

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 102/10
5151136

BETWEEN

KEVIN O'CONNOR
Applicant

A N D

ANCHOR PRESS LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Angela Sharma, Advocate for Applicant
Maree Kirk, Counsel for Respondent

Investigation Meeting: 25 March 2010 at Nelson

Determination: 29 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kevin O'Connor worked for Anchor Press Limited (APL) as a Printer from April 2002 until his employment was terminated in 2008 because of medical incapacity.

[2] In his amended statement of problem Mr O'Connor says that he was unjustifiably disadvantaged and unjustifiably dismissed. The first grievance is based on various alleged actions and omissions by APL in relation to the introduction and operation of a secondhand printer (the Roland printer). After working on the Roland Mr O'Connor developed health problems which were covered by ACC and for which he had some treatment and time off work. This was this incapacity that also resulted in the dismissal.

[3] APL says that it justifiably dismissed Mr O'Connor and denies that it unjustifiably disadvantaged him in any way. It also raises limitation issues.

[4] After investigating this matter by hearing and testing the evidence and considering the submissions, especially for Mr O'Connor, I came to the conclusion that he could not succeed with his unjustified disadvantage claim and conveyed that to the parties. I will set out an overview of the facts and the reasons for that conclusion. I will then explain in greater detail the events leading up to the dismissal before applying the test for justification.

Unjustified disadvantage – what happened?

[5] The Roland was introduced in or about September 2005. There is evidence about its poor state of repair and difficulties with commissioning it. On the evidence for Mr O'Connor there were difficulties operating it, especially on his own. That was partly the design of the machine, partly its placement and partly because of his physical characteristics. Those views are not entirely shared by APL but it is not necessary to resolve the disagreements.

[6] In January 2007 APL's General Manager was Nicki Malcolm. Hamish Neale is a Director of the company. Ms Malcolm's appointment as General Manager marked Mr Neale's transition towards a governance rather than an operational management role in the business. Part of that transition involved Mr Neale diverting staffing issues to Ms Malcolm and him being present on the premises less often. Accordingly, I accept the evidence for APL that any discussions between it and Mr O'Connor about his concerns over the Roland were principally with Ms Malcolm once she became General Manager.

[7] Because Ms Malcolm found little time to directly supervise production work, she came to think that one of the production staff should be appointed as supervisor. Mr O'Connor seemed the most appropriate choice, so in February 2008 she spoke to him about that in her office. Mr O'Connor's evidence suggests that this approach was the result of his complaints to Mr Neale and Ms Malcolm about being overworked and his deteriorating health from operating the Roland. However, I prefer Ms Malcolm's evidence about the genesis of this discussion. There was some discussion between them about the proposal and Ms Malcolm agreed to write a job description for the new role. She did that within a day or so and gave it to

Mr O'Connor. Mr O'Connor's evidence is that he told Ms Malcolm that the job description was not what had been agreed and that the new role was *virtually impossible* as it had him printing and supervising. However, I do not accept that matters ever got to the point of agreement. Nor do I accept that Mr O'Connor told Ms Malcolm about his health problems at that time. I prefer Ms Malcolm's evidence that she knew nothing about those health problems until May 2008. The end of the discussions between Mr O'Connor and Ms Malcolm about the possibility of a supervisor position came about because Mr O'Connor declined to consider it further. That is the evidence of them both. As a result there can be no valid complaint now about this matter.

[8] Mr O'Connor's evidence is that he became aware of discomfort in his left elbow and tingling in his fingers in November 2007. There is a problem with this evidence because the accident that is said to have caused Mr O'Connor's ongoing symptoms apparently occurred on 16 December 2007. Mr O'Connor saw a doctor on 29 January 2008. Mr O'Connor attributes his symptoms to working long hours in the weeks leading up to Christmas 2007. The doctor's evidence, which I accept, is that the symptoms were attributed to Mr O'Connor's work as a printer at APL.

