved by mediation between BP and him. The parties did attend mediation.

[22] I accept that Mr Nightingale identified in his statement of problem that he had lost his job due to sickness. He referred to his clearance for twenty hours per week, that he had an idea of working on the till and that he had been treated differently to someone else who given light duties. That suggested he wanted to return to work and the evidence is consistent with that, except that any return to work could not have been to his full time role. Mr Nightingale's claims were not sufficient for the employer to know there was a personal grievance. Instead this is one of the unusual situations where in the absence of a personal grievance there is an employment relationship problem about Mr Nightingale's complaint about not being able to work due to sickness and wanting to work.

[23] Any remedies would have been minimal because the outcome would not have been any different. I would have had to take into account Mr Nightingale's stroke that impacted on his capability to work full time, or in any other role, because of BP's requirements for employees to be able to complete all the tasks in a customer service representative's role. Thus there would have been no lost wages.

[24] Under s 113 of the Act an employee can only challenge a dismissal as a personal grievance. Thus it is not open to the Authority to assess damages in regard to a dismissal that might be wrongful as an alternative to the statutory remedies for personal grievances. Also the claim provided no notice for any damages and what the cause of action would be.

[25] Finally, during my investigation I discovered that BP appears not to have paid Mr Nightingale his final entitlement of 2 weeks pay in lieu of notice under the terms of the employment agreement. Computer generated pay slips were produced. These were inadequate wages time and holiday records that did not provide the hourly rate, Mr Nightingale's position, his place of work and the details of the calculations. BP had a choice to write to Mr Nightingale and give him 2 weeks written notice, which implies the period would be worked out. He would not have been able to work out any notice given BP's requirements and he was on unpaid leave. However, BP was obliged to pay him a minimum of 2 weeks base pay in lieu of notice to terminate the employment agreement for medical reasons under the employment agreement. It appears to owe Mr Nightingale a total of \$15.50 for 40 hours per week for 2 weeks in

the absence of any other records or explanation and because the payment was required under the terms of the medical termination provision of the employment agreement. The sum owed would be \$1,240. Mr Osborne offered Mr Nightingale across the table the payment of two weeks wages in lieu of notice to fix the matter. Mr Nightingale declined and requested a determination to bring closure for him.

[26] It is my suggestion that the employment relationship problem be fixed by BP paying Mr Nightingale 2 weeks' wages in lieu of notice in the sum of \$1,240 (otherwise he can consider a wages arrears claim).

[27] To address the issue raised from the employment relationship problem lodged by Mr Nightingale my conclusion is that BP was not required to provide Mr Nightingale with 20 hours work per week and it has supported the reasons for its decision. Whatever Mr Nightingale understood from Dr Waite did not oblige BP to provide a light to sedentary job given Mr Nightingale's long term medical condition and the customer support representative role.

[28] Mr Nightingale is to be reimbursed by BP the \$70.00 filing fee he paid to lodge the employment relationship problem in the Authority.

P R Stapp
Member of the Employment Relations Authority