[9] Mr O'Connor was referred for further investigation and the doctor received a report of those tests dated 30 May 2008. Dr Parker next saw Mr O'Connor on 20 June 2008. His notes refer to Mr O'Connor's advice about having to repetitively tighten bolts and frequently lift heavy reams of paper in order to operate the Roland. The doctor considered that these work tasks *would more likely than not have been a large contributor to the symptoms ... complained of*. Mr O'Connor was given a medical certificate restricting him to light duties (avoiding gripping/heavy lifting) from 20 June until 4 July 2008. In this medical certificate Mr O'Connor's condition was attributed to an accident on 16 December 2007.

[10] I accept Ms Malcolm's evidence that APL knew nothing of any accident on this date until she saw the medical certificate. I note that 16 December 2007 was a Sunday. There is no documented record of an accident on that day and APL's records do not support Mr O'Connor's claims about having spoken to Ms Malcolm on that day. In any event, Mr O'Connor gave his certificate to Ms Malcolm on Monday 23 June 2008.

[11] Mr O'Connor's evidence is that neither Ms Malcolm nor Mr Neale took note of the restriction and that the demands of his workload remained unchanged. This evidence is not correct. Ms Malcolm's evidence is that they tried to find light duties for Mr O'Connor but by mid morning on Tuesday 24 June she told him that there were none. Mr O'Connor then ceased work. Pay records provided to the Authority show that Mr O'Connor was paid sick leave for three days in that pay week and two days sick leave in the following period. Properly, Mr O'Connor should have been paid wages for the day and part day he worked, then APL should have paid him for his first week's absence on ACC due to a workplace injury at the rate of 80% of his weekly wage. From this distance, the point is immaterial because Mr O'Connor has apparently received earnings related compensation backdated to cover this period.

[12] Mr O'Connor next saw his doctor on 8 July 2008 and was given a further ACC medical certificate restricting use of his left arm for three weeks. Mr O'Connor's evidence is that Mr Neale showed him no empathy when he told him on Monday 15 July that he could only do light duties. The Monday was actually 14 July in 2008. I prefer Mr Neale's evidence that their discussion was on 10 July 2008. At that time Mr O'Connor was off work but had a discussion with Mr Neale about being paid holiday pay pending the start of ACC earnings related compensation. In response to Mr O'Connor's request Mr Neale agreed to pay him holiday pay. There is a letter dated 10 July 2008 from Ms Malcolm to ACC about this that backs up Mr Neale's evidence on the point. The arrangement was that Mr O'Connor would repay the holiday pay advance once he had received the backdated weekly compensation from ACC.

[13] Mr O'Connor did not work until the week starting 21 July 2008. Ms Malcolm spoke to him and asked if he could do some work with the assistance of other staff to operate the Roland. APL had work that needed to be done and no-one else was trained or willing to operate the Roland. I also accept the evidence of Ms Malcolm supported by the pay records to the effect that when Mr O'Connor resumed work on 21 July, he was assisted by other staff for the first three days. Over the following two days Mr O'Connor did not do any printing work, so he did not need the same assistance. I accept Ms Malcolm's evidence that Mr O'Connor did not say anything to her about his arm being sore until the end of that week.

[14] Mr O'Connor next attended work on Monday 28 July 2008, but only to participate in an ACC workplace assessment to develop return to work recommendations (the Ramazzini report). APL paid Mr O'Connor wages for that day. The report itself is dated 31 July 2008 and makes recommendations to support a graduated return to full duties over two weeks starting Monday 4 August 2008.

[15] Mr O'Connor saw his doctor again on 29 July 2008. The doctor's evidence is that Mr O'Connor's symptoms had not improved but, in his opinion, the symptoms would have been less likely to have recurred if Mr O'Connor had been given the opportunity to completely rest his left arm over the three preceding weeks. On this occasion the doctor certified Mr O'Connor as fully unfit for work until 19 August 2008. As a result, the return to work recommendations in the Ramazzini report were not implemented.

Conclusions about unjustified disadvantage grievances

[16] Mr O'Connor suffered personal injury to his left hand/arm covered by the Injury Prevention, Rehabilitation and Compensation Act 2001. Proceedings in respect of that injury are limited by s.317 of the Act which says:

317(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any Court in New Zealand, for damages arising directly or indirectly out of –

- (a) personal injury covered by this Act; or*
- (b) personal injury covered by the former Acts.*

317(2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from, -

- (a) any damage to property; or*
- (b) any express term of any contract or agreement (other than an accident insurance contract under the Accident Insurance Act 1998); or*
- (c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract of service.*

317(3) However, no Court, Tribunal or other body may award compensation in any proceeding referred to in subsection (2) for personal injury at the times prescribed in subsection (1).

...

[17] Mr O'Connor's complaint is advanced on the basis that APL ignored safety obligations and his health problems in order to meet its printing deadlines. In general I do not accept that as an accurate characterisation of events. As explained above, once APL was told of the health issues efforts were made to provide work for Mr O'Connor within the restrictions noted on the medical certificates. When that could not be accommodated, Mr O'Connor did not work.

[18] Any grievance about APL causing or contributing to Mr O'Connor's injury must have arisen by 29 July 2008 at the very latest.

[19] Mr O'Connor initially sought advice from the Nelson Bays Community Law Centre who wrote to APL on 11 and 14 August and who also attended several meetings over that time. Their assistance focused on the looming possibility of dismissal. It is not suggested that any grievance about personal injury was raised at this time. There is also correspondence dated 1 October 2008 but that did not raise any grievance about personal injury. However, a letter dated 17 October 2008 from Mr O'Connor's representative made the following claim:

10. *Toward the end of his second week away from work he was contacted by his employer requesting him to return to work for the week commencing the 21st of July 2008 to print urgent jobs. Kevin contacted his medical practitioner who consented to his return to work on the basis that he resumed light duties only. Kevin agreed to repay ACC for any benefit paid to him for this week. He was advised by his employer that he would be paid accordingly.*
11. *During this week his symptoms started to return and he began to experience discomfort in his elbow and tingling in his fingers. This is mainly attributed to his employer ignoring Kevin's medical practitioner's request that he undertake light duties only and instead insisting that he operate the four colours Roland press.*

[20] I accept that this was sufficient to raise a grievance concerning APL's alleged action in ignoring the doctor's request that Mr O'Connor undertake light duties only.

[21] There are two hurdles that Mr O'Connor cannot overcome in respect of such a grievance. The first is the limitation that no compensation for personal injury can be awarded as set out above. Mr O'Connor's real complaint is that he blames his employer for the injury that he suffered. However, the law does not permit him to be awarded any compensation for that.

[22] The second hurdle is that I do not accept that APL did ignore the medical certificates. As noted, Mr O'Connor was asked to do some printing work with appropriate assistance and he agreed to that request, apparently after consulting his doctor. He also did some other work for the remainder of the week. However, there is no evidence that he was required to use his left arm in the manner that had apparently caused the injury.

[23] Accordingly, I find that there is no personal grievance in respect of these matters.

[24] To some extent Mr O'Connor also asserts more generally that APL failed to provide a safe and healthy workplace. I accept counsel's analysis of the duty by reference to *Attorney General v Gilbert* [2002] 1 ERNZ 31. An employer is not a guarantor of an employee's health and safety but must take all reasonable steps to avoid exposing an employee to unnecessary risk of injury. On the facts here there was no breach of this obligation by APL. Characterising the complaint in this way also runs into the s.317 limitation as above. Mr O'Connor's representative makes submissions about stress and refers to *Gilbert*. In the present case, Mr O'Connor suffered a physical injury for which he claimed and was granted cover under ACC. That marks an important difference with *Gilbert*.

The dismissal

[25] After receiving the 29 July 2008 certificate, APL became concerned about the effects on its business of not being able to operate the Roland due to Mr O'Connor's absence. Ms Malcolm wrote to Mr O'Connor on 31 July 2008. The letter says that APL is not able to keep Mr O'Connor's job open indefinitely and asks him to get a medical report on his condition, the prognosis and the likely timeframe for a return to full duties. It asks for that information by 5 August, in advance of a meeting on 6 August. The letter makes it clear that APL may have to terminate Mr O'Connor's employment if he cannot return to full duties within an acceptable period of time.

[26] Mr O'Connor met briefly with Ms Malcolm later on 6 August. By that time he had been referred to a hand specialist for an appointment on 7 August with the prospect of a referral to a medical specialist at a later time. Ms Malcolm instructed Mr O'Connor that she required the medical information form sent with her 31 July letter returned by 8 August.

[27] As noted previously, Mr O'Connor involved the Community Law Centre who wrote to APL on his behalf. There was a meeting on 13 August. By that time APL had received a response to its questions from Mr O'Connor's doctor. It is useful to set that out in full:

We are writing to you requesting information about the above named employee's medical status to assist us in our investigation into his ongoing employment with us. We ask that you complete the questions below.

*What is the diagnosis of the employee's medical condition?
Left lateral epicondylitis*

*What is the prognosis for recovery?
Will make a full recovery.*

*When is he likely to be able to return to his full duties, full time?
(please refer to the attached job description)
Lateral epicondylitis takes a varying length of time to recover. Given that Mr O'Connor's duties involve a large amount of repetitive movements, it is likely to be up to 3 months from 20/6.*

*Is it likely the injury will reoccur if there is a return to full duties?
If he returns too soon it is likely to recur, but if fully healed, it will not.*

*What are the workplace factors that are contributing to the employee's injury?
Tasks which involve repetitive use of the arm, such as gripping (eg tightening bolts) lifting reams of paper, and cleaning cylinders with his left hand.*

*What adjustments could we make to assist his return to work?
See – Ramazzini report. Allow breaks, micro pauses, stretches. Variation of tasks to avoid constant repetitive tasks.*

[28] The Community Law Centre sent a further letter on 14 August. That letter sets out a proposal to reconsider appointing Mr O'Connor to a supervisory position as discussed earlier in 2008, with Mr O'Connor to train the new employee to operate the Roland under his supervision. The letter asks for the proposal to be considered and time allowed for medical specialists to give an opinion regarding Mr O'Connor's prognosis before any final decision about his ongoing employment.

[29] There was a further meeting on 15 August with Mr O'Connor involved by speaker phone.

[30] Having heard from Mr O'Connor, APL decided not to wait for any further reports. Ms Malcolm wrote a letter dated 15 August 2008 to Mr O'Connor that reads:

Dear Kevin,

Thank you for meeting with me with your representative on Wednesday 13 August 2008, and again today by teleconference, to discuss your continued absence from work and the medical report provided by your doctor.

At our first meeting we discussed the impact your absence was having on the business, and the medical report provided by your doctor. You confirmed that you were currently unable to return to your position and it is unlikely that you will be able to return for some time. We discussed possible alternatives and the information I had received from the supplier of the machine and another business that uses that machine. I then provided you and your representative until 3pm yesterday to provide any further information you wanted me to consider before making the decision. Thank you for the further information.

At today's discussion you let me know you had an appointment with the physiotherapists for next Thursday, and she may be able to provide assistance for you to return to work. We took an adjournment to consider this further information.

In reaching my decision I have taken the following into account:

- *The affect your absence on the business and other staff.*
- *Approaching the busiest time of the year.*
- *Our ability to find a temporary replacement.*
- *Light duties/assistance with the job.*
- *Redeployment.*
- *Changes to the machine.*
- *Creating a new supervisory position.*
- *Creating a temporary position to train a new machine operator.*
- *Waiting for additional medical information from a specialist.*
- *Medical report from your GP.*
- *ACC reports and medical information.*
- *The length of absence to date.*

I have spent considerable time, and have spoken to a number of people, to try to resolve this issue to the satisfaction of both of us. Unfortunately I have been unable to find a way to keep your position open for you without putting the business at risk. It is critical a decision is made immediately. To further delay this means we will lose further business. You are unable to provide a timeframe for obtaining a specialist's report and we are unable to cater for that uncertainty.

It is therefore with considerable regret that I confirm that your employment with us is to be terminated on medical grounds. As per

the terms of your employment agreement we will provide you with two weeks notice, effective from today's date. During the two week notice period if further information becomes available which means there is an alternative to termination of your employment, I will give this serious consideration and if appropriate withdraw the notice. If no alternative decision is made your final date of employment with us will be 29 August 2008. Your holiday pay will be calculated and paid up to that date.

I am very sorry that it has been necessary to reach this decision. I wish to thank you for your service to Anchor Press, and on your full recovering I would be happy to consider an application from you for any vacancy we may have. Please also let me know if we can assist you in looking for alternative work once you have recovered.

*Signed
Nicki Malcolm*

Justification

[31] Justification for this dismissal must be assessed objectively by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[32] The classic formulation of the balancing exercise involved in assessing justification in cases of this type is found in *Hoskin v Coastal Fish Suppliers Limited* [1985] ACJ 124 where the Arbitration Court said *There can come a point at which an employer (particularly in a small shop) can fairly cry halt* although that case itself involved absence due to illness and public health considerations not relevant here.

[33] The employment agreement between Mr O'Connor and APL includes relevant provisions. To paraphrase, it permits APL to terminate Mr O'Connor's employment on notice if, as a result of physical illness, he is rendered incapable of the proper ongoing performance of his duties. However, such termination shall not occur until APL has taken reasonable steps to consult with Mr O'Connor, has taken all reasonable steps to obtain informed medical opinion as to Mr O'Connor's ability to perform his duties and has considered redeploying him on alternative duties.

[34] I should mention the evidence, which I accept, that APL's inability to operate the Roland from 20 June was causing it significant financial losses that it was not in a position to sustain. No other printer could or would operate the machine so APL could not accept some work and had to farm out to its cost work it was already contracted to perform. Not operating the Roland meant less work available to keep

other staff gainfully employed. At the time APL reasonably expected employing a replacement would take at least six weeks from the date it advertised a vacancy. It needed to act promptly to secure a replacement before its busy period which starts around October each year. These matters were discussed with Mr O'Connor, as indicated in Ms Malcolm's letter.

[35] I find that Mr O'Connor was rendered incapable of the proper performance of his duties. Further, I find that APL took reasonable steps to consult with him. The initial timeframe set by Ms Malcolm was very short but that was adjusted to allow Mr O'Connor a proper opportunity to get advice and representation. The evidence indicates that APL approached this consultation process with an open mind. Consideration was given to Mr O'Connor's proposal but, for the reasons indicated in Ms Malcolm's letter, it did not resolve APL's concerns.

[36] For Mr O'Connor, a point is made about APL's refusal to wait for further medical reports. At the time, no date had been established for Mr O'Connor to see a specialist although that was in prospect. The medical information to hand was that a full recovery to normal duties was likely to take up to three months. That information did not express any uncertainty about the diagnosis or the prognosis. In light of that, I do not accept that there was any requirement for APL to wait for any specialist report. As events unfolded, Mr O'Connor obtained an appointment to see a different specialist but that occurred after the dismissal decision so cannot be regarded as a relevant matter.

[37] Another matter that occurred shortly after the decision to dismiss was that Mr Neale chanced upon an experienced printer who was looking for and available to commence employment. That is not relevant to justification which must be assessed as at the time of the decision. For the same reason, the fact that Mr O'Connor did not become fully fit until Christmas 2009 is not relevant.

[38] For the foregoing reasons I find that APL justifiably dismissed Mr O'Connor.

Summary

[39] Mr O'Connor does not have any sustainable personal grievance against his former employer. His claims for remedies are dismissed.

[40] Costs are reserved. I will not set a timetable since I understand that counsel will not be available for some time. Any claim should be made promptly thereafter by counsel lodging and filing a memorandum and Mr O'Connor may have 14 days to lodge and file a memorandum in response.

Non publication order

[41] APL provided otherwise confidential information about its financial position, referred to in paragraph [34] above. I make an order prohibiting the publication of APL's financial records or the other specific evidence on the point given by Mr Neale.

Philip Cheyne
Member of the Employment Relations Authority